

ARTICLES

STANDING AS AN ARTICLE II NONDELEGATION DOCTRINE

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I. INTRODUCTION

Prosecutorial discretion is a tremendous power. In both the criminal and the civil contexts, deciding to initiate enforcement actions is a considerable responsibility—one that should be exercised with care and consistency, but one that can be seriously abused. Such discretion is thus perhaps not a power that we should hastily confer on every member of society.

This concept of prosecutorial discretion as an immense power, with considerable potential for abuse, offers a rationale for Article III standing doctrine that appears to have gone unnoticed in the academic literature. Standing doctrine, in my view, curtails the prosecutorial discretion of private plaintiffs. I arrive at this conclusion by comparing the broad Article III standing of the Executive Branch to the constraints placed on private parties. I focus primarily on the following (apparent) anomaly: although Congress may, consistent with Article III, authorize the Executive Branch to assert the abstract “injury to the interest in seeing that the law is obeyed,”¹ Congress may not confer similarly broad standing on private parties.

It is important to recognize that the authority to “see that federal law is obeyed”² gives the Executive Branch a considerable degree of discretionary enforcement authority. The Executive Branch may bring suit against any person, anywhere in the country, for any legal

¹ *FEC v. Akins*, 524 U.S. 11, 24 (1998).

² *See id.*

violation. But it is not feasible to pursue every transgression of federal law. Accordingly, the Executive Branch must exercise prosecutorial discretion to decide which of these innumerable offenses to pursue in federal court.

The Executive Branch cannot avoid this discretionary enforcement responsibility. The Take Care Clause of Article II, which provides that the Executive Branch “shall take care that the laws [are] faithfully executed,”³ requires it to “see that federal law is obeyed.” The Take Care Clause therefore also requires it to exercise the considerable degree of prosecutorial discretion that is necessary to fulfill that law enforcement function. Moreover, the Executive Branch has a constitutional duty to exercise that obligation faithfully, with due regard for congressional mandates and constitutional constraints.

But the degree of discretionary enforcement authority exercised by the Executive Branch also creates a troubling potential for abuse. Such discretion can be used to discriminate against, or otherwise unfairly target, certain individuals or groups. For this reason, I assert that the Executive Branch’s duties to “see that federal law is obeyed,” and to exercise the accompanying prosecutorial discretion, are non-delegable. Given the potential for abuse, Article II prohibits Congress and the Executive Branch from delegating such discretionary enforcement authority to private parties, who are not subject to constitutional requirements or to the other legal and political checks that, to some degree, curtail executive enforcement discretion.

This Article II nondelegation doctrine provides a constitutional explanation for much of Article III standing doctrine. Standing enforces this Article II nondelegation principle by curtailing private prosecutorial discretion. Standing doctrine prohibits a private plaintiff from asserting abstract grievances, such as the “injury to the interest in seeing that the law is obeyed,” that would allow her to sue any person, anywhere in the country, for any violation of law. A private party may bring suit only if she has suffered a more concrete “injury-in-fact.” That injury, in turn, further limits the scope of her prosecutorial discretion, because she may sue only the person that caused her injury and may seek redress only for that harm.

Viewing standing in these Article II nondelegation terms has surprising implications for existing theories of standing doctrine. Currently, most scholars and jurists who consider the foundations of standing doctrine fall into one of two camps. Several prominent

³ U.S. CONST. art. II, § 3.

judges, including Chief Justice John G. Roberts and Justice Antonin Scalia, contend that the Constitution requires that a plaintiff have a concrete injury in every case, and that Congress may not confer standing on a broader class of citizens.⁴ Conversely, most legal academics assert that standing doctrine lacks any constitutional foundation, and that Congress may confer standing as it sees fit.⁵ But, interestingly, both sides do appear to agree on one thing: whatever its rationale, a central feature of standing doctrine is that it blocks private suits that might interfere with executive enforcement efforts.⁶

The Article II nondelegation doctrine offers an alternative account. I argue that standing doctrine does have a constitutional foundation: it enforces the Article II nondelegation principle by curtail- ing private prosecutorial discretion. And, under this constitutional analysis, standing doctrine's principal function is *not* to protect the Executive Branch. Instead, standing doctrine protects individual liberty by shielding private parties from arbitrary exercises of private prosecutorial discretion.

⁴ See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1219–21, 1226, 1231–32 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881–82, 894–99 (1983).

⁵ See, e.g., Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 54 (1984) (suggesting that courts should not “hold[] unconstitutional an act of Congress” conferring standing on private plaintiffs); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1371, 1397 (1973) (stating that “at least when Congress so authorizes the Court may properly render . . . pronouncements [about the meaning of the Constitution] whether or not recognizable private interests are involved”); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1154–60 (1993) (arguing that the injury-in-fact inquiry should not be used to limit Congress’s power to confer standing); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, ‘Injuries,’ and Article III*, 91 MICH. L. REV. 163, 235 (1992) (asserting that “Congress can create standing as it chooses and, in general, can deny standing when it likes”); see also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988) (making the more nuanced claim that Congress should have “essentially unlimited power to define the class of persons entitled to enforce [a statutory] duty,” while Congress should have only “some, but not unlimited, power to grant standing to enforce constitutional rights”); *infra* note 7.

⁶ See, e.g., Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 334 (2002) (“The Court has enlisted the injury concept to provide a bulwark against intrusions on executive power, a task that the concept simply cannot carry out.”); Roberts, *supra* note 4, at 1230 (asserting that the injury-in-fact requirement “ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive’s* responsibility of taking care that the laws be faithfully executed”); Sunstein, *supra* note 5, at 194–95 (observing that many “key cases” in which the Court denied standing “have involved attempts by some plaintiff to require the executive branch to fulfill its statutory responsibilities by enforcing the law more vigorously”); see also *infra* notes 15–22 and accompanying text.

This constitutional foundation for standing doctrine changes not only the focus but also the scope of the constitutional protection. Understood in Article II nondelegation terms, standing doctrine applies (as a constitutional mandate) only in cases that implicate private liberty. Such cases include all suits against private parties *and* all suits against the Executive Branch in which the real party-in-interest is a private individual or entity (i.e., suits demanding that the Executive Branch impose burdens on, or deny benefits to, specific private parties). But this Article II nondelegation theory leaves Congress otherwise free to authorize private suits against the federal government. The Article II nondelegation doctrine thus offers a constitutional justification for much of Article III standing doctrine, while also preserving some space for legislative action.

In Part II, I briefly contrast the theory presented here with prior Article II theories of standing. In Part III, I discuss the Executive Branch's broad Article III standing. I explain that the Executive Branch's Article II duty to "see that federal law is obeyed" requires it to exercise substantial prosecutorial discretion. In Part IV, I show that standing doctrine prevents private parties from exercising the same degree of prosecutorial discretion, and explain that this limitation can be seen in Article II nondelegation terms.

II. A NEW ARTICLE II THEORY OF STANDING

Standing doctrine has sustained great criticism in the academic commentary.⁷ The three-part test that comprises the doctrine is easily summarized, but much less easily explained. The Supreme Court has stated that standing derives from the "case" or "controversy" re-

⁷ See e.g., Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 381 (1989) (arguing that "modern standing doctrine lacks a coherent conceptual foundation"); Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 4 (2001) (urging that "the American doctrine of standing is in a sad state of disrepair"); Fletcher, *supra* note 5, at 221 ("The root of the problem is . . . that the intellectual structure of standing law is ill-matched to the task it is asked to perform."); Nichol, *supra* note 6, at 304 (claiming that "as a body of law, the standing doctrine has failed"); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 480 (1996) (arguing that standing doctrine is "theoretically incoherent"); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 129 (2007) (asserting that current justiciability doctrines, including standing, "serve little or no useful purpose"); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 639–40 (1999) (arguing that the injury-in-fact test is incoherent); *supra* notes 5–6 and *infra* note 27. For rare defenses of standing doctrine, see *infra* note 105.

quirement of Article III.⁸ In order to satisfy this “bedrock” requirement and bring suit in federal court, a plaintiff must demonstrate that she has suffered (or is likely to suffer) an “injury-in-fact” that was (or will be) caused by the defendant and that can be redressed by the plaintiff’s requested relief.⁹

I am principally concerned with the following puzzle of standing doctrine: the dichotomy between Executive Branch and private party standing. The Supreme Court has held that Article III prohibits private suits asserting abstract grievances, such as the “injury to the interest in seeing that the law is obeyed.”¹⁰ But, as several commentators have observed, this constitutional limitation does not apply to the Executive Branch.¹¹ Instead, the Court has repeatedly found that the Executive Branch may file suit to “see that federal law is obeyed,” at least if it has the blessing of Congress.¹² How can it be that Congress

⁸ See *McCConnell v. FEC*, 540 U.S. 93, 225 (2003). The case-or-controversy requirement is found in U.S. CONST. art. III, § 2, cl. 1.

⁹ *McCConnell*, 540 U.S. at 225–26; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

¹⁰ *FEC v. Akins*, 524 U.S. 11, 23–24 (1998) (stating that a plaintiff may not assert a “generalized grievance” “where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature,” such as “harm to the ‘common concern for obedience to law’” or the “injury to the interest in seeing that the law is obeyed” (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)); see *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (“The only injury plaintiffs allege is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance . . . that we have refused to countenance in the past.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) (“[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”).

¹¹ See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 667 (2006) (“Congress . . . possesses undoubted power to authorize enforcement actions by the government. In suits by the government, courts characteristically make no inquiry into injury.”); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2245 (1999) (observing that, when the federal government initiates a federal criminal prosecution, it asserts “an ‘abstract . . . injury to the interest in seeing that the law is obeyed’” (quoting *Akins*, 524 U.S. at 24)); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 627 (2005) (“Federal courts regularly adjudicate government enforcement actions that would lack ‘injury in fact’ if brought by private plaintiffs.”); Jonathan R. Siegel, *Congress’s Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 67–68 (1999) (“The courts do not require the government, as they would a private party, to demonstrate that it has suffered an injury in fact.”).

¹² See, e.g., *United States v. Raines*, 362 U.S. 17, 27 (1960) (concluding that it is “perfectly competent for Congress to authorize the [Attorney General] to be the guardian of [the] public interest” in the “due observance of all the constitutional guarantees”); *L. Singer & Sons*, 311 U.S. at 303–04 (“[A] suit [to enforce a statute] cannot be instituted by an individual unless he possesses something more than a common concern for obedience to law.

may confer broad standing upon the Executive Branch, but not upon a private attorney general?¹³

This anomaly may suggest that standing doctrine depends, at least in part, on Article II.¹⁴ Commentators have, however, generally assumed that any Article II theory of standing must take the following form¹⁵: Article II vests the President with “the executive power,”¹⁶ and further states that he “shall take care that the laws [are] faithfully executed.”¹⁷ These provisions, the argument goes, give the Executive Branch a general power over law enforcement and private suits to “see that the law is obeyed” interfere with the Executive Branch’s en-

The general or common interest finds protection in the permission to sue granted to public authorities.” (internal quotation marks omitted)); *In re Debs*, 158 U.S. 564, 586 (1895) (“[W]henever the wrongs complained of are such as affect the public at large . . . the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts . . .”); *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 367 (1888) (“The essence of the right of the United States to interfere in the present case is its obligation to protect the public . . .”); see also *Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 547 (1915) (“[E]very citizen and every taxpayer is interested in the enforcement of law . . . But that general interest is not a private but a public interest. Being such, it is to be represented by the Attorney General or the District Attorney . . .”).

- 13 The Supreme Court recently indicated that state governments are subject to less restrictive standing requirements than private parties. See *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). This Article focuses on the contrast between Executive Branch and private party standing and does not address the distinct issue of state standing.
- 14 See Hartnett, *supra* note 11, at 2256 (asserting that, given the differences between Executive Branch and private party standing, the question of “‘Who can constitutionally be empowered to represent . . . public interests in court?’” must be “a question of the proper interpretation, not of Article III or Article I, but of Article II”). The scholarly interest in Article II also stems from references to the Take Care Clause in a few central standing decisions. See *Lujan*, 504 U.S. at 577 (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’” (quoting U.S. CONST. art. II, § 3)); *Allen v. Wright*, 468 U.S. 737, 756–57, 761 (1984) (“The Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to ‘take Care that the Laws be faithfully executed.’”).
- 15 This Article II theory appears to underlie Chief Justice Roberts’s and Justice Scalia’s approach to standing doctrine. See Roberts, *supra* note 4, at 1230 (asserting that the injury-in-fact requirement “ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive’s* responsibility of taking care that the laws be faithfully executed”); Scalia, *supra* note 4, at 894 (arguing that standing “excludes [courts] from the . . . undemocratic role of prescribing how the other two branches should function”).
- 16 U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).
- 17 U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

forcement prerogative.¹⁸ Private parties may, for example, bring suits that the Executive Branch has explicitly decided to forgo, and thereby interfere with its overall enforcement strategy. Even more intrusively, a private party might bring suit directly against the Executive Branch to force it to change its overall enforcement policies or to urge it to bring an enforcement action against a third party. In sum, according to this argument, private actions are problematic under Article II because they interfere with the Executive Branch's enforcement discretion.¹⁹

There are several flaws in this approach, most of which have been noted before. Most importantly, as Gene Nichol and Cass Sunstein have pointed out, the above analysis cannot possibly explain standing doctrine.²⁰ This analysis provides no principled means of distinguishing between suits in which the plaintiff can show an injury-in-fact, and those in which she cannot. Although it is true that a private suit to "see that the law is obeyed" may interfere with the Executive Branch's enforcement strategy, so might any other private enforcement action.²¹ A party with an injury-in-fact is free to bring an enforcement action that the Executive Branch has declined to bring, and sometimes even to bring suit directly against the Executive Branch. Accordingly, the injury-in-fact requirement of standing doctrine does

18 See David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 874 (2004) ("The Article II theory begins with the premise that the Executive's power to 'take Care that the Laws be faithfully executed' limits other parties' capacity to sue."); Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1028 (2001) (characterizing this theory to mean that "[w]ere Congress positioned to empower 'any citizen' to enforce its laws, Congress could usurp a central element of the executive's Article II prerogatives"); Sunstein, *supra* note 5, at 211 (interpreting *Lujan* and other cases to assert that "standing limitations . . . protect against intrusions on the President's power under the Take Care Clause").

19 See, e.g., Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155, 158 (2001) (asserting that the typical Article II-based theory "invokes the separation of powers concern . . . that the Executive Branch must be allowed its prosecutorial discretion").

20 See Nichol, *supra* note 5, at 1164–65; Sunstein, *supra* note 5, at 211–14.

21 Thus, as a few commentators have observed, this Article II-based theory, taken to its logical conclusion, would require the invalidation of much existing law. See William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 283 (2001) (stating that the logical conclusion of this theory would be that "citizens can never enforce statutory law"); Driesen, *supra* note 18, at 875 (similarly noting that "[a]n exclusive executive enforcement power would . . . require disallowance of all private, state, tribal, and territorial actions litigating federal public law questions, including actions brought by seriously injured parties").

not protect the Executive Branch from private interference with its so-called enforcement prerogative.

This failure to explain standing doctrine reflects, in my view, errors in the conceptual underpinnings of this Article II-based theory. First, it conceives of the Executive Branch's law enforcement function as a power, rather than as a duty. This conception leads commentators to focus excessively on ways in which private enforcement actions interfere with the Executive Branch's enforcement power. And that leads to the second major problem with prior reliance on Article II. It focuses on the wrong entity. The focus should not be on the Executive Branch, but on the private plaintiff—the party to whom standing doctrine actually applies.²²

I seek here to offer a constitutional analysis that avoids these conceptual problems.²³ I believe, as Professor Sunstein and others have

²² The focus on executive enforcement power has led some commentators to suggest that standing doctrine applies only when a private party brings suit against the Executive Branch. See Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1793 n.5 (1993) (asserting that suits against private parties “do[] not rise to the level of a constitutional concern”); Winter, *supra* note 19, at 159. The Court has, however, applied standing requirements in suits against private parties as well as state and local governments. See *infra* note 96.

Harold Krent and Ethan Shenkman have offered perhaps the most cogent Article II analysis to date. Relying on the theory of the “unitary executive,” Krent and Shenkman assert that Article II prevents private parties that lack an “individuated” interest (an interest that appears to be analogous to an Article III injury-in-fact) from bringing enforcement actions in federal court. See Krent & Shenkman, *supra*, at 1794–96. The authors argue that the principle of political accountability underlying the notion of the unitary executive requires that the President be in charge of law enforcement efforts involving the “unindividuated” interests of the public at large. *Id.* at 1794–96, 1804–08. Krent and Shenkman offer many persuasive *policy* arguments as to why the President should be in charge of certain law enforcement activities. But they do not clearly explain why there is any *constitutional* distinction between cases involving individuated and unindividuated interests. See Cass R. Sunstein, Correspondence, *Article II Revisionism*, 92 MICH. L. REV. 131, 137 (1993) (stating, in response to the Krent & Shenkman article, that “[t]he unanswered question remains why [the] distinction [between individuated and unindividuated interests] is crucial for purposes of Article II”). Furthermore, Krent and Shenkman suggest that their constitutional analysis is limited to suits against the Executive Branch. See Krent & Shenkman, *supra*, at 1793 n.5.

²³ For purposes of this constitutional analysis, I bracket questions about the historical foundations of standing doctrine. For historical arguments that standing must not be a constitutional requirement, because courts at the Founding did not require private parties to demonstrate an injury-in-fact, see Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819–27 (1969); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396–99 (1988). For a contrary position, see Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691, 694–724 (2004)

asserted, that the Take Care Clause creates a “duty, not a license.”²⁴ Indeed, that formulation is more in keeping with the text of the provision, which states that the Executive Branch “*shall* take Care that the Laws be faithfully executed.”²⁵ Furthermore, my focus is *not* on how a private enforcement action might interfere with the Executive Branch’s so-called enforcement power, but rather on how much enforcement power may be exercised by a private plaintiff.

This conceptual approach makes possible a more coherent understanding of standing doctrine. The Take Care Clause imposes on the Executive Branch a duty to take appropriate measures, including filing suit in federal court, to “see that federal law is obeyed.” The Take Care Clause thus also (as discussed in Part III) imposes a corollary responsibility. It requires the Executive Branch to exercise the substantial degree of prosecutorial discretion that is necessary to fulfill that law enforcement obligation.²⁶

I argue here that these Article II duties are nondelegable. As commentators critical of executive enforcement discretion have argued (and as discussed in Part IV), such discretion creates a troubling potential for abuse, even when it is exercised by a governmental entity that is subject to constitutional and other legal and political constraints. Given this potential for abuse, the Constitution prohibits Congress and the Executive Branch from delegating such prosecutorial discretion to private parties, who are subject to no such requirements.

This Article II nondelegation principle offers a new rationale for Article III standing doctrine. Standing enforces the Article II nondelegation doctrine by curtailing private prosecutorial discretion. Standing doctrine prohibits a private plaintiff from asserting an abstract grievance (such as the “injury to the interest in seeing that the law is obeyed”) that would allow her to sue any person for any legal violation. Furthermore, standing doctrine permits a court to identify

(asserting, based on their comprehensive survey of early American law, that “history does not defeat standing doctrine” (emphasis omitted)).

24 Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985); see Caminker, *supra* note 7, at 377 (“[T]he take care clause is better understood as a directive that the President must execute the law consistently with Congress’ will, rather than as a grant of exogenously defined power . . .”).

25 U.S. CONST. art. II, § 3 (emphasis added).

26 The term “prosecutorial discretion,” as used here, refers to the authority to decide whether to pursue a violation of law by bringing an enforcement action in federal court. The term applies to enforcement actions (including civil suits) brought by both the Executive Branch and private parties.

private enforcement actions that do *not* implicate the Executive Branch's nondelegable Article II responsibilities. When a private party has suffered an injury-in-fact, she cannot exercise substantial prosecutorial discretion. She may sue only the person that caused her injury and may seek redress only for that harm.

This Article II nondelegation concept of standing rests on normative premises that differ markedly from prior Article II theories. Under the Article II nondelegation principle, standing doctrine serves *not* to protect the Executive Branch, but instead to safeguard individual liberty against arbitrary exercises of private prosecutorial discretion. The constitutional protection therefore applies only in cases that implicate private liberty: all suits against private defendants and all suits against the Executive Branch in which the real party-in-interest is a private individual or entity. That latter category consists of (1) suits demanding that the Executive Branch impose burdens on particular private parties (by, for example, bringing an enforcement action against them); and (2) suits seeking to prevent the Executive Branch from conferring a benefit (such as a license, permit, or financial grant) on a specific private party. To bring any such action, a private plaintiff must demonstrate a concrete injury-in-fact.

This Article II nondelegation theory does not, of course, rationalize every facet of standing doctrine. The concept of standing as a limit on private prosecutorial discretion helps to explain and justify the prohibition on abstract grievances—the part of the injury-in-fact requirement that the Court has identified as constitutionally mandated. But I do not purport to defend every standing decision. It is indeed difficult, as many commentators have observed, to understand why the Court has recognized certain injuries-in-fact and not others, and why the Court has adopted a narrow view of causation and redressability in some cases and not others.²⁷

²⁷ See *supra* notes 5–7. The Court itself has acknowledged that standing doctrine has flaws. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court . . .”). For just a few of the insightful critiques of the Court’s standing jurisprudence, see Fallon, *supra* note 5, at 22–30, 43–47 (contending that, once a plaintiff has demonstrated an injury-in-fact, the Court should not substantially restrict the remedies that she may pursue to redress that injury); Fletcher, *supra* note 5, at 229–39 (asserting that the Court should abandon the “injury-in-fact” inquiry altogether and focus on whether the relevant statutory or constitutional provision confers a legal right on the plaintiff); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2280–88 (1998) (asserting that neither precedent nor any identifiable theory explains the manner in which the Court has defined an injury-in-

The Article II nondelegation principle does, however, help explain why—and when—a private plaintiff must assert a concrete injury that guides her prosecutorial discretion. This theory thus also carves out some space for congressional conferrals of standing. Although Congress may *never* permit a private party to bring suit against any person, anywhere in the country, for any violation of law, Congress does have some leeway to authorize any person to sue the Executive Branch.²⁸

III. THE ARTICLE III STANDING OF THE EXECUTIVE BRANCH

In this Part, I examine the nature of and the basis for the Executive Branch's broad Article III standing.²⁹ This analysis reveals that the Executive Branch's duty to "see that federal law is obeyed" requires it to exercise a substantial degree of prosecutorial discretion.

A. *Standing to Enforce Federal Law*

By the late nineteenth century, the Supreme Court made it clear that the Executive Branch had standing to assert injuries that would not suffice for a private plaintiff. For example, in *United States v. American Bell Telephone Co.*,³⁰ an 1888 case involving a land patent, the Court observed that a private party (at that time) could challenge the validity of such a patent only if she had a "pecuniary interest" in the matter.³¹ By contrast, the Executive Branch was not so constrained: "the right of the United States to interfere" in the action arose from its "obligation to protect the public."³²

fact in the racial gerrymandering context); Nichol, *supra* note 5, at 1154–60 (arguing that the Court's injury-in-fact inquiry is malleable and essentially value-laden); Sunstein, *supra* note 5, at 183–92 (asserting that the proper inquiry is whether the relevant provision creates a cause of action for the plaintiff); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 680–84 (1977) (asserting that the Court's standing inquiry often amounts to a determination on the merits of the plaintiff's claim).

28 For purposes of this analysis, I bracket questions of Congress's power to confer standing in suits against the States. Such cases could raise federalism concerns that are beyond the scope of this Article.

29 I focus on Congress's authority to confer standing on the Executive Branch, not on whether the Executive Branch has inherent power to file suit absent congressional authorization. For insightful discussions of the latter issue, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993); Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111 (1997).

30 128 U.S. 315 (1888).

31 *See id.* at 366–67.

32 *Id.*

Likewise, in *In re Debs*,³³ the Court stated that the federal government's "obligation[] . . . to promote the interest of all" and to "prevent . . . injury to the general welfare" can often be "sufficient to give [the United States] a standing in court."³⁴ Accordingly, the Court upheld the Executive Branch's standing to protect the public interest in the free flow of interstate commerce.³⁵ Federal courts followed suit in subsequent cases, raising no Article III concerns about law enforcement actions brought by the Executive Branch.³⁶

*United States v. Raines*³⁷ constitutes perhaps the most explicit statement of Congress's authority to confer standing on the Executive Branch. In *Raines*, the federal government brought suit against local officials in Georgia, alleging that they had improperly interfered with voter registration efforts by African Americans.³⁸ The Civil Rights Act of 1957 expressly permitted such suits.³⁹ The local officials, however, argued that Congress lacked the power to "authorize the United States to bring this action in support of private constitutional rights."⁴⁰

The Supreme Court rejected that contention, stating that "there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights."⁴¹ The Court found that it was "perfectly competent" for

33 158 U.S. 564 (1895).

34 *Id.* at 584.

35 *See id.* at 599.

36 *See supra* notes 11–12. Courts have doubted the Executive Branch's standing to bring suit only when it *lacked* express congressional approval. *See, e.g.,* *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) (holding that "the United States may not sue [a local police department] to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority"); *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) (concluding that, absent statutory authorization, the Executive Branch may not sue a state to protect the constitutional rights of the mentally retarded confined in state hospitals); *United States v. Solomon*, 563 F.2d 1121, 1123–24 (4th Cir. 1977) (same). But the courts' analyses also indicated that, once Congress authorized the lawsuits, there would be no Article III barrier. *See City of Philadelphia*, 644 F.2d at 201 & n.22; *Mattson*, 600 F.2d at 1297 (stating that the Executive Branch could "easily" establish standing if it had "specific statutory authority"); *Solomon*, 563 F.2d at 1125, 1128 (declining to hold that the Executive Branch could sue "in the absence of specific authority," even though the court had "no doubt that the United States has an interest . . . in the subject matter of the suit").

37 362 U.S. 17 (1960).

38 *Id.* at 19.

39 *Id.* at 19–20; *see also* Civil Rights Act of 1957, 71 Stat. 637 (codified at 42 U.S.C. § 1971(a), (c) (2000)).

40 *Raines*, 362 U.S. at 27.

41 *Id.*

Congress to authorize the Executive Branch “to be the guardian of that public interest.”⁴²

Notably, the *Raines* Court did not conclude that the Executive Branch had standing to assert the private parties’ concrete interest in the right to vote.⁴³ Instead, the Court found that the Executive Branch was authorized to serve as the “guardian” of the abstract “public interest” in the “due observance of all the constitutional guarantees.”⁴⁴ Few formulations come closer to stating that Congress may, consistent with Article III, authorize the Executive Branch to see that the law is obeyed.

B. The Constitutional Foundation for the Executive Branch’s Standing

The Supreme Court has not sought to explain the constitutional basis for the Executive Branch’s broad Article III standing, but the answer seems fairly self-evident. The Court does not interpret Article III in a vacuum, but instead construes Article III in conjunction with the Take Care Clause of Article II.

The Take Care Clause states that the President “shall take Care that the Laws be faithfully executed.”⁴⁵ The provision thereby seems to direct the President to take appropriate measures to “see that federal law is obeyed.” And, as the Supreme Court has observed, “[a] lawsuit is the ultimate remedy for a breach of the law.”⁴⁶ Thus, the Constitution appears to direct the President, in appropriate cases, to file suit in federal court to enforce federal law.

Of course, we have long understood that this duty to “take Care that the Laws [are] faithfully executed” does not require the President to personally initiate federal court enforcement actions.⁴⁷ Instead, the President exercises his law enforcement responsibilities

⁴² *Id.*

⁴³ Nor could the Executive Branch assert such private interests under the Court’s traditional standing jurisprudence. To have third-party standing, a litigant must demonstrate an injury-in-fact, a close relationship with the third party whose rights are at issue, and that the third party is unable to protect her own interests. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). The Executive Branch could not satisfy that first requirement, absent special standing rules.

⁴⁴ *Raines*, 362 U.S. at 27.

⁴⁵ U.S. CONST. art. II, § 3.

⁴⁶ *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

⁴⁷ *See id.* at 135 (“[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.” (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926))); *In re Neagle*, 135 U.S. 1, 63–64 (1890) (stating that the President may fulfill his constitutional obligation to ensure that the laws are “faithfully executed” by delegating to, inter alia, executive departments).

through public officials in the Executive Branch.⁴⁸ Accordingly, I refer to the duty to “take care that the laws [are] faithfully executed” as an obligation of the Executive Branch.

The Executive Branch could not perform this constitutionally assigned duty if it lacked the authority to bring suit in federal court to see that federal law was obeyed. The federal courts accordingly construe such an executive enforcement action as a justiciable Article III case or controversy. Indeed, an interpretation that prevented the Executive Branch from performing this constitutional duty would contravene longstanding separation of powers principles.⁴⁹

We should keep in mind, however, that this contextual analysis—interpreting Article III in light of Article II—has different implications for private enforcement actions. In contrast to the Executive Branch, a private party has no Article II duty to “see that federal law is obeyed.” Accordingly, the constitutional structure does not suggest that such a private suit must qualify as an Article III “case” or “controversy.” Instead, as discussed in Part IV, a contextual reading of Articles II and III indicates precisely the opposite.

48 As used here, the term “Executive Branch” encompasses both independent and executive agencies. (A federal agency is typically considered “independent” if the President lacks the authority to remove the agency’s leaders “at will.” See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 492 (1987)). Although in some contexts it may be appropriate to distinguish these two types of agencies, no such distinctions need be made here. The Department of Justice (an executive agency) supervises virtually all litigation by the United States and represents both independent and executive agencies in federal court. See 28 U.S.C. §§ 516, 519 (2006) (authorizing the Attorney General to represent the interests of the United States in court); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587 (1984) (“The Department of Justice, to varying degrees, represents [the] interests [of both types of agencies] in court . . .”). Accordingly, as other commentators have observed, independent and executive agencies are largely indistinguishable, at least insofar as they bring suit to see that federal law is obeyed. See, e.g., Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 954 (1991) (“[A]t least in regard to litigation, viewing independent agencies as different from executive agencies is a mistake.”).

49 See *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (“[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))); see also *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (stating that the “separation-of-powers inquiry” often “focus[es] ‘on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions’” (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)) (second alteration in original)).

C. *The Executive Branch's Prosecutorial Discretion*

The Executive Branch's Article II duty to "see that federal law is obeyed" encompasses a corollary responsibility. To fulfill that law enforcement function, the Executive Branch must exercise a considerable degree of prosecutorial discretion. This realization has significant implications for private enforcement actions. The Executive Branch's prosecutorial discretion provides a window into the degree of prosecutorial power that a private plaintiff would have, if she too could pursue the "injury to the interest in seeing that the law is obeyed." Indeed, private parties would have even greater prosecutorial discretion, because they are not subject to the legal and political checks that, to some degree, constrain executive enforcement officials. As discussed in Part IV, these distinctions seem to explain why our legal system accords a greater degree of discretionary enforcement authority to the Executive Branch.⁵⁰

1. *The Breadth of the Executive Branch's Prosecutorial Discretion*

As many commentators have observed, the Executive Branch always exercises some discretion in interpreting and applying the law.⁵¹ Statutory and regulatory provisions supply only general guidelines for conduct. The Executive Branch must apply those general proscriptions to specific scenarios.⁵² Moreover, there are countless transgressions of federal law, and the Executive Branch lacks the time and the financial resources to pursue each one,⁵³ even if it wished to.⁵⁴ Ac-

⁵⁰ In discussing prosecutorial discretion, I draw upon analyses from both the criminal and the civil enforcement contexts, which raise analogous concerns. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) ("Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, and similar considerations have been found applicable to administrative prosecutors" (citations omitted)); see also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (recognizing that "an agency's refusal to institute [civil enforcement] proceedings shares to some extent the characteristics of the decision of a [criminal] prosecutor in the Executive Branch not to indict").

⁵¹ See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 373 (2002) ("Very few rules are entirely opaque; most leave some room for interpretation and discretion in application.").

⁵² See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 725 (1997) ("Every statute confers some degree of discretion on those who implement it. No legislator, however prescient, can predict all the twists and turns that lie ahead for his or her handiwork.").

⁵³ See, e.g., Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107 (2005) ("The budget and manpower of federal regulatory agencies are generally quite limited, and many agencies simply lack the capacity to enforce the law adequately.").

cordingly, the Executive Branch must pick and choose among these innumerable violations and determine which to pursue in federal court.

I am most interested in the breadth of the Executive Branch's prosecutorial discretion. The Executive Branch's authority to "see that federal law is obeyed" allows it to pursue *any* transgression of federal law. Accordingly, the Executive Branch has the discretion to bring suit against any person, anywhere in the country, for any violation. The authority of a particular agency is only somewhat more limited. An agency may bring suit against any person, anywhere in the country, for any violation of a particular subset of federal law. In either case, that is an extraordinary discretionary power.

For the Executive Branch, it is also an extraordinary responsibility. As discussed below, the Executive Branch is not (at least in principle) free to exercise its enforcement discretion as it pleases. But that discussion should not distract us from this point: a considerable degree of prosecutorial discretion inevitably accompanies the authority to see that the law is obeyed.

2. *Legal and Political Constraints on Executive Enforcement Discretion*

The academic commentary on executive enforcement discretion suggests that there is much agreement on how the Executive Branch *should* exercise its prosecutorial discretion (although there is much disagreement over the extent to which it adheres to that ideal). I draw upon this literature and relevant doctrine to identify certain essential elements of that normative standard: faithful interpretation, uniformity, and nondiscrimination. I also note various ways in which our legal system can hold the Executive Branch accountable when it fails to comply with that standard. Notably, I offer this account, not to suggest that the Executive Branch always (or even typically) abides by that normative standard, but instead to underscore (as discussed in Part IV) that private parties have no similar obligations and are subject to no such constraints.

54 Various commentators have observed that full enforcement of the law might be unwise, even if it were feasible, because it could discourage lawful and socially beneficial conduct. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1749 n.14 (2005) (observing that overenforcement "is detrimental to society . . . when it chills socially beneficial conduct"); Deborah Platt Majoras, *Recognizing the Significance of Prosecutorial Discretion in a Multi-Layered Antitrust Enforcement World*, 11 GEO. MASON L. REV. 121, 123-24 (2002) (noting that overenforcement may cause parties to "avoid[] legitimate behavior").

First, the Executive Branch should, in accordance with the very text of the Take Care Clause, interpret and apply the law faithfully. Thus, the Executive Branch should not construe a legal provision narrowly, so as to render it essentially meaningless. Nor should the Executive Branch refuse to enforce a provision of law⁵⁵ simply because the current presidential administration disagrees with its underlying policies.⁵⁶

The Executive Branch should also apply the law uniformly,⁵⁷ establishing national enforcement policies and priorities to guide its enforcement officials in exercising prosecutorial discretion.⁵⁸ And, critically, these policies and priorities must be “nondiscriminatory.” As used here, that term means that the Executive Branch may not use its prosecutorial discretion to favor or disfavor certain individuals or groups. Thus, the Executive Branch should not pursue individuals for nefarious reasons, such as personal animosity,⁵⁹ or because of their race or ideology.⁶⁰ Nor should administrative officials decline to

55 See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583–84 (1994) (stating that the Take Care Clause “mak[es] clear that the President has no royal prerogative to suspend statutes”); Sunstein, *supra* note 24, at 670 (“[T]he ‘take Care’ clause does not authorize the executive to fail to enforce those laws of which it disapproves.”). Justice Scalia has, however, expressed a contrary view. See Scalia, *supra* note 4, at 897 (arguing that executive officials should not enforce laws that have outlived their usefulness).

56 See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2347 (2001) (noting the “risk that a presidential administration might displace the preferences of a prior . . . Congress by interpreting statutes inconsistently with their drafters’ objectives”). One exception may be when the Executive Branch considers a statute to be unconstitutional. Because the Constitution is the *supreme* law that the Executive Branch is charged with faithfully executing, it should perhaps decline to enforce seemingly unconstitutional provisions. See Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 397 (1987) (noting this possibility, but arguing that the President should enforce the law even in this context).

57 See Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1068 (1978) (asserting that the Executive Branch should adopt a “coherent, consistent interpretation of the law, to the extent that it is administratively possible to do so”).

58 See, e.g., Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 152 (1992) (asserting that agencies should adopt enforcement guidelines).

59 See Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940) (stating that “the most dangerous power of the prosecutor” is “that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted”).

60 See *Wayte v. United States*, 470 U.S. 598, 608 (1985) (stating that the Executive Branch may not bring an enforcement action to punish an individual for “exercis[ing] . . . protected statutory and constitutional rights”); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (holding that administrative officials violated the Fourteenth Amendment when they discriminated on the basis of race in applying a local ordinance);

bring enforcement actions against regulated parties that have sought to “capture” the relevant agency.⁶¹ Instead, the Executive Branch should apply the law in an evenhanded and consistent manner.

Recent history has, however, cast doubt on the Executive Branch’s willingness or capacity to enforce the law in accordance with this nondiscrimination principle. According to media reports, the Justice Department under Attorney General Alberto Gonzales was politically biased in exercising its prosecutorial discretion.⁶² Several U.S. Attorneys claimed that they were discharged, either because they brought criminal prosecutions against President George W. Bush’s political supporters or because they failed to prosecute his political opponents. This “U.S. Attorney Scandal,” along with other complaints of improper management and low morale at the Justice Department, stirred congressional investigations into its enforcement policies and practices.⁶³ The mounting criticism ultimately led Gonzales to resign from his post as Attorney General.⁶⁴

What can we take away from these events? This recent history certainly illustrates the extent to which the Executive Branch’s prosecutorial discretion is subject to abuse (a topic discussed further in Part IV).⁶⁵ But I think we can take away a more positive message as well. The U.S. Attorney Scandal was a “scandal” because we demand more from our federal enforcement officials. We expect them to enforce the law in a fair and evenhanded manner. We expect them to prosecute individuals for their conduct and not for their political beliefs.⁶⁶

see also Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980) (“In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.”).

61 *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) (“It has become widely accepted . . . that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.” (footnotes omitted)). Some commentators, however, have voiced doubts about the validity of agency “capture” theory. *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1566 (1992) (asserting that commentators may “overstate the susceptibility of agencies to capture”).

62 *See* Dan Eggen, *Ex-Attorney General Says Politics Drove Federal Prosecution*, WASH. POST, Oct. 24, 2007, at A3.

63 For a thoughtful discussion of these events, see Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187 (2008).

64 *See* Dan Eggen & Michael A. Fletcher, *Embattled Gonzales Resigns: Attorney General Was Criticized for Terrorism Policy, Prosecutor Firings*, WASH. POST, Aug. 28, 2007, at A1.

65 *See infra* notes 172–75 and accompanying text.

66 *Cf.* Lara Jakes Jordan, *Mukasey Sworn in as Attorney General*, ASSOC. PRESS, Nov. 9, 2007 (observing that the newly appointed Attorney General Michael Mukasey “made clear to sena-

Most importantly, when the Executive Branch fails to properly perform this duty, we have mechanisms to hold it accountable. We can even force a recalcitrant Attorney General to resign.

Indeed, our legal system has crafted various methods to hold executive enforcement officials accountable for the discretionary decisions that they make in “seeing that federal law is obeyed.” First, executive enforcement decisions are subject to a limited form of judicial review. Federal courts may examine whether the Executive Branch has violated the Constitution by selectively targeting persons of a particular ethnicity or ideology.⁶⁷ The courts can also review executive enforcement decisions that are out of step with a clear statutory mandate.⁶⁸

Executive enforcement decisions are also subject to congressional oversight. Congress may amend a statute to clarify the Executive Branch’s duties, establishing enforcement priorities⁶⁹ or prescribing the remedies that the Executive Branch is permitted to seek for various statutory violations.⁷⁰ Congress may also use its appropriations power⁷¹ or hold congressional hearings to exert control over an agency’s enforcement practices (as illustrated by the U.S. Attorney Scandal).⁷²

Furthermore, the Executive Branch can itself take measures to cabin the prosecutorial discretion of individual enforcement officials. It can, for example, provide its employees with manuals that set forth

tors” during his confirmation hearings that he would not “tolerate politics influencing decisions about prosecuting cases or hiring career attorneys”).

67 See *supra* note 60.

68 An agency’s decision not to take a particular enforcement action is “presumptively unreviewable.” *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). But this presumption “may be rebutted” when a congressional statute “has provided guidelines for the agency to follow in exercising its enforcement powers.” *See id.* at 832–33. Furthermore, federal courts can review enforcement decisions that are based on (allegedly incorrect) statutory interpretations, such as an agency’s conclusion that it lacks jurisdiction to exercise its enforcement authority. *See* *FEC v. Akins*, 524 U.S. 11, 25 (1998).

69 *See Heckler*, 470 U.S. at 833.

70 For example, in the civil regulatory context, Congress sometimes establishes parameters for the assessment of civil monetary penalties. *See* 29 U.S.C. § 666(a)–(d) (2006); 12 U.S.C. § 1818(i)(2)(A)–(C) (2006).

71 *See, e.g.*, Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 418 (1982) (“Congress . . . may use the appropriations process . . . to ensure that [an] agency does not overenforce a statute, or to indicate that certain . . . illegalities . . . are the intended object of the statutory standard.”).

72 *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 791 (1999) (“Oversight hearings . . . give legislators in the relevant committees the chance to impose costs if enforcers are insufficiently attentive to their concerns.”).

its enforcement policies,⁷³ and then conduct internal reviews⁷⁴ or take other measures to prevent officials from bringing suits that are out of step with those policies.⁷⁵

I identify these compliance mechanisms to highlight (as discussed in Part IV) that no such constraints apply to private prosecutorial discretion. But I do not want to overstate the effectiveness of any of these forms of review. Judicial review is often an inadequate means of curtailing executive enforcement discretion. Federal courts rarely review individual nonenforcement decisions,⁷⁶ and selective prosecution claims are extremely difficult to prove.⁷⁷ Moreover, Congress may not have the time, the staff, or the political will to hold oversight hearings every time it disagrees with an executive enforcement policy, much less an individual enforcement decision.⁷⁸ Congress may be

⁷³ See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 843 (2004) (“Prosecutors’ offices, especially those that deal with a large volume of similar cases, often adopt policies in order to promote consistency and administrative efficiency.”). This method of restraint does, however, rely on the Executive Branch’s willingness and capacity to constrain individual enforcement officials. The publication of such guidelines does not give rise to any individual rights and, accordingly, defendants cannot rely on those guidelines to challenge individual enforcement decisions in court. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1153 (D.C. Cir. 2006) (“[T]he guidelines provide no enforceable rights to any individuals, but merely guide the discretion of the prosecutors.”); *United States v. Patenostro*, 966 F.2d 907, 912 (5th Cir. 1992).

⁷⁴ See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 960 n.303 (2000) (observing that the Executive Office of U.S. Attorneys conducts reviews every few years to ensure that field offices “comply[] with Department policies and procedures”).

⁷⁵ Notably, the federal government has a centralized system for determining which cases should be appealed to the courts of appeals and ultimately to the Supreme Court. See United States Department of Justice, Functions of the Office of the Solicitor General, <http://www.usdoj.gov/osg/aboutosg/function.html> (noting that the Solicitor General’s Office “review[s] all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, what position should be taken”). The Solicitor General can use this authority over the appellate process to ensure, to some degree, consistency in government enforcement efforts. For example, on two occasions, the Solicitor General successfully moved in the Supreme Court to dismiss criminal prosecutions that were out of step with the federal government’s overall enforcement policies. See *Redmond v. United States*, 384 U.S. 264, 264–65 (1966); *Petite v. United States*, 361 U.S. 529, 530–31 (1960).

⁷⁶ See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (holding that an agency’s decision not to take a particular enforcement action is “presumptively unreviewable”).

⁷⁷ See *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996) (stating that enforcement decisions are entitled to a “presumption of regularity” and that, in order to “dispel [that] presumption,” a person must provide “clear evidence” that the decision was improperly motivated).

⁷⁸ See Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1424 (2000) (“Traditionally, Congress has used [oversight] hearings sparingly and for matters of some prominence.”).

even less inclined to correct executive enforcement decisions by statutory amendment, given the cumbersome nature of the legislative process (and the possibility of presidential veto).⁷⁹ The Executive Branch is likewise subject to budgetary and time constraints that may hinder its ability to oversee individual enforcement officials (assuming, of course, that it has the political will to conduct such oversight at all).

Ultimately, no amount of central executive supervision, congressional oversight, or federal court review will fully cabin prosecutorial discretion—not when officials are charged with the abstract duty to ensure that “the law is obeyed.” Thus, in the end, we must recognize—as former Attorney General (and Supreme Court Justice) Robert Jackson put it—that we grant our public officials this discretionary enforcement authority, not because we are confident that they will always exercise it perfectly, but “because it seems necessary that such a power to prosecute be lodged somewhere.”⁸⁰ And the Constitution, via the Take Care Clause of Article II, has indicated where we should “lodge” the power to see that the law is obeyed. The Constitution has designated the Executive Branch as “the guardian of that public interest.”⁸¹

IV. THE ARTICLE III STANDING OF PRIVATE PLAINTIFFS

It has been well-established for over a century that the Executive Branch has standing to bring suit in federal court to “see that federal law is obeyed.” It is equally well-established that private plaintiffs may not assert such an abstract grievance. As described below, this restriction prevents private plaintiffs from exercising the same degree of prosecutorial discretion as the Executive Branch.

This concept of standing as a limit on private prosecutorial discretion provides both a principled explanation and a policy rationale for much of standing doctrine. This analysis also suggests a constitutional and normative justification for standing doctrine that has largely been overlooked by commentators: standing doctrine pro-

79 See Kagan, *supra* note 56, at 2259 (“[A]ll the claims of legislative control [over administrative action] inadequately acknowledge the limits on Congress’s ability to impose harsh sanctions. Statutory (including most budgetary) punishments require the action of the full Congress—action which is costly and difficult to accomplish.”).

80 Jackson, *supra* note 59, at 3.

81 *United States v. Raines*, 362 U.S. 17, 27 (1960).

pects individual liberty against arbitrary exercises of private prosecutorial discretion.

A. *Private Parties Must Allege “Something More” Than the “Common Concern for Obedience to Law”*

*Fairchild v. Hughes*⁸² provides an early illustration of the Supreme Court’s unwillingness to hear abstract private grievances. In *Fairchild*, the plaintiff challenged the validity of the Nineteenth Amendment (the amendment that gave women the right to vote).⁸³ The plaintiff claimed an interest in the case as a citizen and taxpayer and as a “member[] of the American Constitutional League,” an association that sought to protect “the fundamental principles of the American Constitution, and especially that which gives to each state the right to determine for itself the question as to who should exercise the elective franchise therein.”⁸⁴ The Court dismissed the suit, stating that the plaintiff asserted “only the right, possessed by every citizen, to require that the government be administered according to law.”⁸⁵ This “general right,” the Court declared, “[o]bviously . . . does not entitle a private citizen to institute” a suit in federal court.⁸⁶

The Court later applied the same principles to a purely private dispute. In *L. Singer & Sons v. Union Pacific Railroad Co.*,⁸⁷ the plaintiffs sought to prevent a railroad from taking action that would (allegedly) violate the Transportation Act of 1920.⁸⁸ The Court held that, to bring the action, the plaintiffs had to allege “something more than a common concern for obedience to law.”⁸⁹

*Lujan v. Defenders of Wildlife*⁹⁰ confirmed that this limitation on private party standing has constitutional underpinnings. In *Lujan*, certain environmental organizations filed suit against the Department of Interior, challenging its regulatory interpretation of the Endangered

82 258 U.S. 126 (1922).

83 See *id.* at 127; see also U.S. CONST. amend. XIX, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

84 *Fairchild*, 258 U.S. at 127 (internal quotation marks omitted).

85 *Id.* at 129.

86 *Id.* at 129–30.

87 311 U.S. 295 (1940).

88 See *id.* at 297.

89 *Id.* at 303.

90 504 U.S. 555 (1992).

Species Act.⁹¹ After concluding that the plaintiffs failed to allege a cognizable injury,⁹² the Court held that the statute's "citizen-suit" provision did not provide an alternative basis for standing.⁹³

The citizen-suit provision stated that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of" any provision of the Endangered Species Act or its implementing regulations.⁹⁴ The *Lujan* Court found that Congress could not, consistent with Article III, confer "upon *all* persons" this "abstract, self-contained, noninstrumental 'right'" to enforce federal law.⁹⁵ The Court declared that a plaintiff asserting only an injury "to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy."⁹⁶

91 *Id.* at 557–59. The statutory provision at issue requires each federal agency, in consultation with the Secretary of the Interior, to ensure that any action "authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued existence of any endangered species." *Id.* at 558 (quoting 16 U.S.C. § 1536(a)(2) (1988)). The plaintiffs in *Lujan* objected to a regulation stating that this consultation requirement did not apply to agency action in foreign countries. *See id.* at 558–59.

92 *See id.* at 562–67. The plaintiff organizations' claim for standing rested in part on affidavits from two members. *See id.* at 563–64. Each member stated that she had previously observed an endangered species in a foreign country and that the existence of the species was now threatened by a project that received federal funds. *See id.* at 563. Each member also asserted that she planned to return to the location to view the species again. *See id.* at 563–64. The Supreme Court held that the affidavits did not establish an injury-in-fact, because they failed to show that the affiants would "imminent[ly]" be harmed by the threat to the species. *See id.* at 564 (internal quotation marks omitted). According to the Court, the plaintiffs needed to have "concrete plans," not simply "'some day' intentions," to return to the foreign countries in order to demonstrate "'actual or imminent' injury." *Id.*

93 *See id.* at 571–73.

94 *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g) (1988)).

95 *See id.* at 573.

96 *Id.* at 573–74. *Lujan* did not announce a constitutional rule solely for cases against the federal government (or, more specifically, against the Executive Branch). The Supreme Court and the courts of appeals have applied similar principles in lawsuits against non-federal defendants. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007) (rejecting a challenge to a Colorado law for lack of standing); *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303–04 (1940) (holding that the plaintiffs could not challenge the railroad's conduct based solely on their interest in ensuring compliance with federal law); *W. Pac. Cal. R.R. Co. v. S. Pac. Co.*, 284 U.S. 47, 51–52 (1931) (stating that to be a party-in-interest, the complainant must have some definite legal right that is seriously threatened); *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542, 546–47 (6th Cir. 2004) (finding a concrete and particularized injury sufficient to confer Article III standing); *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001) (finding no particularized harm to allow standing against the Commission on Presidential Debates).

The Supreme Court has thus repeatedly found that a private plaintiff must allege “something more”⁹⁷ than an interest in “seeing that the law is obeyed.” But this “something more” cannot simply be an ideological interest in a particular area of law. In *Fairchild v. Hughes*, for example, the Court indicated that the plaintiff could not challenge the Nineteenth Amendment simply by asserting a special interest in protecting each State’s alleged “right to determine for itself the question as to who should exercise the elective franchise therein.”⁹⁸

The Court made this point more explicit in *Sierra Club v. Morton*.⁹⁹ In *Morton*, a private interest group brought suit against the Department of Interior to enjoin it from issuing permits for a development in a wilderness area.¹⁰⁰ The organization asserted that it should have standing to bring the action in light of its “special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country.”¹⁰¹

The Supreme Court rejected that claim.¹⁰² The organization’s “special interest” in environmental protection did not constitute a judicially cognizable interest. The Court stated that, if “a mere interest in a problem” sufficed for standing, then “any individual citizen” with a “bona fide special interest” in a particular legal issue could file suit.¹⁰³

97 *L. Singer & Sons*, 311 U.S. at 303–04.

98 258 U.S. 126, 127 (1922).

99 405 U.S. 727 (1972).

100 *See id.* at 730.

101 *Id.*

102 *See id.* at 738–41.

103 *Id.* at 739–40 (internal quotation marks omitted). The Court purported to adhere to these limitations on private party standing in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). *Stevens* involved the False Claims Act, which prohibits any person from making a fraudulent claim for payment to the federal government, and allows private *qui tam* relators to enforce the provision by filing suit against an alleged violator. *See* 31 U.S.C. §§ 3729(a)(1), 3730(b)(1) (2000); *Stevens*, 529 U.S. at 768, 771–78. The Court found that relators could (consistent with Article III) bring these suits, because they asserted the government’s “proprietary injury resulting from the alleged fraud,” rather than its abstract “sovereign[.]” interest in law enforcement. *Id.* at 771, 773 (noting that the statute “can reasonably be regarded as effecting a partial assignment of the Government’s *damages claim*” (emphasis added)). I do not claim that this distinction between “sovereign” and “proprietary” interests is necessarily coherent. I note only that the Court’s analysis is superficially consistent with the cases holding that private parties lack standing to see that the law is obeyed. A more extensive discussion of *Stevens* and the False Claims Act is beyond the scope of this Article.

B. Standing Doctrine Curtails Private Prosecutorial Discretion

The Supreme Court has never clearly identified the basis for the prohibition on abstract private grievances. But the Court's analysis in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*¹⁰⁴ suggests one concern that may be animating the Court: a concern that certain classes of injuries could give private individuals an unlimited amount of prosecutorial discretion.¹⁰⁵

In *Valley Forge*, a private interest group that advocates the separation of church and state, along with several of its employees, filed suit, challenging the federal government's decision to convey federal property to a religious institution.¹⁰⁶ The Supreme Court held that the plaintiffs lacked standing because they failed to assert an injury-in-fact.¹⁰⁷ The plaintiffs could not simply claim that "the Constitution has been violated."¹⁰⁸ Nor could they rely on a "special interest" in the Establishment Clause. The Court concluded, as it had in *Sierra Club v. Morton*, that the plaintiffs' "firm[] commit[ment] to the constitutional principle of separation of church and State" was not in and of itself sufficient for standing.¹⁰⁹

Notably, the Court in *Valley Forge* seemed particularly disturbed by the fact that the plaintiffs were from the Washington, D.C. area and were challenging the conveyance of property located in Pennsylvania.¹¹⁰ The Court emphasized that the plaintiffs only knew of the allegedly unconstitutional transfer of property because of a "news release."¹¹¹ The Court found that the plaintiffs had no cognizable in-

¹⁰⁴ 454 U.S. 464 (1982).

¹⁰⁵ Standing doctrine may, of course, also serve other values. For insightful discussions, see Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306–15 (1979) (arguing that standing protects the values of representation and self-determination); Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1664 (2007) (contending that standing helps "prevent the inefficient disposition of constitutional entitlements"); and MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* 159 (2000) (asserting that standing helps prevent litigants "from strategically timing cases . . . to manipulate the substantive evolution of constitutional doctrine").

¹⁰⁶ 454 U.S. at 469.

¹⁰⁷ *See id.* at 482–87.

¹⁰⁸ *Id.* at 485.

¹⁰⁹ *Id.* at 486 ("It is evident that [the plaintiffs] are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").

¹¹⁰ *See id.* at 486–87.

¹¹¹ *See id.* at 469 (observing that the plaintiffs "learned of the conveyance through a news release"); *id.* at 486–87 ("[The plaintiffs] complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organiza-

terest in this distant conduct: they could not, simply by alleging a constitutional violation, confer upon themselves “a special license to roam the country in search of governmental wrongdoing” and “reveal their discoveries in federal court.”¹¹²

1. *The Prosecutorial Discretion Conferred by “Abstract Concerns”*

The Court’s analysis in *Valley Forge* suggests the missing link in much of standing doctrine. The Court indicated that a private plaintiff may not assert an injury that would allow her to “roam the country in search of” legal violations and initiate an enforcement action against the violator of her choice. Put another way, a private plaintiff should not be permitted to file suit against any person, anywhere in the country, for any violation of law. The Court thus suggested that a private plaintiff should not have standing to assert an injury that would give her an unlimited amount of prosecutorial discretion.

What kinds of injuries would confer on a private plaintiff substantial prosecutorial discretion? One such injury appears to be the “injury to the interest in seeing that the law is obeyed.” As we have seen, the Executive Branch, in pursuing that law enforcement interest, has precisely the degree of prosecutorial discretion that the Court found impermissible for a private party. The Executive Branch may “roam the country in search of” legal violations and bring suit against any person for any transgression. There are certain legal and political constraints on executive enforcement discretion, but (as discussed below) virtually none of those limitations apply to private parties. Accordingly, if a private party could assert the “interest in seeing that the law [was] obeyed,” she would have almost unlimited power to “roam the country in search of” legal violations and pursue the violator of her choice.

But that is not the only abstract grievance that would give a private plaintiff such expansive prosecutorial discretion. Other abstract interests would give private plaintiffs a similar degree of discretionary enforcement authority. As discussed, the Court in *Sierra Club v. Morton* and *Valley Forge* held that private parties lack standing to assert a “special interest” in—or a “firm[] commit[ment]” to—the enforcement of a particular area of law. The Supreme Court applied these

tional headquarters are located in Washington, D.C. They learned of the transfer through a news release.” (footnote omitted)).

112 *Id.* at 487.

principles in *Diamond v. Charles*,¹¹³ when it held that a litigant could not simply allege a “conscientious objection to abortion.”¹¹⁴ Such an “abstract concern,” the Court declared, “does not substitute for the concrete injury required by Art. III.”¹¹⁵

If a plaintiff had Article III standing to assert a “conscientious objection” to particular conduct (or a “special interest” in a particular area of law), there would seem to be no Article III means of limiting her discretion to file suit in federal court. It does not appear that a federal court would ever have an “objective basis” for rejecting a would-be plaintiff’s assertion that she had a “bona fide” “special interest” in a particular matter.¹¹⁶

Thus, if a private plaintiff had standing to file suit, based solely on her own asserted “special interest,” she could become a self-appointed enforcer of any area of federal law. And she would have an extraordinary degree of prosecutorial discretion. Her asserted “special interest” would allow her to bring suit against any person, anywhere in the country, for any violation of her chosen field of federal law.

2. *Standing Limits Private Prosecutorial Discretion*

We will soon explore why it may make sense to prevent private parties from exercising substantial prosecutorial discretion. But we should first examine how standing doctrine curtails private prosecutorial discretion. A private individual generally cannot file suit unless

113 476 U.S. 54 (1986).

114 *Id.* at 67.

115 *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)). *Diamond* grew out of a constitutional challenge to a restrictive Illinois abortion statute. *See id.* at 57–58. A physician (*Diamond*) intervened in the litigation, asserting that he had an interest in defending the statute because of his “conscientious objection to abortions.” *Id.* The lower courts later enjoined the enforcement of certain provisions of the state law and Illinois declined to further defend the statute. *See id.* at 61. Only *Diamond* sought review in the Supreme Court. *Id.* The Court held that, when a private intervenor such as *Diamond* is the sole party to appeal, he must satisfy the standing requirements of Article III. *See id.* at 68. And, as noted in the text, the Court found that *Diamond* lacked standing because he suffered no judicially cognizable injury. *See id.* at 71.

116 *Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1972) (“[I]f a ‘special interest’ in [environmental protection] were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide ‘special interest’ organization, however small or short-lived. And if any group with a bona fide ‘special interest’ could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.”).

she has suffered a concrete injury-in-fact.¹¹⁷ That injury further cabins her prosecutorial discretion by defining which defendants she can hale into court. She can sue only the party (or parties) that caused the legally cognizable harm.¹¹⁸ And she can seek redress (in the form of damages or injunctive relief) only for the harm that she suffered and/or to prevent that harm from occurring or recurring.¹¹⁹ The injury-in-fact requirement of standing doctrine thus, to a large extent, determines the scope of a plaintiff's prosecutorial discretion.

Let's examine how the Supreme Court has managed to curtail private prosecutorial discretion, even as it has relaxed the standing requirements for private plaintiffs. As noted, a private plaintiff may bring suit only when she suffers an injury-in-fact. Accordingly, when the Court recognizes new injuries as judicially cognizable, that increases the likelihood that a private party can file suit. And, over the past several decades, the Court has expanded the realm of injuries to encompass vote dilution,¹²⁰ racial gerrymandering,¹²¹ an aesthetic interest in a wilderness area,¹²² and an interest in the preservation of a species of wildlife.¹²³

But, even as the Court has recognized new injuries-in-fact, it has (albeit imperfectly¹²⁴) consistently defined the relevant injury in a way that cabins private prosecutorial discretion. The Court, as an initial matter, defines the injury in a manner that limits the pool of potential prosecutors. Often, the parameters established by the Court are

117 See *McConnell v. FEC*, 540 U.S. 93, 225 (2003).

118 See, e.g., *Simon*, 426 U.S. at 40–44 (holding that indigent plaintiffs, who were denied treatment at certain tax-exempt hospitals, lacked standing to sue the Internal Revenue Service, because their injury—the denial of care—was caused by the hospital rather than by the IRS); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–18 (1973) (holding that a mother could not bring suit against a state prosecutor for failing to enforce the child support laws on behalf of children born out-of-wedlock, because the mother “made no showing that her failure to secure support payments [from her own child’s father] result[ed] from the nonenforcement”).

119 See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”). I do not mean to dispute that, once a private plaintiff demonstrates an injury-in-fact, she may seek “broad injunctive relief” or other remedies that are “not necessarily coterminous with” her personal injury. See *Morrison*, *supra* note 11, at 603–04. But she must nevertheless target the particular illegal conduct that injured her. See *infra* text accompanying notes 124–35.

120 See *Baker v. Carr*, 369 U.S. 186, 207–08 (1962).

121 See *Shaw v. Reno*, 509 U.S. 630, 658 (1993).

122 See *Laidlaw*, 528 U.S. at 183; *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73–74, 74 n.18 (1978).

123 See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986).

124 For insightful critiques of the Court’s standing jurisprudence, see *supra* notes 5–7, 27.

geographic. In the racial gerrymandering context, for example, the plaintiff must reside in one of the (allegedly poorly drawn) majority-minority districts.¹²⁵ Likewise, in the vote dilution context, the plaintiff must reside in the area where her votes will (allegedly) be accorded less weight.¹²⁶

The definition of the relevant injury-in-fact then determines the scope of each potential plaintiff's prosecutorial discretion. A plaintiff who brings a vote dilution claim has the discretion to file suit only against the governmental entity that drew the (allegedly unlawful) district lines. And she can challenge—and seek redress for—only the alleged vote dilution. She lacks standing to see that all aspects of election law are obeyed.

Along similar lines, in environmental cases, the Court has defined each injury in a way that limits both the pool of potential prosecutors, and cabins each potential plaintiff's prosecutorial discretion. To some extent, as in the voting rights context, the parameters established by the Court are geographic. An individual can generally file an enforcement action if she resides near a facility that has allegedly polluted the surrounding air or water, claiming that the pollution has adversely affected her health or negatively impacted the value of her property.¹²⁷ The Court has also focused on "actual use," i.e., whether a complaining individual regularly spends time in a particular wilderness area or views a particular endangered species.¹²⁸

The definition of the relevant injury then, in turn, determines the prosecutorial discretion of any would-be plaintiff. The affected individual can bring suit against only the particular defendant (or defen-

125 See *Sinkfield v. Kelley*, 531 U.S. 28, 29–31 (2000); *United States v. Hays*, 515 U.S. 737, 744–45 (1995).

126 See *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330–34 (1999); *Baker v. Carr*, 369 U.S. 186, 207–08 (1962).

127 See *Laidlaw*, 528 U.S. at 182–84 (holding that an environmental organization had standing, in part because a member of the organization lived near the defendant hazardous waste facility and alleged that the pollution caused by the facility reduced the value of her property); *Duke Power*, 438 U.S. at 67, 73–74 (concluding that the plaintiffs—"40 individuals who live within close proximity to the planned [nuclear power] facilities"—alleged a cognizable injury, given that the emissions from such facilities can cause adverse "health and genetic consequences").

128 See, e.g., *Laidlaw*, 528 U.S. at 183 ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972))); *Japan Whaling*, 478 U.S. at 230 n.4 (noting that the plaintiffs "undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting").

dants) whose conduct has harmed (or threatens to harm) her health; the value of her property; the wilderness area that she uses; or the species that she enjoys viewing. She lacks standing to “roam the country in search of” other violations of environmental laws—even other violations by the same defendant—and “reveal [her] discoveries in federal court.”

This analysis helps to explain the Court’s willingness to consider certain establishment clause challenges on the merits, even as it denied standing to the plaintiffs in *Valley Forge*.¹²⁹ The Court has, for example, ruled on allegations that local government crèche and Ten Commandments displays violate the Establishment Clause—without so much as mentioning standing.¹³⁰ Significantly, the plaintiffs who brought these suits had more than just an abstract interest in preventing government endorsement of religion. Each suit was brought in part by local residents who lived near and actually observed the challenged religious displays.¹³¹ The plaintiffs thus had the discretion to contest only the particular display in their community and to seek redress only for that harm. These plaintiffs were not given the more general authority to “see that [the Establishment Clause] is obeyed.”¹³²

¹²⁹ Many thanks to Richard Fallon for suggesting this application of the standing theory presented here.

¹³⁰ See *McCreary County v. ACLU*, 545 U.S. 844, 850, 881 (2005) (holding that a Ten Commandments display on a county courthouse violates the Establishment Clause); *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (holding that a Ten Commandments display on state capitol grounds does not violate the Establishment Clause); *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (holding that a crèche display at a county courthouse is unconstitutional); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (holding that a city’s crèche display is constitutional).

¹³¹ See *Van Orden*, 545 U.S. at 682; *Allegheny*, 492 U.S. at 587–88; *Lynch*, 465 U.S. at 671–72; *ACLU v. McCreary County*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000) (“[T]he plaintiffs here have standing because they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business.”).

¹³² I do not separately discuss establishment clause challenges based on taxpayer standing, which are governed by distinct rules. The general rule is that private parties lack standing to challenge government conduct based solely on their status as federal taxpayers. See *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). Although the Court in *Flast v. Cohen*, 392 U.S. 83 (1968), carved out an exception to this rule for establishment clause challenges to federal expenditures, the Court has gradually narrowed the *Flast* exception so that it covers only challenges to certain exercises of congressional power under the Spending Clause. See *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2568 (2007) (holding that federal taxpayers may challenge only government expenditures that are “expressly authorized or mandated by a[] specific congressional enactment”). A full discussion of taxpayer standing is beyond the scope of this Article. But, as noted below, the constitutional analysis here may offer an alternative rationale for the Court’s decision to grant standing in *Flast* and deny it in *Valley Forge*. See *infra* note 210.

Private organizations do tend to have a larger degree of prosecutorial discretion than an individual plaintiff. A private interest group may bring an enforcement action against any defendant whose conduct has injured one of the organization's members, as long as the lawsuit is germane to its purposes.¹³³ An organization with a nationwide membership will often be able to satisfy this requirement, and will therefore retain the prosecutorial discretion to pursue a number of offenses (and/or offenders). For example, in *Sierra Club v. Morton*, the Supreme Court found that the plaintiff organization lacked standing to challenge a recreational development near a wilderness area, based solely on its "special interest" in environmental protection.¹³⁴ But, the Court indicated, the organization could have brought the identical suit if it had alleged that one of its members would be harmed by the development (perhaps because that person lived near the wilderness area and hiked there).¹³⁵

The prosecutorial discretion of such a private interest group is still, however, not coextensive with that of the Executive Branch. A private organization is limited to filing suits against defendants whose conduct harms the interests of the organization's members. Thus, like an individual plaintiff, a private organization lacks Article III standing to "roam the country in search of" any violation of federal law (or even a particular subset of federal law) and "reveal [its] discoveries in federal court."

133 See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) ("[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."); see also *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556-57 (1996) (concluding that the third prong of this test is not a constitutional requirement). Notably, the standard for "germaneness" is not a particularly exacting one. See *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2000).

134 405 U.S. 727, 738-40 (1972).

135 See *id.* at 735 ("Nowhere in the pleadings or affidavits did the [Sierra] Club state that its members use [the wilderness area]."); *id.* at 735 n.8 (noting that the plaintiff could seek leave to amend its complaint to allege such an injury). Indeed, it appears that the plaintiff in *Morton* could have satisfied the requirements for organizational standing. According to an amicus brief, the plaintiff organization did have members that used the wilderness area at issue. See *id.* The organization, however, declined to rely on the interests of its members. See *id.*

C. Policy Bases for Curtailing Private Prosecutorial Discretion

But why would we place these limitations on private enforcement actions? After all, private attorneys general often perform a valuable law enforcement function. Private actions (when they proceed to the merits) can and plainly do help serve the public interest in “seeing that the law is obeyed,” whether it be in the civil rights context;¹³⁶ the environmental context;¹³⁷ or the commercial context (especially with respect to antitrust¹³⁸ and securities law).¹³⁹

Moreover, it seems quite possible that conferring standing on an unlimited number of private prosecutors to “see that the law is obeyed” would be a way to solve some of the law enforcement difficulties faced by the Executive Branch. As noted above, the Executive Branch lacks sufficient financial resources to pursue every violation of federal law; millions of private attorneys general should be able to pick up much of the slack. Indeed, private plaintiffs that are able to satisfy the requirements of current standing law often perform that very function.¹⁴⁰

But we should keep in mind that private attorneys general do not constitute (and should not have to constitute) a cohesive group, working together in pursuit of a common public goal. Thus, in evaluating the prosecutorial capacities of private attorneys general, each must be considered a separate and distinct entity. And, once we look at would-be private plaintiffs on this individual basis, we can see policy reasons for preventing every private party in the country from ex-

136 See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) (“When the Civil Rights Act of 1964 was passed, it was evident that . . . the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.”).

137 See Sandra B. Zellmer, *The Virtues of ‘Command and Control’ Regulation: Barring Exotic Species from Aquatic Ecosystems*, 2000 U. ILL. L. REV. 1233, 1267 (noting the importance of private enforcement of environmental laws).

138 See *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) (“[P]rivate suits are an important element of the Nation’s antitrust enforcement effort: . . . [They] provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.” (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979))); 15 U.S.C. § 15 (2006) (authorizing private antitrust actions).

139 See *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (“[I]mplied private actions provide ‘a most effective weapon in the enforcement’ of the securities laws and are ‘a necessary supplement to [Securities & Exchange] Commission action’” (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964))).

140 See *supra* notes 136–39; Stephenson, *supra* note 53, at 107–08.

ercising the same degree of prosecutorial discretion as the Executive Branch.

1. A Hypothetical Private Attorney General

Let's examine whether a private plaintiff, who brings an enforcement action, means to serve as a "representative of the [entire] public."¹⁴¹ Assume for a moment that we have conferred upon a private attorney general Article III standing to see that an area of federal law is obeyed. We will use bankruptcy law as a paradigm. Assume that our private attorney general (a private nonprofit organization) chose this field because of its "special interest" in protecting lower-level employees who are adversely affected by corporate reorganizations. To facilitate our private attorney general's "special interest," we will allow it to "roam the country in search of" violations of the Bankruptcy Code and "reveal [its] discoveries in federal court."¹⁴²

But, of course, like the Executive Branch, our private attorney general will have only a finite amount of resources to pursue these legal violations. Thus, like the Executive Branch, the private attorney general must choose which statutory violations to pursue. Presumably, it will focus on the violations that relate to its "special interest": protecting the employees of corporate debtors. Accordingly, our private attorney general will be motivated to bring suit against any corporate debtor that fails to comply with the statutory provisions protecting employees' collective bargaining agreements¹⁴³ and retirement benefits.¹⁴⁴

But our private attorney general may not spend its limited resources enforcing statutory provisions that do not further its "special interest." For example, the Bankruptcy Code requires a corporate debtor to pay its post-petition contractors before paying virtually any other creditor.¹⁴⁵ This is clearly an important requirement of the

¹⁴¹ *Sierra Club v. Morton*, 405 U.S. 727, 736 (1972).

¹⁴² *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982).

¹⁴³ *See* 11 U.S.C. § 1113 (b)(1)(A) (2006) (stating that a debtor may modify a collective bargaining agreement only as "necessary to permit . . . reorganization" and must ensure that "all of the affected parties are treated fairly and equitably").

¹⁴⁴ *See* 11 U.S.C. § 1114(e)(1) (2006) (requiring that the debtor "timely pay and . . . not modify" retirement benefits except by agreement of the parties or by court order).

¹⁴⁵ *See* 11 U.S.C. §§ 503(b), 507(a)(2) (stating that such expenses are "administrative expenses," which are given high priority under the Code); *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 383 (6th Cir. 2001). Such "administrative expenses" also include the post-petition wages of a debtor corporation's employees. *See* 11 U.S.C. § 503(b)(1)(A)(i).

Code. The debtor could not reorganize if it could not obtain the goods and services to conduct its business; and, without such a promise of payment, other companies would be disinclined to do business with a debtor in bankruptcy.¹⁴⁶ But the payment of such expenses reduces the amount available to other creditors, including the employees and former employees of the debtor corporation. Thus, if a debtor fails to pay one of its post-petition contractors, our private attorney general is unlikely to pursue that statutory violation, which does not serve—and, in fact, tends to undermine—its “special interest.”

The Bankruptcy Code, like most federal law, reflects a wide range of interests, not all of which are consistent with—or even particularly relevant to—our private attorney general’s own “special interest.” Our private attorney general has no interest in using its scarce resources to see that every provision of the Bankruptcy Code is obeyed.

This reasoning is not limited to the bankruptcy context. We likewise do not expect an organization focused on environmental protection to pursue just “any” violation of federal environmental law. Such an organization is not likely to file suit on behalf of a corporation whose request for a permit to discharge pollutants under the Clean Water Act may have been improperly denied.¹⁴⁷ Such an improper denial would constitute “any” violation of federal environmental law and, indeed, it may be a violation that Congress would want pursued. Nevertheless, a permit denial is not a transgression that we expect to trigger a lawsuit by a private conservation group. On the contrary, we expect—indeed, many of us hope—that such a group will bring enforcement actions to further its “special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country.”¹⁴⁸

2. *The Lack of Constraints on Private Prosecutorial Discretion*

The above discussion suggests some important differences between the Executive Branch and private parties, which help explain

Our private attorney general would be inclined to ensure that a debtor made those payments.

¹⁴⁶ See *In re* FBI Distrib. Corp., 330 F.3d 36, 41 (1st Cir. 2003).

¹⁴⁷ Under the Clean Water Act, a person that plans to discharge pollutants into the nation’s waters must apply to the Environmental Protection Agency for a “national pollution discharge elimination system” (“NPDES”) permit. See 33 U.S.C. §§ 1311(a), 1342 (2000). An applicant may seek review of an adverse decision. See *id.* § 1369(b)(1)(F).

¹⁴⁸ *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972).

why our legal system places greater limitations on private prosecutorial discretion. First, in contrast to the Executive Branch, a private party has no constitutional obligation to “faithfully” execute the laws. Accordingly, a private party is free to ignore certain provisions of law and refuse to enforce them when they do not comport with its “special interest.” Likewise, a private party has no duty to adopt nationally uniform enforcement policies. A private party is free to focus on tobacco litigation in Virginia or immigration rights in Arizona, and need not consider how those actions will affect overall enforcement efforts.

Nor do we expect a private party to abide by what I have described as the “nondiscrimination” principle. Certainly, no one complains that a private organization might be “captured” by a special interest or that it may bring suits to advance only certain ideological goals. Indeed, those are the defining features of a private interest group. But private parties are also free to ignore the other half of the nondiscrimination principle articulated above. Although the Constitution prohibits the Executive Branch from targeting ideological opponents or individuals of a particular ethnicity, these restrictions do not apply to private prosecutorial discretion.¹⁴⁹ In *Federal Election Commission v. Akins*,¹⁵⁰ for example, a group of plaintiff voters brought suit against the FEC, urging it to require the American Israel Public Affairs Committee (“AIPAC”) to make certain disclosures about its political activities.¹⁵¹ As the Court observed, the plaintiffs sought the information about AIPAC because they “often opposed” the political positions taken by AIPAC.¹⁵² The Court did not suggest that there was anything unlawful about a private enforcement action motivated by the plaintiffs’ ideological opposition to a particular group.

Private parties’ freedom from these constitutional restrictions would raise troubling possibilities if they had the authority to see that any area of federal law was obeyed. A private group might, for example, assert a “conscientious objection” to undocumented workers, and therefore declare a “special interest” in enforcing federal immigration law. Like the private attorneys general discussed above, this self-

149 The Constitution, with a few exceptions (such as the Thirteenth Amendment), restricts only the actions of governmental entities. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). The conduct of private parties “violates the Constitution only when it may be attributed to state action.” *Id.*; see *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–73, 177 (1972).

150 524 U.S. 11 (1998).

151 See *id.* at 13–16.

152 *Id.* at 15–16.

appointed watchdog of immigration law would have only a finite amount of resources, and would thus focus only on the parts of immigration law that furthered its “special interest.” Accordingly, the interest group would likely concentrate on the statutory provisions requiring removal of certain aliens,¹⁵³ and would be less concerned about the laws permitting other immigrants to remain in the country as refugees.¹⁵⁴

Alternatively, as in *Diamond v. Charles*, a private plaintiff might assert a “conscientious objection to abortions,”¹⁵⁵ and therefore claim a “special interest” in enforcing restrictions on federal funding of abortions.¹⁵⁶ Conversely, a private interest group might assert a “conscientious objection” to persons who interfere with family planning services, and thus claim a “special interest” in enforcing the Freedom of Access to Clinics Entrances Act.¹⁵⁷ Such a private attorney general might be inclined to use its finite resources to enforce this law against members of pro-life interest groups, because—analogueous to *Federal Election Commission v. Akins*—its views are “often opposed” to such groups. There do not appear to be any legal constraints on such ideologically motivated private enforcement actions.¹⁵⁸

And that leads us to the final distinction between the Executive Branch and private parties: accountability. I do not dispute that it is difficult to hold the Executive Branch accountable for its discretionary enforcement decisions. But, as challenging as it is to hold the Ex-

¹⁵³ See 8 U.S.C. § 1227(a) (2000) (setting forth the classes of deportable aliens).

¹⁵⁴ See 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A) (2006) (providing that an individual who qualifies as a “refugee” may be granted asylum).

¹⁵⁵ 476 U.S. 54, 57–58 (1986).

¹⁵⁶ Since 1976, Congress has, via either an appropriations measure or a joint resolution, prohibited the use of federal Medicaid funds for abortions. This restriction is commonly known as the “Hyde Amendment.” See Pub. L. No. 108–99, §§ 508, 509, 118 Stat. 277 (2004) (prohibiting the use of federal Medicaid funds for abortion except in cases of rape, incest, and when the mother’s life would be endangered by the pregnancy); *Harris v. McRae*, 448 U.S. 297, 302 (1980); see also *id.* at 326–27 (rejecting a constitutional challenge to the funding restriction).

¹⁵⁷ 18 U.S.C. § 248 (2006). The statute prohibits the “intentional[] . . . intimidat[ion]” of persons “obtaining or providing reproductive health services.” *Id.* § 248(a)(1).

¹⁵⁸ Other commentators have raised similar concerns. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1445 (2003) (“Private delegates’ exemption from constitutional constraints means that they can wield these government powers in ways that raise serious abuse of power concerns. Imagine, for example, an individual who commences a meritless suit for civil penalties against a company out of spite or because its owners are African American.”); see also Woolhandler & Nelson, *supra* note 23, at 731 (observing, with respect to *qui tam* actions, that “there are obvious dangers in a system that permits prosecutorial discretion to reside in each of 250 million autonomous decision-makers who are self-appointed and out for their own financial gain”).

ecutive Branch accountable, it would be far more difficult to constrain the prosecutorial discretion of a private party, if she too could bring suit to see that the law was obeyed.

Virtually none of the checks on executive enforcement discretion apply to private parties. Private enforcement decisions are not subject to judicial review for the simple reason that there are no constitutional or other legal restrictions to enforce.¹⁵⁹ Nor are there political constraints. Private parties clearly need not abide by any enforcement guidelines issued by the Executive Branch. Nor are they subject to the congressional appropriations process.¹⁶⁰ In fact, the only constraint that would seem to apply to both the Executive Branch and private parties is a change in the law. Given the time-consuming nature of the legislative process, it seems doubtful that Congress would narrow a statute solely to curtail private prosecutorial discretion. But, even in the (unlikely) event that Congress took that step, it would have only a limited effect. A private party would still have the authority to sue any person for any violation of the (somewhat narrowed) provision. Indeed, the other checks on the Executive Branch's enforcement discretion are critical precisely because statutes themselves do not significantly limit that discretion.

Some may argue that private enforcement actions can themselves serve as a check on executive enforcement discretion.¹⁶¹ Private parties may bring suit against private entities that have gone unnoticed by (or, worse, have captured) the relevant administrative agency. Alternatively, private parties might bring suit directly against an agency, urging it to change its enforcement policies or to do a better job of enforcing certain provisions of law. Private actions can thereby serve not only to supplement, but to compensate for, lax executive enforcement efforts. This is undoubtedly a strong argument in favor of private enforcement of the law. But it is not an argument for private prosecutorial discretion. Indeed, this argument seems to presume

¹⁵⁹ See Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 104 (1990) ("Delegations to private attorneys general . . . are immune from most external supervision—judicial oversight does not extend to their motives or strategy.").

¹⁶⁰ See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 39–40 (1975) (observing that, although "the annual appropriations hearing affords the legislature an opportunity to assure that [an] agency has not strayed too far," "[t]here is no corresponding check in private enforcement").

¹⁶¹ See Sunstein, *supra* note 7, at 647 (arguing that Congress may authorize private enforcement actions because it has "concluded that the agency (or private defendant) is not entirely reliable on its own and that relevant people should have access to the courts in order to ensure that the . . . law is enforced").

that the Executive Branch will abuse its immense enforcement discretion—that it will favor certain groups, while disfavoring others, or enforce certain laws, while neglecting others—and that such abuse is a bad thing. Such an argument, which rests on concerns about the abuse of prosecutorial discretion, does not seem to justify giving every private individual and organization the same degree of prosecutorial discretion.

Some commentary suggests that Congress could pass legislation to curtail private prosecutorial discretion.¹⁶² But it may be difficult for Congress to require private parties to adhere to the same requirements as the Executive Branch, without running afoul of other constitutional constraints. For example, the First Amendment protects private parties' interest in selectively enforcing the law, bringing suits solely to advance their ideological "special interests."¹⁶³ Accordingly, Congress could not easily restrict private parties' authority to pick and choose among the laws that they enforce. The First Amendment may also limit Congress's power to regulate ideologically motivated lawsuits; it is doubtful that a statute reading "no suit may be brought against a plaintiff's ideological opponent" would pass constitutional muster. In any event, as one commentator observes, it seems unlikely that Congress would enact any such restrictions on private prosecutorial discretion.¹⁶⁴ Given the lack of alternative constraints, standing doctrine seems to serve a useful purpose by curtailing private prosecutorial discretion.

Notably, the problem to be addressed is not private enforcement of the law. Private parties who demonstrate an injury-in-fact often serve the public interest in seeing that the law is obeyed, and such lawsuits should be encouraged. But it does not seem that *every* private individual and organization in the country should have the discretion to sue any person for any legal violation. Standing doctrine (correctly, in my view) permits the former but prohibits the latter. It may

162 See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 587 (2000) ("Congress could extend the procedural requirements of the [Administrative Procedure Act]—or any other good-government statute—to private actors.").

163 See *NAACP v. Button*, 371 U.S. 415, 429–30 (1963) (concluding that a lawsuit can itself be "a form of political expression" protected by the First Amendment and "may well be the sole practicable avenue open to a minority to petition for redress of grievances"); see also *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (observing that the First Amendment's Free Speech Clause protects the "freedom to associate with others for the common advancement of political beliefs and ideas").

164 See Freeman, *supra* note 162, at 591 ("Congress and the states will likely balk at excessively proceduralizing private institutions. In short, private actors will escape most traditional constraints most of the time.").

be troubling that the Executive Branch exercises considerable prosecutorial discretion in fulfilling its constitutional duty to enforce federal law. But at least the Executive Branch is subject to a degree of judicial and congressional oversight. It seems unwise to transfer such discretionary enforcement authority to a private party that is “unencumbered by the legal and practical checks” that constrain “public enforcement agencies.”¹⁶⁵

D. A Constitutional Foundation for Standing Doctrine

To state the policy rationale for standing doctrine is also to suggest its constitutional justification. Much of our constitutional structure is designed “to preclude the exercise of arbitrary power.”¹⁶⁶ The term “arbitrary,” as used here, refers to the improper exercise of discretionary power, i.e., random, uneven, or discriminatory decision-making. The Constitution in various respects prohibits the government itself from acting arbitrarily: Several provisions of the Bill of Rights are enforced by prophylactic rules that constrain administrative discretion, and thereby seek to prevent arbitrary exercises of discretion.¹⁶⁷

¹⁶⁵ *Nike, Inc. v. Kasky*, 539 U.S. 654, 678, 679–80 (2003) (Breyer, J., dissenting from the denial of certiorari) (observing that, under California law, private parties may bring certain suits “even though they themselves have suffered no harm,” and expressing concern that such plaintiffs “potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks” on “public enforcement agencies”); *see also* *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) (observing that, in private suits under the Racketeer Influenced and Corrupt Organizations Act, “the restraining influence of [public] prosecutors is completely absent”).

¹⁶⁶ *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

¹⁶⁷ Arbitrary exercises of discretion are prohibited by the First Amendment’s Free Speech Clause, *see* *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757, 772 (1988) (invalidating a licensing scheme that gave the mayor “unfettered discretion” to deny permit applications for news racks); the Fourth Amendment’s protection against unreasonable searches and seizures, *see* *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (stating that the Fourth Amendment “impose[s] a standard of reasonableness upon the exercise of discretion by government officials . . . to safeguard the privacy and security of individuals against arbitrary invasions” (internal quotation marks and footnote omitted)); the Due Process Clause, *see* *City of Chicago v. Morales*, 527 U.S. 41, 56, 60–64 (1999) (invalidating a local ordinance that failed to “establish minimal guidelines to govern law enforcement” and thereby created a significant “potential for arbitrary enforcement”); and the Equal Protection Clause, *see* *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (stating that the Equal Protection Clause protects against “intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents”).

The Constitution also proscribes arbitrary action in another way. It prohibits the government from delegating certain discretionary functions to nongovernmental actors. Various constitutional rules—ranging from the Article I nondelegation doctrine¹⁶⁸ to the due process and establishment clause contexts¹⁶⁹—prohibit the government (at least in theory¹⁷⁰) from delegating broad discretionary power to private parties.

I assert that similar principles apply to the Take Care Clause of Article II, at least insofar as it requires the Executive Branch to exercise the broad prosecutorial discretion to “see that federal law is obeyed.”¹⁷¹ Such discretion creates a significant potential for abuse, even when it is exercised by a governmental entity that is subject to constitutional and other legal and political constraints. Such concerns would only be heightened in the context of private prosecutorial discretion, because private parties are subject to virtually none of those restrictions. Accordingly, the Constitution does not permit the delegation of such expansive discretionary enforcement authority to private parties.

This Article II nondelegation principle provides a constitutional explanation for much of Article III standing doctrine. Standing ensures that private parties cannot exercise the broad prosecutorial discretion that the Executive Branch exercises when it enforces federal law. Standing doctrine, in short, enforces the Article II nondelegation doctrine by curtailing private prosecutorial discretion.

168 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–22, 537 (1935) (invalidating the National Industrial Recovery Act, which permitted private trade and industrial associations to create codes of fair competition for much of the economy); see also *Yakus v. United States*, 321 U.S. 414, 424 (1944) (stating that the problem in *Schechter* was that “[t]he function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated”).

169 See *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 117, 125–27 (1982) (invalidating on Establishment Clause grounds a state law that permitted churches to veto applications for liquor licenses, and stating that “important, discretionary governmental powers” may not be “delegated to or shared with religious institutions”); *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936) (invalidating on due process grounds the Bituminous Coal Conservation Act, which delegated rulemaking authority to coal producers and miners).

170 The Article I nondelegation doctrine serves largely as a “theoretical” prohibition because, as many commentators have observed, courts have not found a judicially manageable standard for enforcing it. See, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 241–42 (2000) (noting that there is no “reliable metric” for determining when “a statute confers too much discretion”).

171 I do not argue that other Article II functions are nondelegable. Such a claim is beyond the scope of this Article.

1. *An Article II Nondelegation Doctrine*

The Take Care Clause imposes a duty upon the Executive Branch to see that federal law is obeyed. That provision thus also requires the Executive Branch to exercise the degree of prosecutorial discretion necessary to fulfill that law enforcement function. That is an immense responsibility. The authority to “see that federal law is obeyed” allows the Executive Branch to sue any person, anywhere in the country, for any legal violation. To have even a semblance of a coherent enforcement system, the Executive Branch must translate that broad authority into more concrete enforcement policies. Then each individual executive enforcement official must apply those policies in particular cases. Throughout this process, executive enforcement officials must make discretionary judgment calls as they determine which of the innumerable violations of federal law to pursue in federal court.

The Take Care Clause not only imposes this discretionary law enforcement responsibility on the Executive Branch. It also prohibits Congress and the Executive Branch from delegating that authority to private parties. Private parties may not exercise the broad prosecutorial discretion that inevitably accompanies the authority to see that federal law is obeyed.

This Article II nondelegation doctrine is rooted in a central premise of our constitutional order: the need for structural checks against the exercise of arbitrary power. As the commentary on executive enforcement discretion makes clear, the degree of prosecutorial discretion involved in seeing that federal law is obeyed creates a serious potential for abuse. Justice Jackson aptly observed that “[l]aw enforcement is not automatic. It isn’t blind.”¹⁷² Instead, it depends on the judgments of individual enforcement officials, who have tremendous leeway to choose the targets of their enforcement actions. And, although executive enforcement officials are supposed to exercise their discretion in an evenhanded and nondiscriminatory manner, the authority to sue any person for any violation of federal law allows them to act in a far less reputable fashion:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of

¹⁷² Jackson, *supra* note 59, at 5.

finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.¹⁷³

Justice Jackson was not alone in recognizing that the immense prosecutorial discretion exercised by the Executive Branch carries with it this potential for abuse. Other commentators have raised similar concerns about the arbitrary exercise of executive enforcement discretion.¹⁷⁴ Given these concerns, there may be, as Justice Jackson suggested, only one reason to allow *anyone* to exercise such broad discretionary enforcement authority: “[I]t seems necessary that such a power to prosecute be lodged somewhere.”¹⁷⁵ So the Take Care Clause lodges that power in a governmental entity that is subject to constitutional requirements, congressional oversight, and judicial review. Those legal and political checks, we hope, will prevent most abuses of executive enforcement discretion.

The concerns about executive enforcement discretion suggest why, as a constitutional matter, such prosecutorial discretion may not be delegated to private parties. If a private plaintiff had the discretion to sue any person, anywhere in the country, for any violation of law, she too would have the “most dangerous power of the prosecutor”—the power to target the defendants of her choice. And, as Gil-

173 *Id.*

174 See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1686–97 (2004) (arguing that courts should conduct more searching review of enforcement decisions to “prevent[] . . . arbitrary agency decisionmaking”); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998) (“The deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application.”); Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring and Informally Adjudicating*, 63 HARV. L. REV. 193, 218–25 (1949) (arguing that administrative agencies’ enforcement discretion creates the potential for “[a]dministrative arbitrariness”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1553 (1981) (noting “the potential for arbitrariness and discrimination that such discretion creates”); see also Thomas, *supra* note 58, at 152 (asserting that agencies should adopt enforcement guidelines to “eliminat[e] the randomness and arbitrariness of individual enforcement decisions by individual agency personnel”).

175 Jackson, *supra* note 59, at 3 (“These powers have been granted to our law-enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere.”).

lian Metzger has observed, “[p]rivate delegates’ exemption” from the legal and political checks on the Executive Branch “means that they can wield [such] government powers in ways that raise serious abuse of power concerns.”¹⁷⁶ Private parties not only could bring suit against any person for any legal violation, but also would have far greater freedom than the Executive Branch to target ideological opponents, persons of a particular ethnicity, or individuals that they found “personally obnoxious.” The Article II nondelegation doctrine prohibits private entities from exercising this “most dangerous power” and thereby serves as a prophylactic barrier against the arbitrary exercise of private prosecutorial discretion.

This Article II nondelegation principle appears to be a logical extension of other constitutional rules that seek to protect private liberty against arbitrary encroachment.¹⁷⁷ The void-for-vagueness doctrine, for example, is specifically designed to prevent the “arbitrary enforcement” of federal and state law.¹⁷⁸ Thus, in *Kolender v. Lawson*,¹⁷⁹ the Court invalidated a statute that permitted police officers to detain any individual who failed to provide what was, in a particular officer’s view, “credible and reliable” identification.¹⁸⁰ The Court emphasized that, by giving each officer “virtually complete discretion” to detain individuals,¹⁸¹ the provision “furnishe[d] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.”¹⁸²

Likewise, the “basic purpose” of the Fourth Amendment’s prohibition on unreasonable searches and seizures “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”¹⁸³ Thus, in *Delaware v. Prouse*,¹⁸⁴ the Court held that police officers may not randomly stop vehicles on the highway, but

176 Metzger, *supra* note 158, at 1145.

177 See *supra* notes 167–69.

178 *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (stating that the “principal element” of the void-for-vagueness doctrine is “the requirement that a legislature establish minimal guidelines” to prevent “arbitrary enforcement” by law enforcement officials (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974))); see *Gonzales v. Carhart*, 127 S. Ct. 1610, 1628 (2007).

179 461 U.S. 352.

180 See *id.* at 353–54, 361–62.

181 *Id.* at 358.

182 *Id.* at 360 (internal quotation marks omitted).

183 *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967).

184 440 U.S. 648 (1979).

must have at least a reasonable suspicion of a traffic violation.¹⁸⁵ The Court declared that the government's asserted safety concerns did not "justify subjecting every occupant of every vehicle on the road[] to a seizure . . . at the unbridled discretion of law enforcement officials."¹⁸⁶ And, in *Marshall v. Barlow's, Inc.*,¹⁸⁷ the Court invalidated the Occupational Health and Safety Act, insofar as it authorized warrantless inspections of employment facilities.¹⁸⁸ Such laws "devolve[] almost unbridled discretion upon executive and administrative officers . . . as to when to search and whom to search"¹⁸⁹ and impermissibly leave the liberty of private citizens "to the discretion of the officer in the field."¹⁹⁰

Similar concerns about arbitrary interference with private liberty have led the Court to invalidate delegations to private parties. For example, in *Fuentes v. Shevin*,¹⁹¹ the Court struck down two state laws that allowed creditors to "unilaterally invoke state power to replevy goods" from debtors, without giving the debtor a pre-deprivation hearing.¹⁹² The Court emphasized that the hearing would help protect a debtor's property rights "from arbitrary encroachment . . . a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party."¹⁹³ And, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*,¹⁹⁴ the Court struck down a local ordinance that gave private parties the authority to veto the construction of an old-age home.¹⁹⁵ The Court found this "delegation of power" "repugnant" because the ordinance established

185 *Id.* at 663 ("[W]e hold that except in those situations in which there is at least articulable and reasonable suspicion" of a particular traffic violation, "stopping an automobile and detaining the driver . . . [is] unreasonable under the Fourth Amendment.").

186 *Id.* at 661.

187 436 U.S. 307 (1978).

188 *Id.* at 325 ("We hold that . . . the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent . . .").

189 *Id.* at 323.

190 See *v. City of Seattle*, 387 U.S. 541, 550 (1967); *Camara v. Mun. Court*, 387 U.S. 523, 532 (1967); see *id.* at 534, 540 (applying the warrant requirement to local health inspections).

191 407 U.S. 67 (1972).

192 *Id.* at 93, 96.

193 *Id.* at 80–81; *id.* at 93 (stating that the statutes impermissibly "abdicate[d] effective state control over state power").

194 278 U.S. 116 (1928).

195 *Id.* at 118, 122–23 (finding that "the attempted delegation of power cannot be sustained, and the restriction thereby sought . . . is arbitrary and repugnant to the due process clause").

no “standard or rule” to guide the parties’ discretion, and thus left them “free to withhold consent for selfish reasons or arbitrarily.”¹⁹⁶

The Article II nondelegation doctrine rests on similar premises. Under this theory, Congress may not confer on private parties the unbridled discretion as to when and whom to sue. The Article II nondelegation principle thus helps ensure that private liberty is not “subject to the discretion of [every would-be plaintiff] in the [nation].”¹⁹⁷

This Article II nondelegation theory also finds support in separation of powers doctrine. In *Buckley v. Valeo*,¹⁹⁸ the Court invalidated the Federal Election Campaign Act of 1971, in part because it delegated too much discretionary enforcement authority outside the Executive Branch. The statute in *Buckley* authorized the Federal Election Commission to bring enforcement actions against “any acts or practices which constitute or will constitute a violation of this Act.”¹⁹⁹ The statute, in other words, permitted the FEC to see that federal election law was obeyed. As we have seen, the Supreme Court has repeatedly upheld such conferrals of standing on the Executive Branch. But the FEC was not, as originally constituted, under the control of the Executive Branch. Four of the six voting members of the Commission were appointed by Congress; only two were selected by the President.²⁰⁰ The Court held that, absent additional executive oversight, the FEC could not exercise its “wide ranging”²⁰¹ “discretionary power to seek judicial relief.”²⁰²

196 *Id.* at 122.

197 *Camara v. Mun. Court*, 387 U.S. 523, 532 (1967).

198 424 U.S. 1 (1976).

199 *Id.* at 111 (quoting 2 U.S.C. § 437g(a)(5) (1970)).

200 *See id.* at 113 (describing the appointment process for the Commission).

201 *Id.* at 111.

202 *Id.* at 113, 137–41. The Court found that the Commission members were principal “Officers of the United States,” who must be appointed by the President (with the advice and consent of the Senate) under the Appointments Clause. *See id.* at 132; *see also* U.S. CONST. art. II, § 2, cl. 2. My reliance on *Buckley* may seem to echo themes commonly associated with unitary executive theory. Indeed, as Harold Krent has suggested, much of unitary executive theory can be understood in Article II nondelegation terms. *See, e.g.*, Krent, *supra* note 159, at 90 (“Congress’ many decisions to create private attorneys general represent substantial delegations of administrative authority.”). But unitary executive theory may not serve as the most useful analytical tool in this context. Unitarians assert that any person who exercises a discretionary executive function must be subject to the control and supervision of the President. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (“Unitary executive theorists . . . conclude that the President alone possesses *all* of the executive power and that he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power.” (footnote omitted)). This

But what are the boundaries of this Article II nondelegation doctrine? Surely no one (not even those most committed to unitary executive theory)²⁰³ would seriously argue that private parties can *never* exercise *any* prosecutorial discretion. Such a rule would prohibit all private enforcement of the law. Every private plaintiff, even one who has suffered a concrete injury-in-fact, has some discretionary enforcement authority. The injured party has, at a minimum, the discretion to decide whether or not to bring suit. A private organization may exercise even more prosecutorial discretion: it can choose to bring suit against any person that has injured one of its members, as long as the suit is germane to the organization's purposes.

I do not claim that the Article II nondelegation doctrine prohibits all such exercises of private prosecutorial discretion. Instead, it prohibits the delegation of the Executive Branch's duty to see that federal law or an area of federal law is obeyed. That was the line drawn by *Buckley*, which invalidated a delegation of "discretionary power" to see that federal election law was obeyed. And that prohibition goes a long way toward preventing arbitrary exercises of private prosecutorial discretion, while at the same time allowing for private enforcement of the law. As the commentary on executive enforcement discretion suggests, it is that degree of "discretionary power" that seems most susceptible to abuse. It may be true, as Justice Jackson suggested, that "such a power to prosecute [must] be lodged somewhere."²⁰⁴ But the Article II nondelegation doctrine instructs that such a power to prosecute, and the accompanying prosecutorial discretion, may not be lodged everywhere.

2. *Standing Enforces the Article II Nondelegation Doctrine*

Once we identify the Article II principle at stake, the enforcement of that principle is fairly straightforward. Standing doctrine helps ensure that private parties do not exercise the "discretionary power"

theory could be interpreted to mean that Article II prohibits *any* delegation of discretionary enforcement power, and accordingly that *any* private enforcement action is invalid. (Every private enforcement action, after all, involves some discretion. The plaintiff has, at a minimum, the discretion to decide whether to bring suit.) That is clearly not the law, and I doubt many Unitarians would advocate such a position. But unitary executive theory does not seem to offer any principled means of distinguishing between enforcement actions that require presidential supervision and those that do not.

203 See *supra* note 202.

204 Jackson, *supra* note 59, at 3.

that inevitably accompanies the authority to see that federal law or an area of federal law is obeyed.

First, standing doctrine prohibits private plaintiffs from asserting abstract grievances that would give them a virtually unlimited amount of prosecutorial discretion. Such grievances include the “injury to the interest in seeing that the law is obeyed” as well as other abstract concerns, such as a “special interest” in a particular area of law or a “conscientious objection” to particular conduct. As we have seen, if a private plaintiff had standing to see that the law was obeyed, she could bring suit against any person, anywhere in the country, for any violation. In a similar vein, if she sought to enforce a particular area of law that aroused her “special interests” or “conscientious objections,” she could sue any person, anywhere in the country, for any violation of that area of law. Standing doctrine prevents private parties from exercising such discretionary power to seek judicial relief.

Moreover, Article III standing doctrine allows a court to identify private enforcement actions that do *not* implicate the Executive Branch’s nondelegable Article II responsibilities. A plaintiff who can demonstrate an Article III injury-in-fact does not have wide-ranging discretionary power to bring suit. She may sue only the person that caused her injury, and may seek redress only for that harm. The Court may therefore allow such actions to go forward, without Article II nondelegation concerns.²⁰⁵

²⁰⁵ This Article II nondelegation theory of standing may help explain the decisions recognizing standing in suits under the Freedom of Information Act (“FOIA”). FOIA permits any person to request any type of information from a federal agency (including records about a specific private individual or entity), without demonstrating any distinct interest in or particular need for the material. See 5 U.S.C. § 552 (2006); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449 (1989); *Burka v. U.S. Dep’t of Health & Human Servs.*, 142 F.3d 1286, 1290–91 (D.C. Cir. 1998) (noting that a FOIA request can be made by “any person” and that the requesting person is “not required” to demonstrate “any particular need for the information”); *McDonnell v. United States*, 4 F.3d 1227, 1237–38 (3d Cir. 1993) (“A person seeking information under the FOIA . . . need not have a personal stake in the information sought.”). If the agency declines to provide the requested material (perhaps because it concludes that the material is exempt from disclosure, see 5 U.S.C. § 552(b) (setting forth the statutory exemptions)), the individual may file suit, alleging an “informational injury.” See *Pub. Citizen*, 491 U.S. at 449 (stating that refusing to permit an individual to review requested records “constitutes a sufficiently distinct injury to provide standing to sue”); *Burka*, 142 F.3d at 1290–91 (finding standing to bring suit where a FOIA request was denied).

Scholars have suggested that FOIA is hard to reconcile with the Court’s Article III standing jurisprudence. See Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1189 (1993) (arguing that the Court’s reasoning in *Lujan* “could easily support a holding that FOIA’s ‘any person’ standard is unconstitutional”); Sunstein, *supra* note 7, at 633 (urging that certain

This Article II nondelegation theory suggests normative foundations for Article III standing doctrine that have been largely overlooked by commentators. Many scholars and jurists have assumed that standing doctrine serves principally to prevent private interference with executive enforcement efforts.²⁰⁶ But the Article II nondelegation rationale for standing is built on far different premises. Under this theory, standing doctrine does not safeguard the Executive Branch, but instead helps to shield individual liberty from arbitrary exercises of private prosecutorial discretion.

3. *The Scope of the Constitutional Protection*

The Article II nondelegation doctrine not only offers a different normative foundation for standing doctrine, but also suggests a new scope for the constitutional protection. Standing doctrine applies (as a constitutional mandate) only in cases that implicate the liberty interests of particular private individuals.

This constitutional theory thus clearly encompasses all suits against private parties, when a plaintiff might target the defendant for nefarious reasons, such as ideological or racial animosity. But suits against the Executive Branch can also implicate the liberty interests of particular private parties. For example, in *Federal Election Commission v. Akins*, the plaintiffs urged the government to enforce certain reporting requirements against the American Israel Public Affairs Committee, because of the plaintiffs' ideological opposition to that private group.²⁰⁷ And, in *Sierra Club v. Morton* and *Valley Forge*, the plaintiffs sought to prevent the Executive Branch from conferring a

standing decisions appear to be on a "collision course with a number of statutes, including FOIA"); Winter, *supra* note 23, at 1496 (noting similarly that FOIA appears to be in tension with aspects of the Court's standing jurisprudence). But FOIA does not constitute an impermissible delegation of prosecutorial discretion. The statute does not give "any person" the right to sue any person for any statutory violation. Instead, the statute allows "any person" to seek a concrete benefit—information—from a federal agency. If the agency provides the benefit (by producing the requested material), the requester suffers no harm and cannot bring suit. An individual suffers an injury and can file suit—and thereby become a prosecutor—only if the agency declines to produce all or part of the requested information. But, at that point, her prosecutorial discretion is limited. She may sue only the agency that declined to produce the requested material, and may seek only the information that the agency declined to disclose. Accordingly, FOIA does not delegate to "any person" the degree of prosecutorial discretion exercised by the Executive Branch. FOIA provides breadth of discretion with respect to the underlying right to seek information, but not with respect to the right to sue per se.

²⁰⁶ See *supra* notes 6, 15–22, and accompanying text.

²⁰⁷ See 524 U.S. 11, 15–16, 21–25 (1998). For further discussion of *Akins*, see *infra* note 209.

benefit on a specific private entity (in *Morton*, the corporation seeking development permits, and in *Valley Forge*, the religious institution).²⁰⁸

The Article II nondelegation principle applies in all cases that implicate the liberty interests of particular private individuals and entities. The theory thus encompasses all suits against private parties *and* all suits against the government in which a private person is the real party-in-interest. Accordingly, under the Article II nondelegation doctrine, a plaintiff must demonstrate a concrete injury when (1) she demands (as in *Akins*) that the Executive Branch impose a burden on a specific private third party,²⁰⁹ or (2) she attempts (as in *Morton* and *Valley Forge*) to prevent the Executive Branch from conferring a benefit on another private party.²¹⁰

But this Article II theory does not require a showing of injury-in-fact in other suits against the federal government. Many such actions do not implicate the liberty interests of particular private individuals. That is true, for example, when a plaintiff challenges the constitutionality of a federal statute or the validity of a federal regulation. Courts may have strong prudential and institutional reasons for dismissing such suits on standing grounds. As we have seen, private parties—in contrast to the Executive Branch—need not enforce the law

208 See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 469, 482 (1982) (holding that the plaintiffs lacked standing, as federal taxpayers, to challenge the conveyance of property to a religious organization); *Sierra Club v. Morton*, 405 U.S. 727, 729–30, 738–41 (1972) (concluding that the plaintiff lacked standing, based solely on its “special interest” in environmental protection, to prevent the Department of Interior from issuing permits for the corporation’s proposed development plan).

209 The *Akins* Court found that the plaintiffs had standing because they alleged a concrete “informational injury.” See 524 U.S. at 12, 21 (observing that, under its cases, “a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute”). The Court’s analysis resembled its approach in Freedom of Information Act cases. See *supra* note 205.

210 Notably, public officials also have private liberty interests. The Article II nondelegation principle thus provides a constitutional foundation for the denials of standing in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 210–11, 216–27 (1974) (alleging that the Incompatibility Clause prohibits members of Congress from serving in the Armed Forces Reserve, and urging the Reserve to discharge all legislators and to seek back pay from any legislator who served), and *Ex parte Levitt*, 302 U.S. 633, 636 (1937) (claiming that Justice Hugo Black’s appointment violated the Incompatibility Clause, and urging the Court to remove him). This Article II theory may also provide an alternative rationale for the seemingly inconsistent holdings in *Flast v. Cohen*, 392 U.S. 83, 85–88 (1968) (finding standing in a suit challenging, on establishment clause grounds, the statutory criteria by which the government disbursed funds to elementary and secondary schools), and *Valley Forge*, 454 U.S. at 469, 482–87 (denying standing in a suit challenging, on establishment clause grounds, the transfer of property to a religious institution). In contrast to *Valley Forge*, *Flast* did not implicate the liberty interests of any specific private parties.

in a uniform or consistent manner.²¹¹ They have no obligation to faithfully execute every provision of law, but may instead concentrate only on those provisions that arouse their “special interests.” A private organization could thus bring multiple lawsuits against an agency, forcing it to focus on that group’s “special interests,” and distracting it from other statutory responsibilities. Courts may quite reasonably conclude that Congress is better equipped to decide when the benefits of private enforcement outweigh such costs. Moreover, courts have traditionally been in the business of settling disputes brought by plaintiffs with a direct and concrete interest in a case. Accordingly, courts could decide, as a prudential matter, to adjudicate challenges to statutes and regulations only when they are brought by injured parties.

Such broad-based suits against the government do not, however, raise the liberty or the arbitrariness concerns at the heart of the Article II nondelegation principle. Accordingly, this theory does not prohibit Congress from conferring standing on “any person” to bring such suits against the Executive Branch.²¹² Indeed, under this constitutional approach, Congress may authorize any private suit against the federal government, as long as the plaintiff does not ask the government to impose burdens on, or deny benefits to, specific private parties.

But this conclusion raises some questions about the Court’s refusal to recognize the congressional conferral of standing in *Lujan v. Defenders of Wildlife*. The plaintiffs in *Lujan* brought suit against the Department of Interior, claiming that one of its regulations was inconsistent with the Endangered Species Act.²¹³ Such a broad attack on federal law does not seem to implicate the constitutional analysis here.

The citizen-suit provision in *Lujan* was not, however, confined to such challenges to federal government action. Instead, the provision

²¹¹ See *supra* notes 141–49 and accompanying text.

²¹² Thus, under this theory, Congress could have conferred standing in *United States v. Richardson*, 418 U.S. 166, 176–77, 179–80 (1974) (denying standing in a suit alleging that the Central Intelligence Agency Act of 1949 violated the Constitution’s Statement and Account Clause), and *Fairchild v. Hughes*, 258 U.S. 126, 127 (1922) (denying standing in a suit challenging the validity of the Nineteenth Amendment). And the Court probably should have found standing in *Raines v. Byrd*, 521 U.S. 811, 815–16, 829–30 (1997) (holding that members of Congress lacked standing to challenge the constitutionality of the Line-Item Veto Act, even though the statute expressly authorized the suit). In each case, however, the Court may have had other reasons to dismiss the suit as nonjusticiable.

²¹³ 504 U.S. at 557–59.

authorized “any person” to bring suit against “any person”—public or private—alleging any violation of the Endangered Species Act or its implementing regulations.²¹⁴ The provision thus delegated to private parties the Executive Branch’s duty to see that an area of federal law is obeyed. The Article II nondelegation doctrine prohibits such delegations—not because of the way a particular plaintiff exercises such discretion in a particular case, but because granting such authority to every private party in the country raises a serious potential for arbitrary exercises of private prosecutorial discretion. It is thus the very breadth of the grant, and not its application, that is the nub of the constitutional infirmity. Accordingly, this Article II theory would support a decision striking down the citizen-suit provision on its face as an unconstitutional delegation of prosecutorial discretion.²¹⁵

The Article II nondelegation doctrine leaves Congress with some leeway to authorize private suits against the federal government. Congress may permit “any person” to bring enforcement actions that

214 16 U.S.C. § 1540(g) (1988) (stating that “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of” any provision of the Endangered Species Act or its implementing regulations). Other citizen-suit provisions are similar. See, e.g., Clean Air Act, 42 U.S.C. § 7604(a)(1) (2000) (providing that “any person” may sue “any person (including . . . the United States . . .) who is alleged to have violated . . . an emission standard or limitation”); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659(a) (2000) (stating that “any person” may sue “any person (including the United States . . .)” alleging a violation of “any standard, regulation, condition, requirement, or order” issued pursuant to the statute).

215 The Court in *Lujan* never stated whether it held the citizen-suit provision unconstitutional on its face or as applied. Several commentators have assumed that the Court invalidated the provision as applied. See Nichol, *supra* note 6, at 317 (“[T]he Court [in *Lujan*] held that the Endangered Species Act’s broad citizen standing provision, as applied, violated the Constitution.”); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1751–52 (1999) (same); Sunstein, *supra* note 5, at 200 (same). It is unclear why they make this assumption. They may be suggesting that the Court sought to sever the unconstitutional applications of the citizen-suit provision. But, on that theory, to ensure that the provision complied with the constitutional analysis here, the Court effectively would have had to rewrite it—to exclude not only all suits against private parties but also all suits demanding that the Executive Branch impose burdens on, or deny benefits to, specific private parties. There are reasons to doubt that Congress would have enacted such a narrow “citizen-suit” provision. See *supra* note 214 (noting that other citizen-suit provisions are as broad as the provision in *Lujan*). Accordingly, severance may not have been a viable option. See *Reno v. ACLU*, 521 U.S. 844, 884–85 & nn.49–50 (1997) (noting that the severability doctrine does not allow the Court to rewrite a statute to let it stand); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686–87 (1987) (observing that severability analysis depends on congressional intent). For these reasons, regardless of what the Court intended to do, I believe it had reason to invalidate the citizen-suit provision on its face as an unconstitutional delegation of prosecutorial discretion.

do not implicate the liberty interests of particular private parties, such as suits challenging the constitutionality of federal statutes or the validity of federal regulations. But Congress may not confer standing via citizen-suit provisions that transfer to private parties the Executive Branch's duty to "see that federal law is obeyed."²¹⁶

4. *Standing as a Requirement of Articles II and III*

Some may wonder whether resort to Article III is necessary. If standing protects an Article II nondelegation principle, then why not analyze the issue solely in terms of Article II?²¹⁷ That is certainly plausible. I have myself largely characterized the constitutional issue that way.

But, even if standing may be conceived in Article II nondelegation terms, federal courts would not necessarily be wrong to characterize it as a "bedrock" requirement of Article III. Article III does, after all, "defin[e] the role assigned to the [federal] judiciary in a tripartite al-

²¹⁶ See *supra* note 214 (listing several citizen-suit provisions). The Article II nondelegation doctrine may also leave room for congressional conferrals of standing in suits that implicate private liberty (i.e., suits against private parties and suits demanding that the Executive Branch impose burdens on, or deny benefits to, specific private parties). In that context, to comply with the Article II nondelegation principle, Congress might be able to enact statutes that curtail private prosecutorial discretion. Thus, perhaps Congress could define new statutory injuries in a way that, like current standing doctrine, limits both the pool of potential prosecutors and constrains each potential plaintiff's prosecutorial discretion. See *supra* notes 124–28 and accompanying text (explaining how standing doctrine places such constraints on private prosecutorial discretion); *supra* note 205 (noting that the Freedom of Information Act does not delegate substantial prosecutorial discretion). Such an approach resonates with Justice Kennedy's view that Congress may confer standing on private parties, but "must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). But, for purposes of this Article, I bracket questions about the precise boundaries of Congress's authority to confer standing by creating new statutory injuries. I note that, because the concept of a cognizable injury has itself changed over time as our society has evolved, see *supra* notes 120–23; *infra* note 237 and accompanying text, it may be difficult for courts to develop *ex ante* a workable standard for assessing the limits of Congress's authority. Cf. *Whitman v. Am. Trucking Ass'n.*, 531 U.S. 457, 474–75 (2001) (observing that, in the Article I nondelegation context, the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law" (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

²¹⁷ See Hartnett, *supra* note 11, at 2256 (asserting that, given the differences between Executive Branch and private party standing, the question of "Who can constitutionally be empowered to represent . . . public interests in court?" must be "a question of the proper interpretation, not of Article III or Article I, but of Article II"); *supra* notes 15–22 and accompanying text.

location of power”²¹⁸ to ensure that “federal courts will not intrude into areas committed to the other branches of government.”²¹⁹ Federal courts would intrude into an area committed to the Executive Branch, if they adjudicated private actions brought to see that the law was obeyed. Accordingly, the issue may not be whether standing doctrine derives from Article II or Article III. It could be said to derive from both provisions, interpreted in context.²²⁰

The addition of Article II does, however, have significant implications in one context: state court actions.²²¹ While Article III requirements apply only in federal court,²²² the Article II nondelegation doctrine would apply in both federal and state court. Accordingly, this theory would require state courts to identify some way of curtailing private prosecutorial discretion, perhaps by applying standing doctrine. Although full consideration of this issue is beyond the scope of this Article, I wanted to note this implication of adding Article II to the equation.²²³

5. *Is Article III Standing Doctrine the Only Answer?*

Some may doubt that Article III standing doctrine is the only way to enforce the Article II nondelegation principle. That may be true, but I am not aware of any approach that would work as effectively.

Some commentary suggests that Congress could cure any delegation problems by giving the Executive Branch the tools to supervise private enforcement actions brought to “see that federal law is ob-

218 *Spencer v. Kemna*, 523 U.S. 1, 11 (1998) (internal quotation marks omitted).

219 *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 755 (1976) (internal quotation marks omitted).

220 Cf. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1278 (1995) (urging that invoking a single provision “without regard to the structural relationships among various constitutional provisions is an inadequate mode of constitutional interpretation”).

221 Many thanks to Henry Monaghan for pointing out this implication of the Article II theory articulated here.

222 *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (observing that “the constraints of Article III do not apply to state courts . . . even when they address issues of federal law”).

223 The addition of Article II to the analysis could solve a separate problem. The Supreme Court generally refuses to hear appeals from state court decisions when the underlying state court plaintiff lacked Article III standing. If state courts applied standing doctrine to enforce the Article II nondelegation principle, the Court could review more state court interpretations of federal law. *See* William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 265 (1990) (urging that, to ensure Supreme Court review of state court decisions, “[s]tate courts should be required to adhere to article III ‘case or controversy’ requirements whenever they adjudicate questions of federal law”).

eyed.”²²⁴ The argument seems to rely on *Morrison v. Olson*.²²⁵ In *Morrison*, the Court upheld a statute authorizing the creation of an Independent Counsel to “investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws.”²²⁶ The statute gave the Independent Counsel considerable discretion to “initiat[e] and conduct[] prosecutions” in federal court.²²⁷ But the Court upheld this delegation of prosecutorial discretion because the statute (in the Court’s view) gave the Executive Branch sufficient statutory mechanisms to “supervis[e] or control[]”²²⁸ the initiation,²²⁹ scope,²³⁰ and duration²³¹ of an Independent Counsel’s activities.

There are, however, reasons to doubt that such a statutory scheme would effectively curtail private prosecutorial discretion. We should keep in mind that, in *Morrison*, the Court upheld a statute that would allow a single public prosecutor (whose employment would com-

224 See, e.g., Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 355, 361–67 (2001) (asserting that Congress could, consistent with Article II, designate private citizens as the “agents” of the federal government and allow them to bring suit to enforce federal law, as long as Congress gave the Executive Branch the tools to oversee the private agents); Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383, 397–402 (2001) (arguing that federal environmental laws authorizing citizen suits do not violate Article II, because they give the Executive Branch various means of overseeing such suits); see also Krent, *supra* note 159, at 95 (“Congressional delegations of executive-type authority outside the federal government might be accommodated with article II if the Executive retains at least some practical control over the delegated authority.”).

225 487 U.S. 654 (1988).

226 *Id.* at 660.

227 *Id.* at 662 (quoting 28 U.S.C. § 594(a)(9) (1982)).

228 *Id.* at 696.

229 The statute required the Attorney General to request that a special court appoint an Independent Counsel if he concluded that “there [were] ‘reasonable grounds’” for such an independent inquiry. *Id.* at 661 (quoting 28 U.S.C. § 592(c)(1)(A)). The Court reasoned that the Attorney General could therefore also decline to recommend the appointment of an Independent Counsel. See *id.* at 696 (“[T]he Attorney General’s decision not to request appointment if he finds ‘no reasonable grounds to believe that further investigation is warranted’ is committed to his unreviewable discretion.”).

230 The Court noted that, in requesting the appointment of an independent counsel, the Attorney General was required to provide the special court with “sufficient information to . . . defin[e] [the] independent counsel’s prosecutorial jurisdiction.” *Id.* at 661 (quoting 28 U.S.C. § 592(d)). This obligation, the Court concluded, gave the Attorney General some authority over the scope of the Independent Counsel’s jurisdiction. See *id.* at 696 (“The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel.”).

231 The Court emphasized that the Attorney General could remove an independent counsel for “good cause.” *Id.* at 686.

mence only at the request of the Executive Branch)²³² to exercise prosecutorial discretion. It seems at least plausible that the Executive Branch could have both the means and the incentive to keep track of the actions of this high-profile official charged with “prosecut[ing] certain high-ranking Government officials for violations of federal criminal laws.”²³³

But the same cannot be said of private enforcement actions. That is in part because, in attempting to carry out this oversight function, the Executive Branch would be subject to the same budgetary and time constraints that prevent it from pursuing every violation of federal law. The Executive Branch simply lacks the resources to supervise every private lawsuit brought to see that an area of federal law is obeyed.

Furthermore, even if it were feasible, the Executive Branch might still be disinclined to use such statutory tools to control private prosecutorial discretion. As Daryl Levinson has argued, the pervasive assumption that each branch of government aims at all times to maintain and increase its stranglehold on power is largely overstated.²³⁴ In government today, there are many instances of governmental abdication.²³⁵ Although Professor Levinson does not apply this theory to enforcement actions, his thesis fits quite aptly in this context. The Executive Branch may often be tempted to allow private enforcement actions to go forward absent executive supervision (and thereby avoid any political fallout from those enforcement efforts).²³⁶

Standing doctrine does not depend on the Executive Branch’s willingness or capacity to oversee private suits. It therefore appears to be a more reliable means of enforcing the Article II nondelegation principle than a statute akin to that in *Morrison*.

Standing doctrine may also be preferable to alternative mechanisms for enforcing the Article II nondelegation doctrine, because it

²³² See *supra* note 229.

²³³ *Morrison*, 487 U.S. at 660.

²³⁴ See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917, 920 (2005) (observing that an “enduring and pervasive assumption in constitutional law and theory is that much government behavior is driven by self-aggrandizing motives toward *empire-building*,” but asserting that it is today doubtful that “government pervasively seeks to build empire of either the imperialistic or avaricious variety”).

²³⁵ See *id.* at 953–55 (discussing instances in which Congress leaves domestic and foreign policy decisionmaking up to the Executive Branch).

²³⁶ See Simons, *supra* note 74, at 931 n.169 (“[J]ust as Congress delegates broad enforcement authority to prosecutors as a strategy to avoid political responsibility for the hard choices prosecutors must make about whom to prosecute, prosecutors have a similar incentive to resist that authority and the political responsibility it brings.”).

is not a static legal formula. As our society and laws have changed, the Supreme Court has expanded the injury-in-fact concept to cover new injuries, including vote dilution and the inability to view a species of wildlife.²³⁷ Under the Article II theory articulated here, the Court can continue to recognize novel injuries-in-fact, as long as it defines those injuries in a way that curtails private prosecutorial discretion.²³⁸

In presenting this defense of standing doctrine, I do not mean to suggest that the outcomes of the Supreme Court's standing decisions are entirely defensible. It is often difficult to comprehend why the Court recognizes certain injuries and not others, or adopts a narrow view of causation and redressability in some cases and not others. I assert here only that standing doctrine serves a useful purpose in ensuring that private parties do not exercise a law enforcement function that the Constitution has assigned exclusively to the Executive Branch.

V. CONCLUSION

Private enforcement actions clearly perform a valuable law enforcement function. The Supreme Court can facilitate this private enforcement role by recognizing new injuries-in-fact, and thereby expanding the realm of potential private prosecutors. But there appears to be a policy and a constitutional rationale for preventing private parties from asserting abstract grievances, such as the "injury to the interest in seeing that the law is obeyed."²³⁹ If a private plaintiff had such prosecutorial authority, she could exercise the accompanying prosecutorial discretion to pursue the violators of her choice, "unencumbered by the legal and practical checks" that constrain "public enforcement agencies."²⁴⁰

That may be why the Constitution imposes the duty to "take care that the laws [are] faithfully executed" upon the Executive Branch.²⁴¹ As Justice Jackson observed, "it seems necessary that [the] power to

237 See *supra* notes 120–23 and accompanying text.

238 Under this formulation, the injury-in-fact requirement need not be confined to those injuries that were recognized at common law. Cf. Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 55–57 (1993) (suggesting that such a limitation would harm regulatory beneficiaries who often do not suffer traditional common law injuries).

239 *FEC v. Akins*, 524 U.S. 11, 24 (1998).

240 *Nike, Inc. v. Kasky*, 539 U.S. 654, 680 (2003) (Breyer, J., dissenting from the denial of certiorari).

241 U.S. CONST. art. II, § 3.

prosecute” violations of federal law, and the accompanying prosecutorial discretion, “be lodged somewhere.”²⁴² Such authority should be “lodged” solely in a governmental entity that is expected—and constitutionally required—to be “the guardian of [the] public interest.”²⁴³

242 Jackson, *supra* note 59, at 3.

243 United States v. Raines, 362 U.S. 17, 27 (1960).