

REMEDIES SYMPOSIUM
ARTICLE III, REMEDIES, AND
REPRESENTATION

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As articulated by the United States Supreme Court, the principal purpose of Article III standing is to force decisions affecting large numbers of people into the democratic process where all affected parties are represented.¹ The logical implication of this proposition for the proper scope of injunctive relief is straightforward. That relief must not exceed what is reasonably necessary to remedy the particularized injury that sets the plaintiff or plaintiffs apart from the general population. Otherwise, any party with a cognizable injury will be permitted to invoke the judicial power to issue broad injunctions with potentially enormous significance for unrepresented third parties. Put simply, if Article III standing is all about representation, then so is the proper scope of injunctive relief.

The Supreme Court has repeatedly reaffirmed this logic.² Yet courts and commentators, including the Court itself, routinely overlook or simply ignore it. The most prominent recent examples are the universal injunctions issued by federal district courts against President Obama's immigration orders and President Trump's travel ban.³ These injunctions clearly went beyond what was necessary to redress the particularized injuries of the individual plaintiffs. Yet no lower court involved in these cases seems to have seriously considered the implications of Article III for the proper scope of injunctive relief.⁴ Even the Supreme Court, which narrowed the injunction against President Trump's travel ban to persons

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1. See Part I *infra*.
2. See Part II *infra*.
3. See *infra* notes 36 & 38.
4. See *infra* notes 35-39 and accompanying text.

“similarly situated” to the plaintiffs, failed to mention Article III as a justification for doing so. And for good reason: A majority of the justices implicitly approved—or at least failed to disapprove—injunctive relief well beyond what was necessary to remedy the particularized injuries of the only plaintiffs actually before the Court.⁵ As the three dissenters pointed out, persons similarly situated to the plaintiffs are, by definition, not the plaintiffs.⁶

If the representation-centered theory of Article III is correct, the disregard for its implications at the remedial stage is alarming and corrosive of democratic self-government. But there is another possibility. Disregard for the representation-centered theory at the remedial stage might reflect well-justified misgivings, ambivalence, or uneasiness about that theory, even by the Court itself. In this brief symposium essay, we raise and offer some preliminary reflections on this possibility, with an eye to exploring it more fully in future work.

Our argument unfolds in three parts. Part I offers a sympathetic reconstruction of the representation-centered theory of Article III standing. Part II traces the logical implications of this theory for the scope of injunctive relief and suggests how inattention to Article III limits at the remedy stage undermines a good deal of standing doctrine’s chief goal. Part III offers a brief, critical evaluation of the representation-based theory. Our main goal is to raise questions: Is the Court’s theory of representation too simplistic? Is Article III standing doctrine well-crafted to serve the Court’s representational goals? Could it ever be so crafted? Is remedial flexibility a useful antidote to a body of standing doctrine that has worked itself too pure? These are all exceedingly difficult questions, but seldom have they seemed more urgent than they do today. Nothing less than the power, and the limits, of an independent judiciary are at stake.

5. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (“We leave the injunctions entered by the lower courts in place with respect to respondents *and those similarly situated*, as specified in this opinion.”) (emphasis added).

6. *Id.* at 2090 (Thomas, J., dissenting) (“But the Court takes the additional step of keeping the injunctions in place with regard to an unidentified, unnamed group of foreign nationals abroad.”)

I. STANDING AND THE REPRESENTATION-CENTERED THEORY OF ARTICLE III

The nuances of Article III standing doctrine are notoriously convoluted.⁷ But it rests on an ostensibly “basic” foundation—the idea of separation of powers.⁸ As currently elaborated, the requirements for Article III standing flow from twin constitutionally compelled premises, that “generalized grievances [are] more appropriately addressed in the representative branches,”⁹ and that the Constitution limits the judicial power to “actual ‘cases’ and ‘controversies.’”¹⁰

Whether and how standing requirements serve this separation of powers function yield complex responses, none of which has gained the Court’s unequivocal endorsement.¹¹ Antonin Scalia’s representation-centered theory, however, has proven particularly influential.¹² His theory rests on a reading of Article III that limits the judicial power to situations involving minority interests, when political processes cannot be trusted to offer appropriate redress for injuries. The government may anger someone deeply when it acts unlawfully. Unless this person suffers some concrete, particularized injury, however, the harm he or she endures a “mere breach of the social contract,” is a “*majoritarian* one.”¹³ In theory, everyone whom the government represents suffers the same harm and might be persuaded to join the first person in her anger. Politics offers the appropriate response, for “an alleged governmental default of such general impact” surely “would . . . receive fair consideration in the normal political process.”¹⁴ An abstract, “generalized grievance” arising from

7. *E.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1981); Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases – A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RGTS. J. 105, 126 (2014).

8. *Allen v. Wright*, 468 U.S. 737, 752 (1984); *see also* *Raines v. Byrd*, 521 U.S. 811, 820 (1997).

9. *Allen*, 468 U.S. at 751.

10. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993).

11. *See* F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 685–701 (2017) (describing four accounts of standing’s separation-of-powers basis and function).

12. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 95–103 (2007) (comparing Justice Scalia’s theory favorably to more blunt assertions of standing’s separation-of-powers moorings); *id.* at 98 (identifying Scalia’s article with the Court’s decision in *Lujan*).

13. Scalia, *supra* note 12 at 894–95.

14. *Id.* at 896.

governmental action is thus an “undifferentiated public interest” whose vindication belongs to Congress and the Chief Executive.¹⁵

A person with a concrete, distinctive injury suffers uniquely from the government’s action. As such, she has a “minority interest” that others do not share.¹⁶ This injury justifies judicial involvement, since the courts are “assigned [the] role of protecting minority rather than majority interests.”¹⁷ What Justice Scalia called “fair consideration” is the key to the representation-centered theory, and thus to the courthouse door. When the felt effects of government action are widespread, people subject to or aware of the action may develop different preferences in response to it. All views are represented in the political process, and only the “*genuine* desires of the people,” not the preferences of one angry person, should be “given effect.”¹⁸ But the person with a particularized injury cannot count on the fair consideration of his unrepresentative interests by Congress or the Chief Executive. He is thus “entitle[d] . . . to some special protection from the democratic manner in which we ordinarily run our social-contractual affairs.”¹⁹ Hence he can sue, even if his reaction to the government action does not represent the views of the majority.

The Court has not always hewed to the representation-centered theory explicitly or with perfect consistency, but it is as close as there is to a theory underlying modern standing doctrine.²⁰ More generally, the Court has repeatedly seconded Justice Scalia’s insistence that inattention to standing requirements risks “the overjudicialization of the process of self-governance.”²¹ “The law of Article III standing,” the Court recently commented, “serves to prevent the judicial process from being used to usurp the powers of the political branches.”²²

15. *Lujan*, 504 U.S. at 576–77.

16. Scalia, *supra* note 12, at 895.

17. *Id.* at 895.

18. *Id.* at 897.

19. *Id.* at 895.

20. *E.g.*, *Lujan*, 504 U.S. 573–78; *see also* Food & Water Watch, Inc. v. Vilsack, 79 F. Supp. 3d 174, 186 (D.D.C. 2015); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1147–48 (1993); Cass R. Sunstein, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 22, 24–25 (2016).

21. Scalia, *supra* note 12, at 881. *E.g.*, *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

22. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013).

II. REMEDIAL IMPLICATIONS

The representation-centered theory of Article III standing has clear remedial implications, a fact the Court has repeatedly recognized.²³ If a discrete injury-in-fact authorized a lawsuit for any remedy whatsoever, standing doctrine would discharge little more than a ceremonial function. The channeling works its requirements do to protect political power from judicial usurpation would fail.

Two rules of what Richard Fallon calls “remedial standing” are well settled.²⁴ First, a plaintiff might have standing to sue for damages, but if the government does not continue to subject him to “a real and immediate threat” of injury, he cannot also seek an injunction.²⁵ Absent this showing, the plaintiff “is no more entitled to an injunction than any other citizen of” the relevant polity.²⁶ To allow him to obtain injunctive relief without this showing would enlarge the federal court’s power at the expense of the political branches, where the advocacy of the plaintiff, an ordinary citizen with merely an “undifferentiated claim,” belongs.²⁷ Second, a plaintiff can sue to redress the harm he suffers, but he cannot sue to redress different harm suffered by others, even if related to the same government action that injures him.²⁸ “The actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches,” the Court has insisted, “if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.”²⁹

A third rule of remedial standing, which Samuel Bray calls the “plaintiff-protective principle,”³⁰ is closely related. It provides that an injunction can do no more than what is necessary to redress the injury the plaintiff suffers. Although the Court has not yet announced the principle, it requires only a modest inferential step from settled doctrine. A simple hypothetical illustrates.³¹ Assume that the U.S. Forest Service announces

23. *E.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982); *Schlesinger v. Reservists Comm’n to Stop the War*, 418 U.S. 208, 221 (1974).

24. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 21 (1984).

25. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

26. *Id.* at 111.

27. *Id.* at 111–12.

28. *Lewis v. Casey*, 518 U.S. 343, 358 (1996).

29. *Id.* at 357.

30. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 420 (2017).

31. This hypothetical is based closely on *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

a particular permitting process to adjudicate commercial requests to engage in logging in national forests. On January 1, 2016, it uses this process to grant a permit to log in Forest A. Mr. A, who routinely hikes in Forest A, sues to challenge the lawfulness of the permitting process under a federal land use statute. He prevails, and the court enjoins logging in Forest A. On January 1, 2017, the Forest Service uses the same process to issue a permit to log in Forest B. Although beloved by other nature enthusiasts, Forest B is 1,000 miles from Mr. A's residence, and he has never visited it. Mr. A clearly would lack standing to sue to enjoin the Forest B logging.³²

Now assume that, on January 1, 2017, the Forest Service issues permits for logging in both Forests A and B. Mr. A, the Forest A habitué, sues for an injunction to stop all logging, in both forests. Nothing of legal relevance to standing distinguishes the first scenario from the second, just the timing of the Forest Service's decisions. To allow Mr. A to seek the broad remedy would baldly conflict with the Supreme Court's admonition that a plaintiff has no standing to seek a remedy for an allegedly illegal policy "apart from any concrete application that threatens imminent harm to *his interests*."³³

The doctrinal logic of the plaintiff-protective principle is simple. Its political logic, couched in terms of the representation-centered theory, is equally straightforward. A plaintiff may deserve a judicial remedy for his particularized injury. But once he receives an injunction, he no longer enjoys a "minority status relevant to the particular governmental transgression that he seeks to correct."³⁴ If the government continues with its behavior, just not directed at him, the plaintiff has no more claim to further injunctive relief than anyone else concerned by the exercise of government power. At this point, he should vindicate his "majoritarian interest" through politics, not law.

The lower courts have haphazardly heeded the plaintiff-protective principle, notwithstanding its clear doctrinal roots and theoretical mooring.³⁵ Recently, courts adjudicating the landmark executive power

32. *Summers*, 555 U.S. at 496–97; *see also* *Warth v. Seldin*, 422 U.S. 490, 502–03 (1975).

33. *Summers*, 555 U.S. at 494 (emphasis added).

34. *Scalia*, *supra* note 12, at 895.

35. *Compare* *Clement v. California Dep't of Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004); *Soto-Lopez v. New York City Civil Service Comm'n*, 840 F.2d 162, 168–169 (2d Cir. 1988); *Davis v. Astrue*, 874 F. Supp. 2d 856, 868 (N.D. Cal. 2012), *with* *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 649 (9th Cir. 2011); *Warshak v. United States*, 532 F.3d 521, 531 (6th Cir. 2008); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001); *McKenzie v. Chicago*, 118 F.3d 552, 555 & n.* (7th Cir. 1997); *Meinhold*

cases have ignored the principle altogether. In *Texas v. United States*, only a single plaintiff, the State of Texas, demonstrated its standing to sue to challenge one of President Obama's signature immigration policies.³⁶ The Fifth Circuit nonetheless upheld an injunction barring the policy's implementation nationwide, making no attempt to explain why the State of Texas's alleged injury necessitated such a broad remedy, or why other states should benefit from an injunction without establishing their own standing.³⁷ Similarly, only three states across the two travel ban cases have demonstrated their injuries-in-fact.³⁸ Upholding preliminary injunctions barring the travel ban's enforcement nationwide, neither the Fourth Circuit nor the Ninth Circuit bothered to reconcile the remedies with Article III standing doctrine.³⁹

III. A CRITICAL APPRAISAL

By now it should be obvious that the representation-centered theory is a political process theory of the sort developed by John Hart Ely in *Democracy and Distrust*.⁴⁰ At bottom, this theory holds that courts should intervene in the political process only when that process can be expected to malfunction systematically and not otherwise. It also offers an account of when the political process can be expected to malfunction in this way—namely, when its outputs concretely burden particular individuals in ways that set them apart from the general population. Conversely, the representation-centered theory posits that the political process can be expected to function well when its outputs affect broad interests, whose numbers ensure their ability to organize and assert influence in democratic policy-making.

Not only does this theory belong to the same family of theories as Ely's, there are also strong substantive parallels between the two. The main difference is that the representation-centered theory is less skeptical of the democratic process than Ely. Where Ely thought that elected politicians could not be trusted to fairly consider the interests of

v. U.S. Dep't of Defense, 34 F.3d 1469, 1480 (9th Cir. 1994); *Zepeda v. U.S. Immig. & Naturalization Serv.*, 753 F.2d 719, 729 (9th Cir. 1983).

36. 809 F.3d 134, 155 (5th Cir. 2015).

37. The Fifth Circuit disposed of a challenge to the remedy's scope in six sentences and did not address its implications for standing doctrine. *Id.* at 187–188.

38. *Hawaii v. Trump*, 859 F.3d 741, 762 (9th Cir. 2017) (Hawaii); *Washington v. Trump*, 847 F.3d 1151, 1159–1160 (9th Cir. 2017) (Washington and Minnesota).

39. *Washington*, 847 F.3d at 1166–1167; *Hawaii*, 859 F.3d at 787–788.

40. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

disfavored minorities,⁴¹ the only systematic political malfunction the Court recognizes is limited to decisions that single out particular individuals.⁴²

There is an appealing simplicity to this theory, but that simplicity is misleading. To state the obvious, the political process cannot always be trusted to balance reliably and impartially the claims of competing social interests. To the contrary, it is often skewed against large, diffuse interests and in favor of narrow, concentrated ones. Yet the representation-centered theory is perversely more generous to the latter than to the former.⁴³ It also frequently keeps courts from hearing the claims of diffusely injured minorities, on the ground that such claims are insufficiently particularized, even in circumstances where the political process offers no practical hope of redress.⁴⁴ In some of these cases, it is possible that the democratic process is still preferable to the courts, which have their own shortcomings.⁴⁵ But the faith in majoritarian politics undergirding the representation-centered approach is at best naïve, at worst willfully blind to the failings of the democratic process.

If the Court is insufficiently skeptical of the democratic process in cases involving diffuse interests, it is insufficiently skeptical of judicial process in cases where the requirements of Article III standing are

41. *Id.* at 103 (“Obviously our elected representatives are the last persons we should trust with identification of [situations where minorities are denied the protections afforded other groups by the representative system].”).

42. *Lujan*, 504 U.S. at 563. (“[R]espondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents’ members would thereby be “directly” affected”); *Allen v. Wright*, 468 U.S. 737, 755 (1984) (“Neither do they have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. . . . Our cases make clear . . . that such injury accords a basis for standing only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct.” (internal citations omitted)); Scalia, *supra* note 12, at 891–92 (“Yet the doctrine of standing clearly excludes them, unless they can attach themselves to some particular individual who happens to have some personal interest (however minor) at stake.”).

43. *See, e.g.*, Cass R. Sunstein, *What’s Standing After Lujan, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 218–20 (1992) (“Some minorities are especially well-organized and do indeed have access to the political process, including the executive branch. . . . Moreover, some majorities are so diffuse and ill-organized that they face systematic transaction costs barriers to the exercise of ongoing political influence.”).

44. *See, e.g.*, *Allen*, 468 U.S. at 755 (denying standing of racial minority parents to challenge tax exemptions for racially exclusionary private schools because their injuries were insufficiently particularized); *Lyons*, 461 U.S. at 105–06 (1983) (denying standing of African American plaintiff to seek injunctive relief against a municipal chokehold policy applied almost exclusively against racial minorities and other socially marginalized persons)

45. *See generally* NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (emphasizing the importance of comparative institutional analysis).

satisfied. The reason is simple. Even in cases where a plaintiff can demonstrate a concrete and particularized injury that sets her apart from the general population, a judicial decision will always affect interests that are not represented before the court. This is starkly obvious under the existing regime in which courts routinely enable individual litigants to obtain sweeping injunctions that apply to thousands or millions of similarly situated individuals. But it would remain true even if the Court faithfully extended the logic of the representation-centered theory to scope of remedies because precedents established by individual litigants would control all other similar cases.⁴⁶ Either way, courts are making decisions whose effects extend far beyond the parties before the court. This not to say that courts should always stay their hand, only that the problem of representation can be quite thorny even in cases where every jot and tittle of current Article III doctrine has been strictly satisfied.

In sum, the existence of a particularized injury in fact is neither necessary nor sufficient to justify judicial intervention in the political process. It is not necessary because, even where no party has suffered a cognizable Article III injury, it may be practically impossible—or unduly difficult—to vindicate some interests through the political process. It is not sufficient because, even where some party has suffered an Article III injury, judicial decision of that party’s claims will generally affect the potentially conflicting interests of parties that are not effectively represented before the court. In at least some cases, the court’s inability to adequately consider the interests of absent parties will counsel in favor of deferring to the political process even when the requirements of Article III have been satisfied.

These deficiencies in the Court’s existing approach are a byproduct of its fatally simplistic theory of representation and its failure to take seriously the comparative nature of institutional choice. In cases where Article III has not been satisfied, the representation-centered theory seizes upon one shortcoming of the judiciary—that absent parties are unrepresented—and treats this as sufficient to disclaim judicial authority without considering whether the political process might fare even worse. In cases where Article III has been satisfied, the representation-centered theory seizes upon one shortcoming of the political process—its

46. See, e.g., Alan Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565 (2017) (making this point). Even if judicial decisions set no precedent and were strictly confined to suits by individuals with particularized injuries, challenges to government action would affect the interests of the beneficiaries of that action, which may or may not be well represented by the government’s defense. Think of a challenge to environmental regulations brought by industrial interests and defended by lawyers from Scott Pruitt’s EPA.

insensitivity to particularized interests—as sufficient to justify judicial authority without considering whether the judiciary might fare even worse.⁴⁷ The upshot is that the decision to exercise judicial power, whether at the jurisdictional stage or the remedial stage, cannot defensibly rest on the sort of neat division of institutional responsibility posited by the representation-centered theory. A more nuanced and a more complex comparative institutional analysis is required.

We suspect that the Supreme Court recognizes this on an intuitive level, even if it is loathe to admit as much explicitly. This would explain why the Court has frequently allowed individual plaintiffs in environmental cases to pursue broad remedies whose clear purpose is to protect the interest of the public at large.⁴⁸ Under the representation-centered theory, such remedies should be highly suspect. They clearly implicate the interests of parties not represented before the Court, which under the representation-centered theory, should be left to the political process. Indeed, to the extent the plaintiff's interest really is shared by the public at large, the problem is not just with the remedy but with Article III standing, which requires a particularized injury.⁴⁹

And yet, in environmental cases, there is ample reason to distrust the political process. The public's interest in environmental protection is broad but diffuse, while the business and industrial interests that tend to oppose such protection are concentrated and cohesive.⁵⁰ Basic public choice theory predicts that the latter will often prevail over the former even where the social benefits of environmental protection exceed its

47. See KOMESAR, *supra* note 45, at 15–20 (elaborating the problems with such “single-institutional” analysis).

48. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (“The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge EPA’s denial of their rulemaking petition.”); *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000) (“The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former . . . is to raise the standing hurdle higher than the necessary showing for success on the merits . . .”).

49. See *supra* note 13.

50. See, e.g., Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1547 (“Asymmetries of interest and activity in the political realm between concentrated and organized polluters and the dispersed and difficult-to-organize general public are inherent in the environmental domain.”); Sunstein, *Standing*, *supra* note 43, at 219; Wendy Wagner, *The Participation-Centered Model Meets the Administrative Process*, 2013 WISC. L. REV. 671, 680–81 (“This complete absence of public interest representation in at least half of the public-oriented rules provides particularly compelling evidence of participatory imbalances.”); Matthew D. Zinn, *Policing Environmental Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 130 (“Advocates of diffuse interests such as environmental protection face acute public-goods problems in the enforcement setting.”).

costs.⁵¹ This is hardly a sufficient basis for substituting the decisions of courts for the decisions of expert administrative agencies in all cases; in fact, courts may be susceptible to similar minoritarian biases.⁵² Nevertheless, it is a plausible basis for relaxing the simplistic assumptions of the representation-centered theory in at least some environmental cases, especially those brought on behalf of diffuse interests. The Court's frequent (though hardly uniform) willingness to bless broad, public-interest remedies in environmental cases may reflect this logic.

The same goes for the casual disregard that both the Supreme Court and lower courts have shown for the plaintiff-protective principle. Like broad remedial orders in environmental cases, injunctions that violate this principle should be highly suspect under the representation-centered theory. They clearly implicate the interests of parties not represented before the Court, which under the representation-centered theory, should be left to the political process. Indeed, if the plaintiff's interest really is broadly shared by a large class of non-parties, the representation-centered theory suggests that such cases do not belong in court at all. They should be left to the political process.

And yet, as with broad environmental remedies, there is ample reason to distrust the political process in at least some of the cases in which courts have issued universal injunctions. More precisely, there is ample reason to distrust the political process in practically all cases. The real question is whether courts are likely to do any better. In at least some of the universal injunction cases, there is a plausible argument that they are.

Take the recent travel-ban cases. The persons burdened, directly or indirectly, by each of President Trump's successive orders are largely members of a minority religious group against which there is a widespread and strongly held prejudice. Members of this group are clearly not without political allies, as the suits brought by various state attorneys general attest. Opposition to the President's promised travel ban was also a major issue in the recent presidential campaign. But that is hardly adequate assurance against serious political malfunction where the conditions are

51. See, e.g., KOMESAR, *supra* note 45, at 55–56 (“In this scenario, the small, concentrated, interest groups have substantially greater political influence than groups larger in number but with smaller per capita stakes . . .”); Jonathon R. Macey, *Public Choice: The Theory of the Firm and the Theory of the Market Exchange*, 74 CORNELL L. REV. 43, 49–50 (1988) (noting the “significant influence by interest groups on the specific nature and implementation of the environmental programs”); Sunstein, *Standing*, *supra* note 43, at 219; see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

52. See generally Neil Komesar & Wendy Wagner, *The Administrative Process and its Discontents*, ADMIN. L. REV. (forthcoming) (discussing this issue at length).

ripe for majoritarian bias, as they were here.⁵³ This supplies the basis for a classic *Democracy and Distrust*-style argument for courts to step in.

Of course, much more would be needed to make such an argument persuasive. Even where the political process is afflicted with serious majoritarian bias, the courts might do worse. It is also possible that the crude rule embodied by the representation-centered theory has advantages over a more flexible standard.⁵⁴ But we need not take sides on these questions for present purposes. The important point is that the Supreme Court's willingness to countenance a preliminary injunction that clearly violated the plaintiff-protective principle might well have rested, in part, on this sort of comparative institutional calculus. The same goes for the district judges who issued broad injunctions in the various travel ban cases in the first instance. More generally, the disconnect between Article III standing and scope of remedies doctrine may reflect a conscious or unconscious intuition that the representation-centered theory would have pernicious effects if taken all the way to its logical conclusion at the remedial stage. We do not suggest that this is necessarily the case, merely that it represents a plausible and charitable interpretation of the available evidence.

Before closing, we should acknowledge that some of the most important recent criticisms of overly broad injunctions do not sound in the representation-centered theory or even in the constitutional separation of powers. Samuel Bray, for instance, criticizes universal injunctions for encouraging forum shopping; impoverishing the factual record of important cases on appeal; and short-circuiting the process of deliberative "percolation" in the lower courts.⁵⁵ These are weighty and important considerations, which may well counsel against expansive use of the universal injunction. They do not, however, have anything to do with representation or even with the allocation of power between the courts and the political process.

We can see this clearly by considering which judicial powers Bray does not object to. He does not object to the power of the Supreme Court to establish nationally binding precedents that will often achieve the same practical effect as a universal injunction. Nor does he object to the power

53. See KOMESAR, *supra* note 45, at 83 (identifying widely shared prejudice against discrete and insular minorities as a catalyst for majoritarian bias); see also ELY, *supra* note 40, at 78–84 (explaining the role of widely held prejudice in disrupting the usual interest-group bargaining of pluralist politics).

54. See Bray, *supra* note 30, at 481 ("Although in theory a standard would allow for the possibility of national injunctions in appropriate situations, in practice the use of a standard would be seriously deficient.").

55. See Bray, *supra* note 30, at 8–15.

of the lower courts to certify classes or simply to enjoin the same government action in a large aggregation of individual cases.⁵⁶ He is, in other words, fully comfortable with the courts exercising law-making power in ways that violate—or are in significant tension with—the representation-centered theory. His objection to universal injunctions is simply an argument about how the courts can best exercise this authority.⁵⁷ That argument may well be correct, though we suspect that there are cases where the countervailing benefits of universal injunctions—speed, clarity, and uniformity—might justify their use. At any rate, we believe that Bray is arguing from far more solid footing than proponents of the representation-centered theory.

CONCLUSION

The representation-centered theory underlying modern standing doctrine has clear implications for the scope of remedies. If the judicial power to decide cases is constitutionally limited to particularized injuries that set the plaintiff apart from the general population, the remedial power of the federal courts should be similarly limited to that which is necessary to remedy the plaintiff's particularized injury. Yet U.S. Courts, including the Supreme Court, have routinely ignored this straightforward logic. Some have reacted to this apparent inconsistency with alarm. We are more sanguine. The representation-centered theory rests on flawed and oversimplistic institutional assumptions. The willingness of courts to disregard it at the remedial stage—and in several other contexts—bespeaks a healthy skepticism of reformers wielding abstractions.⁵⁸ We recognize that this is a large claim and do not pretend to have fully substantiated it in this brief symposium essay. If we have opened a conversation, that is enough for now.

56. See *id.* at 56 (“[T]he way to resolve legal questions for nonparties is through precedent, not through injunctions.”); *id.* at 57 (“Nothing about the analysis here precludes a Rule 23(b)(2) class action”). Bray also candidly concedes that his pragmatic case against universal injunctions does not apply to injunctions issued by the U.S. Supreme Court. Personal Conversation with Samuel Bray, UCLA Professor of Law, Tucson, Arizona (Oct. 5, 2017). Bray still believes such injunctions are unconstitutional but purely for originalist, rather than institutional, reasons. *Id.*; Bray, *supra* note 30, at 53 (grounding the plaintiff-protective principle in an originalist reading of Article III).

57. *Id.* at 60 (discussing the choice between national injunctions and the plaintiff-protective rule as a matter of “competing policy considerations”).

58. Cf. Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 642 (2015) (“[M]y argument is conservative, in the classical or Burkean sense: it seeks to defend the stability of a longstanding practice against the threat posed by reformers wielding an abstraction.”).