THE ARTICLE III MASK v. THE ARTICLE III REALITY

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The Supreme Court has traditionally maintained that Article III of the Constitution restricts the federal courts to deciding cases. On this view, the role of the federal courts is not to interpret and enforce the Constitution or to require governments to behave lawfully. The courts do these things, but only as an incident of their case-deciding function. The Supreme Court maintains that this principle prevents ideologically motivated meddlers from bringing cases that determine everyone's rights. It also supposedly limits the federal courts to their "proper—and properly limited—role in a democratic society." This Essay, however, suggests that the "case" limitation is a mask that hides a different reality. In reality, it does little to limit the role of the federal courts. Ideologically motivated groups and individuals constantly obtain federal court rulings that determine rights for the whole nation and that require governments to behave lawfully. This Essay reviews recent cases that expose the reality behind the Article III mask. This Essay suggests that the Supreme Court should recognize Article III reality and adjust its doctrines accordingly, particularly by recognizing that (1) the courts will play their proper role in our democratic society so long as they rule only on the legality, and not the wisdom, of government actions, and (2) the justiciability requirements should be discretionary, rather than mandatory, limitations on judicial power.

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INTRODUCTION

A fundamental contradiction lies at the center of the Supreme Court's Article III jurisprudence. On the one hand, the Court has long maintained that the restrictions of Article III are essential to the proper exercise of judicial power.[1] Article III provides that the federal judicial power shall extend to nine specified categories of "cases" and "controversies."[2] Accordingly, the Court has held that federal courts can act only when presented with a properly constituted case or controversy (hereinafter referred to as a "case") under Article III.[3]

The Supreme Court has repeatedly emphasized that the federal courts "have no power per se" to interpret and enforce the Constitution or to compel governments to behave lawfully.[4] Federal courts do these things, to be sure, but only when necessary to resolve a case.[5] Interpreting and enforcing the Constitution and policing government behavior are not the primary roles of the federal courts. They are, on this view, only an *incident* of the courts' role, which is to decide cases.[6]

1. *E.g.*, Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016) ("[T]he judicial Power . . . extends only to 'Cases' and 'Controversies' . . . . [N]o principle is more fundamental to the judiciary's proper role in our system of government."); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (allowing suit by a plaintiff that lacked standing would "create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction'").

2. U.S. CONST., art. III, § 2.

3. *E.g.*, Muskrat v. United States, 219 U.S. 346, 356 (1911) ("[T]he exercise of the judicial power is limited to 'cases' and 'controversies.'"). There is no generally agreed-upon explanation of the distinction between a "case" and a "controversy" as those terms are used in Article III. For one attempt to explain the distinction, see Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994).

4. Frothingham v. Mellon, 262 U.S. 447, 488 (1923); *see also* Reed v. Goertz, 598 U.S. 230, 251 (2023) (Thomas, J., dissenting) (quoting this passage); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 599 (2007) (same).

5. *E.g.*, *Frothingham*, 262 U.S. at 488; *Muskrat*, 219 U.S. at 357.

6. *E.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 392 (3rd ed. 2000) (noting "the continuing debate over whether federal courts exist primarily to resolve concrete disputes among individual litigants, with the power to make constitutional decisions only a necessary incident to this role").

The Supreme Court has sternly explained that the requirement of acting only on a proper Article III case is no mere technicality.[7] Faithfully respecting this restriction, the Court says, is essential to the separation of powers.[8] By acting only on cases and controversies, courts respect their "proper—and properly limited—role in our constitutional system."[9] If courts could act outside the context of a properly presented case, they would "usurp the powers of the political branches"[10] and "assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly [they] do not possess."[11]

On the other hand, even as the Supreme Court frequently and solemnly reiterates the above points, everyone knows that they are something of an inside joke. The Supreme Court *says* that the federal courts exist only to decide particular cases, not to interpret and enforce the Constitution or police government behavior.[12] But as Alexis de Tocqueville observed nearly two hundred years ago, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[13] The courts constantly review the actions of the federal and state governments and frequently hold them unlawful or unconstitutional and issue appropriate relief.[14] It is true that, under the current system, this happens only when courts are presented with a proper Article III

7. *See, e.g.*, *Hein*, 551 U.S. at 599 (noting the importance of the "constitutionally mandated standing inquiry" in maintaining the courts' proper role).

8. *See, e.g.*, *Frothingham*, 262 U.S. at 488 (detailing the roles of the judiciary and legislative branches and emphasizing the limits of the court's role in determining whether acts of Congress are unconstitutional).

9. United States v. Texas, 599 U.S. 670, 675–76 (2023); *see also* Warth v. Seldin, 422 U.S. 490, 498 (1975) (holding that the standing requirement "is founded in concern about the proper—and properly limited—role of the courts in a democratic society"); Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting this passage from *Warth*).

10. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

11. *Frothingham*, 262 U.S. at 489; Lujan v. Defs. of Wildlife, 504 U.S. 555, 574 (1992) (quoting this passage).

12. *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 94 (2007) (referring to this view as the "Great Myth" of justiciability).

13. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835).

14. *See*, *e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (holding that a state antidiscrimination law was unconstitutional as applied); Biden v. Nebraska, 143 S. Ct. 2355 (2023) (holding that the Secretary of Education's forgiveness of student loan debt was unlawful); N.L.R.B. v. Noel Canning, 573 U.S. 513 (2014) (determining that a recess appointment by the President was unconstitutional); Federal Election Comm'n v. Ted Cruz for Senate, 596 U.S. 289 (2022) (holding a federal campaign finance statute unconstitutional).

case. But most of the time, that requirement poses little obstacle to judicial action.[15]

Similarly, the Supreme Court *says* that the justiciability requirements protect us from having a system in which an ideologically motivated interest group (or even a single ideologically motivated individual) can demand a judicial ruling on an issue, which could then bind the whole nation.[16] However, our current system, even with the justiciability requirements, frequently allows exactly that to happen. It frequently happens that ideologically motivated interest groups or individuals bring individual cases—sometimes quite deliberately crafted—that lead to Supreme Court rulings on controversial issues, which then bind the whole nation.[17] The necessity of presenting issues in an Article III case is usually more of a series of hoops that parties must jump through to get judicial action rather than a real constraint on judicial power. An ideologically motivated plaintiff or interest group is simply put through the trouble of constructing an Article III case that presents an issue in a form upon which a federal court can act.[18]

This Essay suggests that the Article III justiciability requirements serve as a mask. They enable the pretense that the federal courts exist only to decide cases as they come along and that everything else is a mere incident of that task. But behind the mask, the courts are acting differently.

Several recent cases highlight the contrast between the Article III mask and Article III reality. These cases show the mask slipping off. The Supreme Court, this Essay suggests, should accept the reality behind the Article III mask and adjust its justiciability doctrines accordingly.

In one recent case, *Kisor v. Wilkie*,[19] the Supreme Court openly stated that the facts of the case had little bearing on the decision.[20]

15. *See infra* Part II.

16. *E.g.*, Sierra Club v. Morton, 405 U.S. 727, 739–40 (1972).

17. *E.g.*, *303 Creative*, 600 U.S. at 602–04 (establishing that the First Amendment protects the right of suppliers of expressive services to decline to provide services that would require them to express views with which they disagree, even if the refusal violates a state antidiscrimination law); District of Columbia v. Heller, 554 U.S. 570 (2008) (establishing that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia).

18. Ideologically minded parties and interest groups are permitted to take affirmative steps to construct cases that present issues upon which they desire judicial action, including deliberately suffering injury so as to give themselves standing, *see Ted Cruz for Senate*, 596 U.S. at 297 (permitting a suit to go forward on the basis of an injury that "could be described in some sense as willingly incurred"), or finding and recruiting as plaintiffs those who have suffered injury from action that an interest group desires to challenge.

19. 139 S. Ct. 2400 (2019); *see infra* Subpart III.A.

20. *Kisor*, 139 S. Ct. at 2408–09.

The Court decided the abstract question presented, which it said did not turn on the facts of any particular case.[21] This admission calls into question the importance of deciding legal issues only in the context of a particular case with particular facts.

In another recent case, *Jones v. Hendrix*,[22] the Court ruled in favor of an amicus curiae it had appointed to make an argument that no party to the case was making.[23] The Court's ruling undermined its frequent assertion that only a party with a "stake" in a case can be counted on to litigate with the necessary vigor.

A third recent case showing slippage in the Article III mask is the much-noted case of *303 Creative LLC v. Elenis*.[24] In that case, the Supreme Court held that the First Amendment rights of a website designer who allegedly desired to go into the wedding website business permitted her to violate a state antidiscrimination law that would have required her to offer her services to same-sex couples.[25] Though many commenters have suggested that the plaintiff lacked standing, the case followed normal standing principles.[26] The remarkable thing about the case was that it involved "facts" of doubtful veracity, but which the Court allowed the parties to establish by stipulation.[27] This case suggests that the Court does not necessarily require a *real* case upon which to adjudicate. Parties are apparently permitted to construct a fake case based on agreed, even if possibly imaginary, facts.

Finally, in another notable recent case, *Biden v. Nebraska*,[28] the Supreme Court invalidated the Secretary of Education's attempt to forgive certain student loan debts.[29] Again, while many commenters (and this time, some dissenting Supreme Court Justices) suggested that the plaintiff lacked standing,[30] the Court's ruling on standing was reasonable. This time, the remarkable thing about the case was the coincidence between the Justices' rulings on justiciability and the merits. Although there was no logical linkage between the standing and merits issues in the case, nine out of nine Justices voted either for the plaintiffs on both issues or against the plaintiffs on both

21. *Id.*

22. 599 U.S. 465 (2023); *see infra* Subpart III.B.

23. *Jones*, 599 U.S. at 471.

24. 600 U.S. 570 (2023); *see infra* Subpart III.C.

25. *303 Creative*, 600 U.S. at 578–82, 603.

26. *E.g.*, David Post, *Case or Controversy Requirement? What Case or Controversy Requirement?*, REASON: THE VOLOKH CONSPIRACY (Jul. 8, 2023, 11:32 AM) https://reason.com/volokh/2023/07/08/case-or-controversy-requirement-what-case-or-controversy-requirement/ ("I can't recall reading a more ridiculous standing decision in the last 10 years or so than the one the Court endorsed in the *303 Creative v. Elenis* case.").

27. *See 303 Creative*, 600 U.S. at 581–84.

28. 143 S. Ct. 2355 (2023); *see infra* Subpart III.D.

29. Biden v. Nebraska, 143 S. Ct. at 2362.

30. *Id.* at 2385 (Kagan, J., dissenting).

issues.[31] Cases such as this one support the hypothesis that justiciability serves as a mask for the Court's desire to take or not to take action on the merits.

This Essay shows how the Court's recent cases support the view that the Court's Article III jurisprudence is a mask. Part I of this Essay lays out the Court's official views. It explains the "private rights" view of the role of the federal courts. This view maintains that the federal courts exist only to decide particular cases and that everything else federal courts do, such as interpreting and enforcing the Constitution or ensuring that governments behave lawfully, is merely an incident of courts' primary, case-deciding role.[32] Part II then examines how the recent cases mentioned above show the official view to be a mask covering a different reality. Part III suggests that the Supreme Court should acknowledge the reality of Article III and adjust its justiciability doctrines accordingly.

I. THE ARTICLE III MASK

The Supreme Court has long subscribed to what is sometimes called the "private rights" view of the role of the federal courts.[33] On this view, the role of the federal courts is solely to decide particular cases between particular parties.[34] The federal courts do not exist for grander purposes sometimes ascribed to them, such as interpreting and enforcing the Constitution or requiring governments and their officers to behave lawfully. While the federal courts do these things, they are not the courts' role. They are mere *incidents* of the courts' role.[35]

Contrasted with the "private rights" view is the "public rights" view (also sometimes called the "special functions" view).[36] On this view, the federal courts do not exist solely to decide cases. That is certainly one function that the federal courts perform, but they also

31. *Id*. at 2362, 2368 (Roberts, J., joined by five Justices, holding for the plaintiffs on both issues); *Id*. at 2385 (Kagan, J., dissenting, joined by two justices, holding against the plaintiffs on both issues)

32. Siegel, *supra* note 12, at 77.

33. See, e.g., Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–68 (1973); Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 12–14 (2003); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 282 (1990); Siegel, *supra* note 12, at 77.

34. Siegel, *supra* note 12, at 77.

35. *See* Tribe, *supra* note 6, at 392; *see also* Marbury v. Madison, 5 U.S. 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals . . . .").

36. *E.g.*, Fallon, *supra* note 33, at 15 (2003).

have special responsibilities, including interpreting and enforcing the Constitution and ensuring that governments behave lawfully.[37]

The battle between these views is not an abstract academic debate. It has vital implications for the way federal courts deal with actual cases. If the courts embraced the "public rights" view of their role, they would likely disfavor doctrines that obstruct their ability to perform that role. If, for example, a federal or state government were acting unlawfully, and especially if it were violating the federal Constitution, the federal courts would be alert for an opportunity to order the government to behave lawfully. They would be disinclined to dismiss cases presenting such an opportunity on technical grounds, such as mootness or lack of standing. These technical barriers would interfere with the courts' ability to perform their role.

A federal court taking the "private rights" view of its role would behave differently. Under the private rights view, the role of the federal courts is simply to decide cases.[38] A federal court does not set out to interpret or enforce the Constitution or to ensure lawful government behavior.[39] If, in the course of deciding a case properly before it, the court needs to do those things, it does them, but not because they define the court's role. They are only the incidental effects of the court's role of deciding cases.[40]

Accordingly, a court taking the private rights view would have no compunction about dismissing a case on technical grounds, even if the case concerned allegedly unconstitutional government action or otherwise presented an issue of social importance. In such cases, the federal courts, in essence, would say: "We are not here to enforce the Constitution or ensure lawful government behavior. We are not even here to address issues. We are here to decide cases. Everything else is secondary. If an issue comes up in a case, we address it. If it doesn't come up in a case, we don't address it. And if it never comes up in a case, we never address it. And that's fine. We shed no tears over our inability to address an issue that never comes up in a case. Our job

37. Tribe, *supra* note 6, at 392; Bandes, *supra* note 33, at 282–83; *see also Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

38. *E.g.*, Stark v. Wickard, 321 U.S. 288, 310 (1944) ("[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights . . . .").

39. *E.g.*, Frothingham v. Mellon, 262 U.S. 447, 488 (1923) ("We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional."); *id.* at 489 ("[T]o assume a position of authority over the governmental acts of another and coequal department [would be to assume] an authority which plainly we do not possess.").

40. *Id.* at 488 ("[A statute's alleged unconstitutionality] may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy.").

is not to address issues. Our job is to decide cases. Addressing issues is merely an *incident* of our job."[41]

The Supreme Court's usual practice of adhering to the private rights view does, in fact, lead it to dismiss many important cases on technical grounds, including many cases challenging government behavior as unconstitutional or otherwise presenting issues of importance to society.[42] The Court implements the view that federal courts can act only on a properly presented case by adhering to the "justiciability" requirements.[43] These requirements define what a "case" is for Article III purposes.[44] The case must be a real dispute between adverse parties.[45] The federal courts will not entertain a request for an "advisory opinion" on an abstract question of law outside the context of a case.[46] The plaintiff must have standing to sue, which requires that the plaintiff have suffered or be imminently in danger of suffering an injury that is fairly traceable to the allegedly unlawful actions of the defendant and likely to be redressed by a favorable judicial ruling.[47] The case must be ripe for consideration (a requirement that usually comes into play in pre-enforcement challenges to statutes or regulations),[48] and it must not be moot; that is, events must not have changed since the case was filed such that a judicial ruling would not affect the parties.[49] If these requirements are not met, there is no Article III "case" upon which a federal court can act, and the court must dismiss. The Supreme Court has indeed ordered innumerable important cases dismissed on justiciability grounds.[50]

For decades, the Court has explained that it feels no remorse about such dismissals. For example, in *Frothingham v. Mellon*,[51] one

41. This is not an actual quotation from any case, but a rhetorical summing up of the Supreme Court's attitude as expressed in many cases. *See infra* notes 41–54 and accompanying text.

42. *See*, *e.g.*, *infra* notes 40–54 and accompanying text.

43. *See*, *e.g.*, JONATHAN R. SIEGEL, FEDERAL COURTS: CASES AND MATERIALS 25 (3d ed. 2023) ("'Justiciability' is that quality that makes something a 'case' that courts can resolve.").

44. *Id*.

45. Muskrat v. United States, 219 U.S. 346, 361 (1911).

46. *See* United States v. Fruehauf, 365 U.S. 146, 157 (1961).

47. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); Allen v. Wright, 468 U.S. 737, 751 (1984).

48. *See, e.g.*, Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967).

49. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 317 (1974).

50. *See*, *e.g.*, Allen v. Wright, 468 U.S. 737, 753 ("We conclude that neither [respondent allegation of injury] suffices to support respondent's standing. The first fails under clear precedent of this Court because it does not constitute judicially cognizable injury. The second fails because that alleged injury is no fairly traceable to the assertedly unlawful conduct of the IRS."); *see also supra* notes 36–43 and accompanying text.

51. 262 U.S. 447 (1923).

of the earliest cases that resulted in a dismissal for lack of what is today called standing to sue (although the Court did not use that term), the plaintiff challenged the constitutionality of a federal program that provided funding to promote health and reduce mortality among infants and mothers of infants.[52] The plaintiff asserted that she was a federal taxpayer and that the program unconstitutionally spent federal money for local purposes in violation of the Tenth Amendment.[53]

The Court held that the case should be dismissed.[54] A taxpayer, the Court said, had no right to challenge an expenditure as unconstitutional.[55] The taxpayer's interest in federal funds "is shared with millions of others, [and] is comparatively minute and indeterminable."[56] Moreover, even if the Court were to enjoin the challenged expenditure, it was far from clear that such a judgment would have any effect on the plaintiff's taxes.[57] Accordingly, the plaintiff could not show that she "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that [s]he suffers in some indefinite way in common with people generally."[58] Dismissal was therefore required.

The Court emphasized that the need to dismiss the case stemmed from the limits on the role of the Court:

> We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power

52. *Id.* at 479.
53. *Id.* at 479, 486.
54. *Id.* at 488–89.
55. *Id.* at 489.
56. *Id.* at 487.
57. One might argue that if the courts enjoined unconstitutional federal spending, the federal government would need less money, and so Congress could lower federal taxes. But federal spending statutes and federal taxing statutes are separate. A court-ordered reduction in federal spending would not, by itself, reduce anyone's taxes. Congress would need to act to change the tax code. Moreover, there is no requirement that the total level of federal spending bear any given relationship to the total level of federal taxation. Indeed, in most years total federal spending is considerably greater than total federal taxation. *See* OFF. OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES, FISCAL YEAR 2023, at 119 (2022). So there is no particular reason to think that enjoining a given amount of federal spending would induce Congress to change federal taxation.
58. *Frothingham*, 262 U.S. at 488.

> to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.[59]

In other words, the Court said that declaring statutes unconstitutional and making the government behave lawfully is not its role but a mere incident of its true role of deciding particular cases.

The Court's attitude in *Frothingham* is not a fussy, old-fashioned punctiliousness that would be obsolete today. The Court displayed the same attitude in numerous subsequent cases.[60] The observation that courts can declare federal statutes unconstitutional only in the course of deciding a particular case is commonplace, as the Court frequently explains in statements such as, "[t]he power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision."[61] The Court regularly justifies justiciability requirements such as standing, ripeness, and mootness by similar invocation of the private rights view.[62]

Even when dismissal of a case on justiciability grounds suggests that the issue presented in the case can *never* come before a federal court for decision, the Court is unperturbed. For example, in *United States v. Richardson*,[63] the plaintiff challenged the failure of the federal government to publish the Central Intelligence Agency's budget.[64] This failure, the plaintiff asserted, violated the

59. *Id.*

60. *See*, *e.g.*, Younger v. Harris, 401 U.S. 37, 52 (1971); *see also* United States v. Raines, 362 U.S. 17, 20–21 (1960) ("The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. . . . This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" (internal quotation omitted)); Gill v. Whitford, 585 U.S. 48, 64–65 (2018) ("Our power as judges to 'say what the law is' . . . is . . . grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right.").

61. *Frothingham*, 401 U.S. at 52.

62. *E.g.* Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37 (1976) (justifying dismissal for lack of standing because "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies"); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (justifying dismissal for mootness because "[t]he starting point for analysis is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'" (internal quotation omitted)); United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 90 (1947) (justifying dismissal for lack of ripeness because "[j]udicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants").

63. 418 U.S. 166 (1974).

64. *Id.* at 168.

Constitution's Statements and Accounts Clause.[65] The Supreme Court held that the case must be dismissed for lack of standing.[66] Moreover, its opinion suggested that *no one* would have standing to challenge the government's failure to publish the CIA's budget. But the Court was undisturbed by this prospect:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.[67]

Thus, the Court showed that it is not bothered by the thought that it may never be able to decide an issue. Its job is to decide cases, not issues. The inability of an issue to arise in a case is, the Court says, the signal that the issue is not part of the Court's job.[68]

The Court's "private rights" attitude continues today and can be seen in some of its most recent decisions. For example, *United States v. Texas*[69] involved a challenge by two states to the Department of Homeland Security's decision to prioritize the arrest and removal of only certain categories of noncitizens.[70] The plaintiff-states asserted that the Department had a statutory duty to arrest additional noncitizens.[71] The Supreme Court, however, held that the plaintiff-states lacked standing to sue.[72] Although it acknowledged that the challenged actions by the defendants were causing injury to the plaintiff-states, the Court held that the injury was not "judicially cognizable."[73]

Again, the Court emphasized that the standing barrier was no mere technicality, but rather, it was fundamental to the role of the federal courts:

> Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787." . . . The principle of Article III standing is "built on a single basic idea—the idea of separation of

65. U.S. CONST. art. I, § 9 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

66. *Richardson*, 418 U.S. at 179–80.

67. *Id.* at 179.

68. *Id.*

69. 599 U.S. 670 (2023).

70. *Id.* at 673.

71. *Id.* at 674.

72. *Id.* at 686.

73. *Id.* at 676.

> powers." . . . Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system. By ensuring that a plaintiff has standing to sue, federal courts "prevent the judicial process from being used to usurp the powers of the political branches."[74]

Thus, judging by what it *says*, the Court seems strongly invested in the view that the judicial role is limited to deciding properly presented Article III "cases" and "controversies."

The Supreme Court has offered a variety of explanations as to why it adheres to the private rights view of its role. Sometimes, the Court suggests that acting only on properly presented cases promotes good judicial decisions. The Court has suggested at least two ways in which justiciability requirements achieve this goal. It has said that because cases present legal issues in a particular factual context, they "tend[ ] to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[75] The Court has also suggested that the justiciability requirements promote good advocacy. By requiring that the plaintiff be injured, the standing requirement ensures that the plaintiff will have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[76]

The Court has also suggested that justiciability requirements prevent parties not affected by a legal issue from using the courts to make law that would govern the affected parties. It has said that the standing requirement "serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."[77]

Most of all, the Court maintains that the Article III justiciability requirements are essential to the separation of powers.[78] Just as we do not want Congress or the President to exceed their constitutional powers, neither should the courts.[79] The Article III justiciability

74. *Id.* at 675–76.

75. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

76. Baker v. Carr, 369 U.S. 186, 204 (1962).

77. Sierra Club v. Morton, 405 U.S. 727, 740 (1972).

78. *E.g.*, Flast v. Cohen, 392 U.S. 83, 96 (1968) ("[T]he rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III."); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing . . . is built on separation-of-powers principles . . . .").

79. *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992) ("[T]he Constitution's central mechanism of separation of powers depends largely upon

requirements embody the limits on judicial power. By acting only on cases and controversies, courts respect their "proper—and properly limited—role in our constitutional system."[80] If courts could act outside the context of a properly presented case, they would "usurp the powers of the political branches"[81] and "assume a position of authority over the governmental acts of another and coequal department, an authority which plainly [they] do not possess."[82] In some cases, the Court suggests that acting on a nonjusticiable matter would encroach on the President's power under Article II to "take Care that the Laws be faithfully executed."[83]

Thus, over many years, the Court has adhered to the private rights view of the role of federal courts. It has insisted that this view requires adherence to the justiciability requirements. The federal courts can act only when presented with a case. Indeed, resolving cases is the very essence of the federal courts' role in our constitutional system. Everything else the federal courts do, such as interpreting and enforcing the Constitution or ensuring lawful government behavior, is a mere incident of their case-deciding role. The courts cannot abstract these functions from their necessary context. The federal courts cannot act to interpret and enforce the Constitution or to police government behavior outside the context of a case.

II. MASK V. REALITY

Even as the Supreme Court tells us over and over again the importance of federal courts acting only on properly presented Article III cases, it is hard to imagine that the Justices are not secretly laughing the whole time. "Oh, but really," they tell us, "we have to maintain the justiciability requirements. Trust us, it's in your own interest! If we didn't do this, your rights would constantly be affected by ideologically motivated meddlers. Why, without the justiciability requirements, we'd have an endless stream of nettlesome activists

common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

80. United States v. Texas, 599 U.S. 670, 675–76 (2023); *see also* Warth v. Seldin, 422 U.S. 490, 498 (1975) (holding that the standing requirement "is founded in concern about the proper—and properly limited—role of the courts in a democratic society"); Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting this passage from *Warth v. Seldin*).

81. *Clapper*, 568 U.S. at 408.

82. Frothingham v. Mellon, 262 U.S. 447, 489 (1923); *Lujan*, 504 U.S. at 574 (quoting this passage).

83. U.S. CONST. art. II, § 3. *E.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021); *Lujan*, 504 U.S. at 577.

and interest groups forcing us to issue rulings that would determine *your* rights!"[84]

Fine, but what do we have now? We have—wait for it—an endless stream of activists and interest groups forcing the federal courts to issue rulings that determine our rights.[85] The judicial system permits this to happen; it simply requires the activists and interest groups to know how to make the system work. It requires that they know how to construct a case that presents the issue upon which they desire a judicial ruling.

Countless important cases deciding vital social issues arose because activists or interest groups deliberately chose to get a judicial ruling on some issue they cared about. The activists might be liberal or conservative; both sides of the ideological spectrum engage in this practice. *Havens Realty Corp. v. Coleman*,[86] for example, arose when a group seeking to fight racial discrimination in housing created a test case by literally sending "testers" into realty offices.[87] *District of Columbia v. Heller*,[88] which established an individual right to bear arms, was deliberately engineered by gun-rights activists.[89] Last term's *303 Creative LLC v. Elenis*[90] (discussed below) was a test case deliberately created by activists who desired to establish that certain service providers could discriminate against same-sex couples, even in the face of a statute prohibiting such discrimination.[91] The list could be extended indefinitely.

The Court's repeated incantation of the private rights view rhetoric therefore rings hollow. The Court says that we need the justiciability requirements to protect us from meddlers bringing cases that determine our rights. But as the above examples show, in the typical case, the only result is that the "meddlers" are put through the trouble of creating a proper test case. That test case then determines our rights.

84. The language in the text above is obviously not a direct quote from any real Supreme Court opinion. Still, although the language is stylized and exaggerated for rhetorical purposes, it is essentially what the Supreme Court said in *Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1972), in explaining why it maintains the standing requirement.

85. *See*, *e.g.*, *infra* notes 87–90 and accompanying text.

86. 455 U.S. 363 (1982).

87. *Id.* at 368.

88. 554 U.S. 570 (2008).

89. *See*, *e.g.*, Scott Neuman, *The 'Gun Dude' and a Supreme Court case that changed who can own firearms in the U.S.*, NPR (Aug. 14, 2022) https://www.npr.org/2022/08/14/1113705501/second-amendment-supreme-court-dick-heller-gun-rights.

90. 600 U.S. 570 (2023).

91. *See*, *e.g.,* Hila Keren, *The Alarming Legal Strategy Behind a SCOTUS Case That Could Undo Decades of Civil Rights Protections*, SLATE (Mar. 9, 2022) https://slate.com/news-and-politics/2022/03/supreme-court-303-creative-coordinated-anti-lgbt-legal-strategy.html.

Similar ripostes might be made to the other reasons proffered for the private rights view, such as the notion that the justiciability requirements are what keep the courts within the "proper—and properly limited—role in our democratic society."[92] The Court says that without the justiciability requirements, courts would be forced to "assume a position of authority over the governmental acts of another and coequal department, an authority which plainly [courts] do not possess."[93] Apparently, this refers to the fact that without the justiciability requirements, activists and interest groups could require the courts to determine whether the other branches of the federal government are acting lawfully. But again, what do we have now? Activists and interest groups constantly require the federal courts to determine whether the other branches are acting lawfully. They simply must jump through the hoops necessary to construct an appropriate case.

In other words, the Article III justiciability requirements serve as a mask. They allow the courts to pretend that interpreting and enforcing the Constitution and policing governmental behavior are things that they do only incidentally, perhaps even reluctantly. The courts claim that they do not set out to do these things. They claim that they set out only to decide the cases that come along, and if deciding those cases happens to require that they enforce the Constitution or compel governments to behave lawfully, it is not their fault.

This attitude, however, is but a mask. This Part highlights several recent cases that expose the mask. In each, the Supreme Court's statements, actions, or votes show that the Court's Article III rhetoric conflicts with Article III reality.

A. Throwing Off the "Particular Case" Mask

The recent case of *Kisor v. Wilkie*[94] was important in two respects. First, the case reaffirmed the principle of "*Auer* deference" (also known as "*Seminole Rock* deference"), which calls for federal courts to defer to a federal executive agency's reasonable construction of its own regulations.[95] This deference principle had been the subject of scholarly and judicial attacks.[96] The Court's reaffirmation of the

92. Warth v. Seldin, 422 U.S. 490, 498 (1975).

93. Frothingham v. Mellon, 262 U.S. 447, 489 (1923).

94. 139 S. Ct. 2400 (2019).

95. *Id.* at 2408. When there is doubt as to the meaning of a regulation, the interpretation given to it by the issuing agency "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997).

96. Harvard's John Manning attacked the *Auer* deference principle in John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). He argued that

principle (albeit with limits)[97] was therefore significant and has received much attention.[98]

Less noted, however, is how the Court's opinion in *Kisor* departed from some of the Court's customary tropes concerning the importance of exercising judicial power only in the context of a particular case. Like most judicial opinions, Justice Kagan's opinion for the Court recites the facts. But, unlike most judicial opinions, the opinion in *Kisor* goes out of its way to deny that the facts had any significance to the Court's decision.

After a brief introductory paragraph, Justice Kagan said, "We begin by summarizing how petitioner James Kisor's case made its way to this Court."[99] Immediately after that, however, she added this remarkable aside:

> Truth be told, nothing recounted in this Part has much bearing on the rest of our decision. The question whether to overrule *Auer* does not turn on any single application, whether right or wrong, of that decision's deference doctrine. But a recitation of the facts and proceedings below at least shows how the question presented arose.[100]

Although this comment has received little attention,[101] it is of great significance to the Article III debate. In making this comment, the Court throws off the Article III mask. As explained in the previous Part, the Court normally takes care to promote the "private rights" view of its role, the hallmark of which is that the Court only decides particular cases involving the rights of particular parties. On this view, addressing legal *issues* and articulating legal rules that govern other future cases are not, in themselves, the Court's role.

Auer deference gave agencies a perverse incentive to create vague regulations that they could later interpret as they pleased. *Id*. at 617. Members of the Supreme Court, particularly Justice Scalia, picked up this argument and started to question *Auer* deference. *E.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 158 (2012); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring).

97. *See Kisor*, 139 S. Ct. at 2414–18 (noting limits on the principle of *Auer* deference).

98. *E.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 949 (2021); Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 199 (2019); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 9–19 (2019); Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1602 (2021).

99. *Kisor*, 139 S. Ct. at 2408.

100. *Id*. at 2408–09.

101. The only other article I have been able to find that touches on this point is Edward L. Rubin, Auer*,* Chevron*, and the Future of* Kisor, 48 FLA. ST. U. L. REV. 719, 723 (2021), which mentions it briefly.

Rather, they are only *incidents* of the Court's role of deciding particular cases.[102]

As part of this view, the Court normally emphasizes the importance of considering legal questions in the context of a particular case with particular facts. Doing so, the Court normally says, ensures that the Court will not regard legal questions as "abstract intellectual problems resolved in the 'rarified atmosphere of a debating society.'"[103] Deciding particular cases with particular facts ensures that "instead those questions will be presented 'in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'"[104]

Despite the number of times the Court has repeated these hoary platitudes,[105] their validity has always been doubtful. As David Driesen has observed, although the Court has "insisted on justiciability criteria that aim to make adjudication concrete," in deciding cases, the Court often "relies upon abstract formalist reasoning to resolve cases on the merits, thereby gaining no benefit from the concrete context."[106] In other words, the Court insists on having particularized facts before it, but it often ignores those facts when making its actual decision.

Consider an example that Driesen highlights: after Congress passed the Line Item Veto Act in 1996, and before the President had exercised the power granted to him by the Act, several members of Congress brought suit to challenge the Act's constitutionality.[107] They asserted that the Act permitted the President, acting alone, to repeal provisions of federal statutes in violation of Article I of the Constitution.[108] When this challenge reached the Supreme Court in the case of *Raines v. Byrd*, the Court held that the plaintiffs lacked standing to sue, as they "alleged no injury to themselves as

102. *See supra* Part I.

103. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 423 (2013) (Breyer, J., dissenting) (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

104. *Id.*

105. According to Westlaw, as of March 18, 2024, the Supreme Court has cited the desirability of having disputes resolved in a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action" ten times, starting with *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982), and ending most recently with *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 804 (2015). A search in Westlaw's ALLFEDS database on the same date shows that lower courts have relied on this passage 151 times.

106. David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 814 (2004).

107. Raines v. Byrd, 521 U.S. 811, 814 (1997).

108. *Id.* at 815–16.

individuals" and "the institutional injury they allege is wholly abstract and widely dispersed."[109]

Subsequently, President Clinton exercised the authority granted by the Line Item Veto Act. In accordance with the Act, he "canceled" a provision of the Balanced Budget Act of 1997 and two provisions of the Taxpayer Relief Act of 1997.[110] Parties that would have benefitted from the canceled provisions brought suit.[111] Like the plaintiffs in *Raines*, they claimed that the Act permitted the President, acting alone, to repeal provisions of federal law in violation of Article I of the Constitution.[112]

This time, the Court determined that a justiciable case was presented and that the case was meritorious.[113] It held the Line Item Veto Act to be unconstitutional.[114] The particular facts of the case, however, played no apparent role in the Court's decision on the merits. The Court considered the facts in some detail in determining that the plaintiffs had standing,[115] but barely mentioned the facts in the section of its opinion dealing with the merits.[116] The Court addressed the merits of the case abstractly. It considered the general question of whether a statute could authorize the President to "cancel" a provision of a statute and decided that question in a way that did not turn on anything about the particular facts presented.[117]

As Driesen observes, this pattern is common.[118] Although a case with particularized facts is necessary to engage the federal courts' jurisdiction, those facts often play little role in deciding the legal questions presented, especially in the Supreme Court. As the case moves up the levels of the federal court hierarchy, it becomes more abstract until the Supreme Court, in essence, decides not so much a particularized case as an abstract legal question.[119]

Kisor is thus not unusual in treating the case as an abstract legal question. But the case is remarkable in that the opinion openly admits the irrelevance of the particular facts before the Court. The Court's admission that nothing in the facts of the case "has much bearing on the rest of our decision" invites an obvious question: If the particular facts don't matter to the decision of a case, why insist on having particular facts? Why does our system fetishize having a

109. *Id*. at 829.
110. Clinton v. City of New York, 524 U.S. 417, 421 (1998).
111. *Id.*
112. *Id*. at 438.
113. *Id*. at 435–36, 447–49.
114. *Id*. at 447–49.
115. *Id*. at 426–36.
116. *Id*. at 436–447.
117. *Id.*
118. Driesen, *supra* note 106, at 844–45.
119. *Id*. at 858–59.

particular case with particular facts if those facts have no bearing on the decision?

In this regard, *Kisor* throws off the Article III mask. *Kisor* admits what we all know: while courts in our system supposedly make decisions based on particular cases involving particular facts, often what really happens, particularly at the Supreme Court level, is that a case serves as a platform for deciding a general issue. Often, as *Kisor* admitted, the facts of the initial case hardly matter. So why do we care whether the initial decision is made on the basis of a particular case or not? *Kisor* suggests—indeed, it basically states—that the decision it made could just as well have been made as an advisory opinion on the abstract question of whether *Auer* deference should be preserved.

To be sure, there might be instances in which particularized facts *do* matter. It is certainly possible to imagine issues to which particularized facts could usefully provide "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[120] For example, in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[121] which overruled *Roe v. Wade*[122] and determined that there is no constitutional right to have an abortion,[123] news reports have called attention to many cases where abortion restrictions have made doctors reluctant to perform abortions—even when a pregnancy poses a high maternal health risk, and there is no chance that the pregnancy will result in the birth of a child who can survive outside the womb.[124] Pregnant women facing health risks in such situations have been forced to wait until the risks become severe enough to justify an abortion under the parameters of a state's law.[125] Whether one agrees or disagrees with *Roe* or *Dobbs*, one might believe that requiring a court to confront this kind of fact pattern could influence the court's ruling on the constitutionality of abortion restrictions.

Still, even on this view, one might ask whether it is necessary for a court to learn about such fact patterns by hearing a particular case concerning them. A court considering a case about abortion rights could receive briefs that help it understand the kinds of fact patterns that its ruling would cover. Indeed, even in our current system, in which court decisions are supposedly made on the basis of cases presenting particular facts, there is no guarantee that the particular

120. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

121. 597 U.S. 215 (2022).

122. 410 U.S. 113 (1973).

123. *Dobbs*, 597 U.S. at 232.

124. *E.g.*, Caroline Kitchener, *Two Friends Were Denied Care After Florida Banned Abortion. One Almost Died.*, WASH. POST, Apr. 10, 2023.

125. *E.g.*, Selena Simmons-Duffin, *In Oklahoma, a Woman Was Told to Wait Until She's 'Crashing' for Abortion Care*, NPR, Apr. 25, 2023.

case that reaches a given court will involve an informative set of facts. *Dobbs*, for example, was not about any particular pregnancy. It was a challenge to a state abortion law brought by a healthcare facility that provided abortions.[126]

Accordingly, even if a plaintiff tried to pursue a case involving a pregnancy that posed an exceptional health risk, there is no guarantee that the case would reach the Supreme Court. The Supreme Court might instead consider a challenge involving an ordinary pregnancy or, as in *Dobbs*, a challenge that was not about one particular pregnancy at all. Again, the fundamental point is that although our system pretends that federal courts only decide particular cases, if we look behind the Article III mask, we see that courts in our system—especially the Supreme Court—issue general legal pronouncements whose impacts reach beyond the particular case that gives rise to them, to the point where the particular case hardly matters.

Moreover, even if *some* issues are best decided in the context of a particular fact pattern, the Court in *Kisor* openly admitted that, for some issues, particularized facts are of no importance.[127] Why then do we require particularized facts in all cases? Why not let courts apply some principled test or exercise judicial discretion to determine whether a given issue requires particularized facts? Of course, giving courts the discretion to determine whether a given issue should be decided only in the context of a particularized case requires us to trust that courts will exercise that discretion wisely. But if we trust courts to wisely decide the *merits* of cases, we should also trust courts to wisely determine whether particularized facts are necessary to decide these merits.

B. Counsel without a Client

Jones v. Hendrix,[128] another recent case, revealed another aspect of the Article III mask. The case involved a situation that occurs with sufficient frequency at the Supreme Court as to seem reassuringly familiar. Yet, under the Court's Article III jurisprudence, it should be rather startling: a counsel representing a position rather than a client. This occurred because the Supreme Court appointed an amicus to argue a position that no party was taking.[129]

Some background is necessary to appreciate what happened. *Jones v. Hendrix* concerned a post-conviction challenge to detention by a prisoner who was serving a sentence imposed by a federal court.[130] Unlike state prisoners, who bring such challenges by filing

126. *Dobbs*, 597 U.S. at 233.
127. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408–09 (2019).
128. 599 U.S. 465 (2023).
129. *Id.* at 471.
130. *Id.* at 469–70.

a petition for habeas corpus under 28 U.S.C. §§ 2241, 2254, prisoners serving federal sentences proceed under a different statute, 28 U.S.C. § 2255. Congress created that statute as a substitute for the habeas remedy for such federal prisoners. It allows a challenge to detention to take the form of a motion filed in the court that imposed the prisoner's sentence.[131] Because this form of challenge is available, § 2255 provides that a habeas petition on behalf of such a prisoner shall not be entertained unless the remedy by motion is "ineffective to test the legality of" the prisoner's detention.[132]

Jones had been convicted of crimes under two federal statutes and was serving his sentence.[133] After his conviction, he filed a post-conviction challenge under § 2255 that resulted in the vacatur of his convictions under one of the statutes, but he remained in prison based on his conviction under the other statute.[134] Years later, however, the Supreme Court issued a decision that narrowly construed the statute supporting Jones' remaining conviction.[135] Jones wanted to challenge his conviction on the basis of this new decision.[136] Unfortunately for him, § 2255 bars a federal prisoner from filing a "second or successive" motion challenging his conviction unless the motion is based on "newly discovered evidence" or a "new rule of constitutional law."[137] Since Jones's case involved neither of these exceptions, he could not file a new § 2255 motion.

Jones, therefore, sought habeas corpus.[138] He asserted that he could do so under § 2255(c)'s exception for cases in which a § 2255 motion was "ineffective to test the legality of his detention."[139] He argued that the Supreme Court's new interpretation of the statute

131. *See* 28 U.S.C. § 2255(a). The purpose of § 2255 was to give prisoners serving federal sentences the same rights they would have in a habeas proceeding, but in another, more convenient forum. The difficulty with the prior system, under which prisoners serving federal sentences challenged their detention by filing habeas petitions, was that those petitions had to be filed in the district where the sentence was being served rather than in the district where the sentence was imposed. That was inconvenient both for the prisoners seeking habeas, as the relevant records and other evidence were often in a different, distant district, and for the courts, as the districts where federal prisons were located had to consider "an inordinate number" of habeas petitions. *See Jones*, 599 U.S. at 474.

132. 28 U.S.C. § 2255(e).

133. *Jones*, 599 U.S. at 470.

134. *Id.*

135. *Id.* (noting the Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019)).

136. *Id.*

137. 28 U.S.C. § 2255(h).

138. *Jones*, 599 U.S. at 471.

139. *Id.* at 474.

involved in his remaining conviction showed that his conviction required proof of elements that were not proved at his trial.[140]

The district court and the court of appeals denied Jones's habeas petition.[141] A motion under § 2255, the court of appeals held, was not "ineffective" to test the legality of Jones's detention, even though such a motion was now unavailable to him. The court of appeals said that Jones could, in his prior § 2255 motion, have argued that the statute under which he was convicted should have received the narrow construction that the Supreme Court subsequently gave to it.[142] That argument would not likely have succeeded in the district court or court of appeals at the time because the court of appeals had already rejected it. But he could have made that argument and perhaps have taken it successfully to the Supreme Court.[143] Accordingly, the court of appeals concluded it was essentially Jones's own fault that he could not now proceed by a § 2255 motion. The court of appeals' decision "deepened a split" in the circuits on the question of whether a federal prisoner may file a habeas petition in this kind of case, and the Supreme Court granted certiorari.[144]

The Solicitor General then notified the Supreme Court that the United States would not be defending the rationale of the court of appeals.[145] The court of appeals' ruling, as the Solicitor General's brief later explained, created a notable danger for federal prisoners. A federal prisoner serving a sentence for conviction of some federal crime might learn from a subsequent Supreme Court ruling that the conduct for which the prisoner was convicted was in fact *not a crime at all*, and yet, if the prisoner had filed a prior § 2255 motion on some other ground, the prisoner would, under the court of appeals' ruling, have no avenue for relief. The Solicitor General argued that a prisoner who, as a result of subsequent Supreme Court rulings, can establish that he is innocent of any federal crime should have an avenue for seeking relief.[146] The Solicitor General did, however, argue that the court of appeals' ruling should be affirmed on the alternative ground that Jones could not establish his innocence even based on the subsequent Supreme Court decision regarding the statute under which he was convicted.[147]

140. *Id.* at 471
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *See* Brief for the Respondent at 28, *Jones*, 599 U.S. 465 (No. 21-857) ("Nothing in AEDPA justifies an inference that Congress silently repealed the traditional habeas remedy for federal prisoners who have been imprisoned for conduct that Congress did not criminalize.").
147. *Id.* at 32.

Since Jones obviously did not support the court of appeals' reasoning either, no party was left to argue in favor of it. The Supreme Court therefore appointed an amicus curiae to argue in favor of the court of appeals' rule that the § 2255(c) remedy is not "ineffective" in a case like Jones's.[148] The Supreme Court remarked that the amicus "ably discharged" her responsibilities—which she evidently did, as the Supreme Court agreed that Jones could not seek habeas relief.[149]

The appointment of an amicus to represent a position not taken by any party, although not common, occurs with sufficient frequency at the Supreme Court that it scarcely raises an eyebrow.[150] Yet, it should. The Court has told us many times that the Article III justiciability requirements ensure that a party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[151] To entertain a case not meeting the Article III

148. *Jones*, 599 U.S. at 471.

149. *Id.* As an aside, the *Jones* case provides a potentially ominous portent for state prisoners seeking habeas relief. The Supreme Court has long held, in accordance with Justice O'Connor's opinion in *Teague v. Lane*, 489 U.S. 288, 295–96 (1989), that a state habeas petitioner is normally not entitled to take advantage of a Supreme Court ruling issued after his state-court conviction becomes final. However, Justice O'Connor indicated that an exception would permit a state habeas petitioner whose state conviction was final to rely on a subsequent Supreme Court ruling that indicated that the Constitution does not permit a state to criminalize the conduct for which the prisoner was convicted. Evidently, the Court wished to avoid the prospect of a prisoner's serving time for conduct that cannot be criminalized. *Id.* at 307.

In 1996, however, Congress, by passing the Antiterrorism and Effective Death Penalty Act (AEDPA), amended the text of the federal habeas statute so that it might be understood to codify the rule of *Teague* while abolishing the exception. *See* 28 U.S.C. § 2254(d). The Supreme Court has on several occasions suggested that the *Teague* exception survived the passage of AEDPA, but only in dicta or in some other context that did not compel the Court to confront the clash between the exception and the new language of § 2254(d). *See* JONATHAN R. SIEGEL, FEDERAL COURTS: CASES AND MATERIALS 924 (3d ed. 2023). If the Court is content to let federal prisoners serve jail time for conduct that Congress has not criminalized, will it insist on freeing state prisoners, simply because they are serving time for conduct that cannot be criminalized?

150. *See*, *e.g.*, Patel v. Garland, 596 U.S. 328, 336 (2022); Lange v. California, 141 S. Ct. 2011, 2017 (2021); Collins v. Yellen, 141 S. Ct. 1761, 1775 (2021); Terry v. United States, 593 U.S. 486, 492 (2021); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2195 (2020), all of which involved amici appointed to defend a position taken by no party. It does seem to have happened rather a lot recently!

151. Baker v. Carr, 369 U.S. 186, 204 (1962); *see also*, *e.g.*, Camreta v. Greene, 563 U.S. 692, 701 (2011); Chafin v. Chafin, 568 U.S. 165, 173 (2013); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 52 (1976).

requirements would, apparently, risk making a decision based on inadequate arguments. And yet the Court is content to decide a case in which one position is argued only by someone who does not represent any party at all and who has no personal stake in the outcome.

Evidently, the Court believes that an amicus with no personal stake can adequately represent a position. While the Court allows this practice only in the context of what is supposedly a properly presented Article III case, the practice exposes another aspect of the Article III mask. If *one* position in a case can be sufficiently represented by a counsel who is counsel for no one and who has no personal stake in a case, it is less clear why the same rule could not apply to *all* the positions in a case.

C. Fake Case, Real Ruling

Another much-noted case from last term, *303 Creative LLC v. Elenis*, further peels the Article III mask away. The case concerned a website designer in Colorado, Lorie Smith, who alleged that she desired to go into the wedding website business.[152] However, she also alleged that she desired not to design wedding websites for same-sex couples, as doing so would "force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman."[153] She was allegedly concerned that if she offered wedding website services while refusing to design such websites for same-sex couples, she would violate Colorado antidiscrimination law.[154] Therefore, she brought suit in federal district court against various state officials and sought a declaratory judgment that the Colorado antidiscrimination law violated her First Amendment rights.[155]

Much public commentary about the case questioned whether the plaintiff had standing.[156] Some argued that the case was entirely hypothetical. The plaintiff was not yet in the wedding website business. She had received no request to design a wedding website, let alone a wedding website for a same-sex couple.[157] And there was no real guarantee she would ever receive one. The case, some said, was a "fake case," manufactured specifically to produce a favorable context in which the courts would decide the clash between the right of free speech and the right to be free of discrimination.[158] Some

152. 303 Creative LLC v. Elenis, 600 U.S. 570, 579 (2023).

153. *Id.*

154. *Id.*

155. *Id.*

156. *E.g.*, Post, *supra* note 26; Laura K. Chapin, 303 Creative*: A Fake Case with Real Consequences*, COLO. NEWSLINE (July 3, 2023).

157. Chapin*, supra* note 156.

158. Mark Joseph Stern, *The Real Story of* 303 Creative v. Elenis, SLATE, (June 1, 2023, 5:52 AM).

people also argued that the case was designed to be unlike previous cases on the same subject, such as the *Masterpiece Cakeshop* case[159] and other real cases involving florists and photographers who did not wish to provide wedding services for same-sex couples. These earlier cases, some said, featured sympathetic parties on both sides: on one side, a "sweet, sincere Christian" who just wanted to follow his or her religious beliefs, and, on the other, a "couple who wanted some respect in shopping for wedding services" but were turned away based on discrimination.[160] These commentators suggested that the *303 Creative* case was manufactured to have a sympathetic plaintiff on one side and *nobody* on the other side.

However, even assuming that this analysis of the strategy behind the *303 Creative* case is correct, it does not change the fact that the plaintiff properly had standing. It is well established that a plaintiff who desires to engage in specified behavior that is proscribed by law and who believes that she has a right to engage in the behavior may challenge the law without actually engaging in the forbidden behavior. It is enough for the plaintiff to allege that she desires to engage in the forbidden behavior, provided that she would face a realistic threat of prosecution if she did. "When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'"[161] Indeed, even in cases where the desired conduct is not criminalized but merely civilly proscribed, it is routine for plaintiffs today to bring anticipatory challenges before the legal requirement has been enforced against anybody.[162] Accordingly, the court of appeals properly determined that the plaintiff had standing, and indeed, the issue was so clear that nobody even challenged standing in the Supreme Court.

Nonetheless, critics were correct in calling *303 Creative* a "fake case," but for a different reason. The reason is that some critical points in the case, which were apparently important to the Supreme Court's ruling, were not necessarily true. Rather, they had been established by stipulation between the parties. The most important points established in this way were that the wedding websites that Smith desired to design would involve "pure speech" and that the speech would be Smith's speech.[163] The Supreme Court said that the

159. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

160. Stern, *supra* note 158.

161. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

162. *E.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (permitting an anticipatory challenge to a regulation imposing certain labelling requirements on drugs).

163. 303 Creative LLC v. Elenis, 600 U.S. 570, 586 (2023).

first point "flows directly from the parties' stipulations,"[164] and "the parties' stipulations lead the way to" the second.[165]

These conclusions could certainly be questioned. Even accepting that a wedding website constitutes speech, one might argue that a reasonable observer of such a website would not perceive it to be the web designer's speech any more than someone who views a photo album constructed online via Shutterfly, Snapfish, or some similar service imagines that the photo album reflects the views of those corporations. Similarly, someone seeing a sign in the window of a wedding boutique that said, "We proudly serve same-sex couples," would surely understand that the sign reflected the views of the boutique's *owners*, not those of the sign-painter hired by the owners to paint the sign. However, when Colorado tried to argue that any burden its law imposed on the plaintiff's speech was incidental, the Court rejected the argument as "difficult to square with the parties' stipulations."[166]

But if Article III requires federal courts to act only when presented with a real, concrete case, how can mere stipulation of the parties create such a case? Let us imagine that the stipulations are incorrect. Let us also imagine that no observer of the plaintiff's wedding websites would perceive them as the speech of the website designer. If that were true, the court would violate Article III by providing an opinion on the hypothetical question of whether the Colorado law would violate the Free Speech rights of the website designer in the counterfactual world imagined by the stipulations. And since a federal court has a duty to ensure that it has proper jurisdiction over any case before it—a duty that exists whether the parties question jurisdiction or not[167]—a federal court should not be permitted to allow the parties to stipulate to the existence of a case that is not a real case.

Thus, the *303 Creative* decision, once again, shows the Article III mask slipping. Sometimes, the Supreme Court avoids a case by insisting on punctilious compliance with justiciability requirements, as, for example, when the Court held that the plaintiffs in *Lujan v. Defenders of Wildlife* lacked standing because, although the plaintiffs had alleged that they wanted to return to Egypt to see endangered crocodiles, they had not stated *when* they planned to do so.[168] But here, where the Court was evidently eager to resolve the issues left

164. *Id.* at 2312.

165. *Id.* at 2313.

166. *Id.* at 2316.

167. *E.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("Neither party has questioned [the circuit court's] jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded.").

168. 504 U.S. 555, 563–64 (1992).

hanging after *Masterpiece Cakeshop*, the Court allowed party stipulations to create what might not have been a real case at all.

D. Suspicious Convergence

Finally, consider the Court's recent decision in *Biden v. Nebraska*.[169] As with *303 Creative*, the case's ruling on standing was widely derided.[170] Once again, the critics were onto something, though it was not the right thing.

Biden v. Nebraska concerned President Biden's attempt to provide some relief to student loan borrowers in light of the COVID-19 pandemic.[171] Even before the pandemic, many student loan debtors had difficulty paying off their debt,[172] and the pandemic made things worse for many borrowers. President Biden instructed his Secretary of Education to forgive $10,000 in debt for all student loan debtors who owed their debt to the federal government and an additional $10,000 for all such debtors who had ever received a Pell Grant.[173]

The Secretary implemented President Biden's directive by invoking his powers under the Higher Education Relief Opportunities for Students Act (the "HEROES Act") of 2003. That act authorized the Secretary to "waive or modify" any provision of the student loan program in connection with a national emergency.[174] Several states challenged the Secretary's action, which, they asserted, exceeded the Secretary's powers under the HEROES Act.

An important question in the case was whether anyone had standing to challenge the Secretary's action—after all, who could be injured by debt forgiveness? The Supreme Court held that the state of Missouri had standing.[175] Missouri had created a corporation known as MOHELA (the Missouri Higher Education Loan Authority).[176] The federal government contracted with MOHELA to service federal student loans in Missouri,[177] and MOHELA earned fees for servicing such loans.[178] If the federal government

169. 143 S. Ct. 2355 (2023).

170. *E.g.*, *id*. at 2385 (Kagan, J., dissenting); Alexander Sammon, *How Biden Blew His Own Student Debt Relief Plan*, SLATE, (June 30, 2023, 1:42 PM).

171. Biden v. Nebraska, 143 S. Ct. at 2362.

172. Some research suggests that prior to the payment moratorium instituted in 2020, three out of every five student loans had a balance that was *higher* than when the loan was originally issued. Laura Beamer & Marshall Steinbaum, *America's Student Loans Were Never Going to Be Repaid*, N.Y. TIMES, July 13, 2023. Thus, these borrowers were unable even to keep up with the interest that they owed, much less pay down the principal.

173. Biden v. Nebraska, 143 S. Ct. at 2364–65.

174. 20 U.S.C. § 1098bb(a)(1).

175. Biden v. Nebraska, 143 S. Ct. at 2365.

176. *Id.*

177. *Id.* at 2365–66.

178. *Id.* at 2366.

implemented its planned loan forgiveness program, MOHELA would lose some of its fee revenue.[179]

While all the Justices agreed that MOHELA had a sufficient injury that would have given it standing to sue,[180] the question of whether MOHELA's injury gave *Missouri* standing to sue was hotly debated. The Court's six-Justice majority said yes. The majority acknowledged that Missouri had created MOHELA as a separate corporation and that Missouri was not responsible for MOHELA's debts. Nonetheless, the Court observed, MOHELA was a state instrumentality. It performed public functions. Its board consisted of state officials and members appointed by the state's governor. Any injury to MOHELA, the Court held, was necessarily an injury to Missouri. The Court noted that in a prior case, it had allowed Arkansas to sue Texas based on an injury to the University of Arkansas, even though that University was established as a separate corporation.[181]

Justice Kagan, in her dissenting opinion, sharply criticized the majority's standing analysis. Justice Kagan cited the usual statements about the importance of the standing requirement that the Court makes when it dismisses a case for want of standing, such as, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies,"[182] and "[f]ederal courts do not possess a roving commission to publicly opine on every legal question."[183] She accused the Court of "reach[ing] out to decide a matter it has no business deciding,"[184] "blow[ing]" through a constitutional guardrail intended to keep courts acting like courts,"[185] and "depart[ing] from the demands of judicial restraint."[186] MOHELA, she contended, was a separate legal entity from the state of Missouri. Although MOHELA would have had standing had it chosen to sue itself (which it had not), Missouri could not assert standing based on injury to MOHELA.

This case reveals the Article III mask in yet another way, different from those discussed earlier in this Essay. The problem does

179. *Id.* at 2368.

180. *See id.* at 2388 (Kagan, J., dissenting) ("If MOHELA had brought this suit, we would have had to resolve it, however hot or divisive."); *id*. at 2391 ("If MOHELA wanted to, it could have brought this suit.").

181. *Id.* at 2366–67 (majority opinion) (discussing *Arkansas v. Texas*, 346 U.S. 368 (1953)).

182. *Id.* at 2385–86 (Kagan, J, dissenting) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37 (1976)).

183. *Id.* at 2386 (quoting TransUnion LLC v. Ramirez, 594 U.S. 413, 424 (2021)).

184. *Id*. at 2388.

185. *Id*.

186. *Id*. at 2400.

not lie in the majority's standing holding per se. That holding was reasonable enough. Justice Kagan was right that a party usually cannot base its standing on injury to a different party. Indeed, she might have mentioned that in most cases, a corporate shareholder is not permitted to sue based on injury to the corporation, even if the shareholder is the sole shareholder or even if the injured corporation is a wholly-owned subsidiary of the plaintiff.[187] Hence, Missouri's claim to standing based on injury to MOHELA was hardly a slam dunk. At the same time, no prior case had addressed the precise issue of whether a state could have standing based on an injury to a state instrumentality set up as a corporation but controlled by state appointees. The Court's reliance on *Arkansas v. Texas*, the most closely analogous precedent, was reasonable.[188]

Thus, the Court's ruling on standing was reasonable, if not inevitable. Nonetheless, the case exposes the mask of standing doctrine for a different reason. The remarkable point about the

187. Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 336 (1990).

188. One might have asked why, even assuming MOHELA had a sufficient Article III injury, it satisfied the "zone of interest" standing requirement. Normally, a party challenging federal agency action must show that it is within the "zone of interests" of the statute allegedly violated. MOHELA's loss of fee revenue that would follow from the government's planned student loan forgiveness would hardly seem to fall within the zone of interests of the HEROES Act. Indeed, a classic illustration of a party that would not meet this requirement was given by the Supreme Court as follows:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990). This hypothetical illustration closely tracks the *Biden v. Nebraska* case. Just as the zone of interests of the hypothetical "on the record" hearing requirement would not include protecting the revenue of a company that had a contract to record and transcribe the agency's proceedings, the zone of interests of the student loan program and the HEROES Act loan forgiveness authority could hardly include protecting the revenue of a corporation that had a contract to service student loans.

Accordingly, even granting (as all the Justices agreed) that MOHELA had a sufficient Article III injury, and even assuming (as six Justices held) that Missouri could derive standing from that of MOHELA, it would seem that Missouri's standing should have failed on the basis of the zone of interests requirement. Curiously, however, although the government made this argument in the district court, it did not repeat the argument in the court of appeals or in the Supreme Court. It would appear, therefore, that the government waived this argument. *See, e.g*, Del Webb Communities, Inc. v. Carlson, 817 F.3d 867, 872 (4th Cir. 2016) (holding the zone of interests requirement to be waivable).

standing holding in *Biden v. Nebraska* is not that it favored the plaintiff. Rather, it is how the individual Justices' opinions on standing coincided with their opinions about the merits of the case.

There is no logical or doctrinal linkage between the standing and merits issues in *Biden v. Texas*. The question of whether a state may bring suit to remedy an injury suffered by a state instrumentality set up as a corporation when the corporation does not desire to sue on its own behalf has nothing to do with the degree of discretion that Congress has vested in the Secretary of Education to forgive student loan debt. The two issues are independent, and one might comfortably take any of the four possible positions that could result from a ruling either way on either of the issues independently.[189]

However, for *nine out of nine* Justices, the individual Justice's ruling for or against the plaintiffs on the issue of standing coincided with the Justice's ruling for or against the plaintiffs on the merits. All six Justices who thought the plaintiffs had standing also determined that the plaintiffs should win on the merits.[190] All three Justices who thought the plaintiffs lacked standing also determined that the plaintiffs should lose on the merits.[191] Not a single Justice's opinion indicated a belief that Missouri had standing but should lose on the merits or, conversely, that Missouri lacked standing but should win on the merits.

What explains this remarkable convergence of rulings on standing and the merits? As noted above, the answer does not lie in any logical linkage between the standing and merits issues. The convergence could, in theory, be a mere coincidence, but the probability that this voting pattern would occur by chance is low. Suppose one assumes that any individual Justice was equally likely to rule for or against the plaintiff on each of the two issues. In that case, the probability that any one Justice would rule the same way on both issues (i.e., either for the plaintiff on both issues or for the defendant on both issues) is one-half. Therefore, the likelihood that all nine Justices would rule the same way on both issues is $(1/2)^9 = 1/512$. Even if, based on the 6-3 vote pattern in the case, one assumes that any individual Justice was 2/3 likely to vote for the plaintiff on each issue individually, which would increase the likelihood that an individual Justice would rule the same way on both issues to (2/3)(2/3)

189. That is, one might logically believe (1) that Missouri had standing to sue based on the injury to MOHELA and the Secretary's actions exceeded the powers vested in him by the HEROES Act; (2) that Missouri had standing and the Secretary's actions were valid; (3) that Missouri lacked standing and the Secretary's actions exceeded his powers; or (4) that Missouri lacked standing and the Secretary's actions were valid.

190. Biden v. Nebraska, 143 S. Ct. at 2368, 2375 (majority rulings on standing and merits).

191. *Id.* at 2385 (Kagan, J., dissenting) (dissenting opinion on standing and merits).

+ (1/3)(1/3) = 5/9, the probability that all nine Justices would rule the same way on both issues would still be only $(5/9)^9 = 1/198$.

Thus, the probability that the observed vote distribution occurred by chance is, at best, about 1 in 200, or 0.5 percent. That seems sufficiently low that we may legitimately infer that some other force was probably at play.

What was that other force? My colleague Dick Pierce has long maintained that "standing depends on the degree of congruence between the political and ideological goals of the plaintiff and those of the judges who answer the standing question."[192] While I think it goes too far to suggest that this rule explains all standing decisions, cases such as *Biden v. Nebraska* support Professor Pierce's rule. Indeed, not only does the case support the rule in that the set of Justices who determined that the plaintiffs had standing perfectly coincided with the set of Justices who believed that the plaintiffs should prevail on the merits, but the case further supports Professor Pierce's rule by providing the somewhat unseemly spectacle that all of the Court's more conservative Justices, who are stereotypically associated with a stricter approach to standing doctrine, determined that the plaintiffs *had* standing, while all of its more liberal Justices, who are stereotypically associated with a more generous approach to standing doctrine, determined that the plaintiffs *lacked* standing.[193] This counterintuitive result suggests that some forces other than those ostensibly supporting the decision were really behind it.

In sum, the Supreme Court's recent cases involve statements and actions that are inconsistent with the traditional "private rights" view of the role of the federal courts. These recent cases show the private rights view to be but a mask. The underlying reality is that the federal courts could properly resolve most issues even outside the context of an Article III "case."

III. UNMASKING

If the Article III justiciability requirements are a mask, what would it mean to unmask? This Part explores what the federal courts should do in light of the arguments in Parts I and II.[194] This Part explains that throwing off the Article III mask and adopting a more

192. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742 (1999).

193. For a somewhat similar case, see *California v. Texas*, 593 U.S. 659, 669 (2021). This case involved a challenge to the Affordable Care Act, which the Court ordered dismissed for lack of standing. Once again, the more liberal Justices believed there was no standing. Two of the Court's more conservative Justices dissented and said that there was standing. The lineup of votes was not as stark as in *Biden v. Nebraska*, but given the subject matter of the suit, it was again suggestive of political forces at play.

194. I previously explained some of the points made in this Part in Siegel, *supra* note 12.

relaxed approach to justiciability would not entail allowing anyone to demand a judicial ruling about anything, nor would it mean that the federal courts would finally "assume a position of authority" over the other branches of government.[195] The change would be more modest but still important.

A. The Courts' Proper—and Properly Limited—Role

Even after relaxing the justiciability requirements, the federal courts would still play a proper—and properly limited—role in our democratic society. Courts will always play such a role so long as they limit themselves to ruling on the legality, and not on the wisdom, of the actions of the political branches of government.

Proponents of strict application of the justiciability requirements suggest that these requirements are what protect us from judicial tyranny.[196] As this Essay has suggested, that is but a mask. The justiciability requirements do little to protect us from excessive assertion of judicial power. Even enforced to the hilt, they allow the courts to decide vital issues of tremendous social importance. They allow the courts to issue orders to the other branches of government. They allow interest groups or individual activists to demand judicial rulings on the issues they care about, and these rulings affect us all. For any of these things to happen, they require that courts be presented with a proper Article III case. But most of the time, this requirement poses only a minor obstacle to judicial action.

What really protects us from excessive judicial power (if anything does) is the principle that courts cannot strike down actions of the political branches because they disagree with those actions as a matter of policy. Courts can set aside actions of Congress or the Executive only when those actions are unlawful or unconstitutional.[197] A lawful action that courts believe to be unwise is protected from judicial invalidation.[198]

Thus, for example, Congress is clearly free to decide whether taxes should be high or low.[199] This decision, which is of tremendous social importance, is for politicians, not judges. Similarly, it was and is up to Congress, not the courts, to decide whether to have federal

195. Frothingham v. Mellon, 262 U.S. 447, 489 (1923).

196. *E.g.*, *id.*; Warth v. Seldin, 422 U.S. 490, 498 (1975).

197. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 138 (1803) ("An act of congress repugnant to the constitution cannot become a law.").

198. *See*, *e.g.*, Helvering v. Davis, 301 U.S. 619, 644 (1937) ("Whether wisdom or unwisdom resides in the [challenged statutory] scheme . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here as often is with power, not with wisdom.").

199. *See* Lyeth v. Hoey, 305 U.S. 188, 194 (1938) (Congress has "plenary power under the Constitution to tax income and to grant exemptions from that tax"); United States v. Bennett, 232 U.S. 299, 306 (1914) (the taxing power "knows no restriction except where one is expressed in or arises from the Constitution").

wealth-redistribution programs such as Social Security.[200] Such policy decisions are legislative, not judicial. Should the term of a copyright extend fifty or seventy years past the author's life? Ask Congress, not a court. Indeed, when someone did ask a court, the Supreme Court's answer was: "[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."[201]

The principle that courts do not review policy judgments is what protects us from judicial tyranny, not the justiciability requirements. The courts will play a proper—and properly limited—role in our democratic society so long as they leave policy matters for elected officials to decide and pass judgment only on the legality (including the constitutionality) of acts of Congress, the Executive, and the states.[202]

B. The Justiciability Requirements after the Unmasking

Imagine that the courts accepted that the Article III justiciability requirements are a mask that should be thrown off. Would anyone then be able to sue about anything? Not quite.

The justiciability requirements should still play some role in determining what is proper judicial business. The reason lies in an important feature of the judicial power, namely, its mandatory character. As the Supreme Court has noted, when a court has jurisdiction over a case, it is usually obliged to exercise that jurisdiction.[203] A plaintiff presenting a case to a court is entitled to a decision on the case. As Chief Justice Marshall put it:

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.[204]

200. *Davis*, 301 U.S. at 640–45.

201. Eldred v. Ashcroft, 537 U.S. 186, 208 (2003). Actually, Congress's power to make that determination was so clear that even the plaintiff did not challenge it. He challenged Congress's decision to extend the life of copyrights already existing on the date it enacted the statute changing the copyright duration. Even as to that, the Court held the matter was a policy question for Congress, not a court.

202. Warth v. Seldin, 422 U.S. 490, 498 (1975).

203. *Cf.* Allegheny Cnty. v. Frank Mashuda Co., 360 U.S. 185, 188 (1959) ("The doctrine of abstention, under which a District Court may decline to exercise . . . its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.").

204. Cohens v. Virginia, 19 U.S. 264, 404 (1821).

Indeed, the judiciary's obligation to exercise its jurisdiction is said to be "virtually unflagging."[205]

This characteristic of judicial power poses a problem regarding the relaxation of the justiciability requirements. If the Article III limitations on the exercise of judicial power were eliminated—particularly if the rule against advisory opinions were completely swept away—courts might be bombarded with demands for determinations of legal questions, including wholly hypothetical questions, which might prove awkward. As this Essay has suggested, in many circumstances, a federal court could decide a question of law (e.g., should the courts follow the rule of *Auer* deference?) in an abstract setting with no particular facts just as well as it could decide the question based on a case with particular facts.

But this may not always be true. Requests for rulings outside the context of particular cases could cause problems. There should still be some distinction between hypothetical questions about fact patterns that are not presently occurring and challenges to actual, present behavior.[206] The former could strain the resources of the federal courts. Consider, for instance, the questions submitted to the Supreme Court by Thomas Jefferson (on behalf of George Washington) in the famous incident usually called the "Correspondence of the Justices."[207] Jefferson sought the Court's advice on the requirements imposed by certain treaties. One need only look at the twenty-nine detailed questions that Jefferson submitted (many with subparts) to understand that the Court would have had little appetite for answering all of them. The Court would hardly have the resources to provide advice on every legal question the Executive branch might face. That task is better left to attorneys in an executive agency's General Counsel's office. Similarly, answering questions about wholly hypothetical fact patterns that might be presented by parties interested in the questions for purely academic or eccentric reasons might not be the best use of federal courts' time.

205. *E.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014) (quoting Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013)).

206. *Compare, e.g.*, Letter from Thomas Jefferson to the Chief Justice and Judges of the Supreme Court of the United States (July 18, 1793), *in* 7 THE WORKS OF THOMAS JEFFERSON 451, 452 n.1 (Paul Leicester Ford ed., 1904) (discussed in the textual paragraph above and involving hypothetical questions), *with* United States v. Richardson, 418 U.S. 166, 168–70 (1974) (involving a challenge to actual, then-current government behavior, although the challenge was brought by a party who was held not to have standing to sue).

207. *See* Letter from Thomas Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782–1793, 486, 486–87 (Henry P. Johnston ed., 1890); George Washington, *Farewell Address to the People of the United States* (Sept. 17, 1796), *reprinted in* 12 THE WRITINGS OF GEORGE WASHINGTON 214, 233–34 (Jared Sparks ed., 1837).

That is not to say that advisory opinions should always be forbidden. In some cases, such opinions could be of great social value. If Congress, for example, were considering a statute that posed potential constitutional problems, an advance court ruling on the statute might inform Congress that wording the statute one way would be unconstitutional, but slightly different wording would be constitutional.[208] Such advance advice could save the constitutionality of a statute, which could be extremely important.

Similarly, as discussed in Part II, while many legal questions can be decided abstractly, some might best be decided based on particularized facts. As to some questions, such as the question presented in *Kisor v. Wilkie*, the facts of the particular case in which the question is decided hardly matter. As to other questions, a court's decision would best be informed by particular facts.

These considerations suggest that recognizing the Article III justiciability requirements as a mask should not entail allowing anyone to demand a judicial ruling on any question. Judicial rulings outside the context of an Article III case should not be wholly forbidden, but moving to the opposite extreme is not appropriate either. The appropriate middle ground is that courts should have discretion as to whether to rule on issues presented outside the context of a traditional Article III case. Courts should only exercise this discretion to decide issues when the purposes of the Article III justiciability requirements (such as promoting vigorous advocacy) are satisfied.

The principle that courts must decide justiciable cases that are within their jurisdiction should be retained. A party that brings a traditional case, even one contrived to present an issue in which the party has an ideological interest, is entitled to a decision. This longstanding principle enables parties to demand their rights.

As the above discussion suggests, to extend that entitlement to anyone who desires a ruling on any issue would go too far. It could sap judicial resources and require decisions on some issues in contexts that are not conducive to good decision-making. But vesting courts with discretion to determine when to decide an issue presented outside the context of an Article III case would allow society to enjoy the best of both worlds. When the social benefits of deciding the issue outside the traditional case process outweigh the social costs of doing

208. Consider, for example, the Affordable Care and Patient Protection Act, passed in 2010. Imagine that the Supreme Court said in advance that imposing a statutory *penalty* on persons who lack health insurance would be unconstitutional, but that imposing a *tax* on such persons would be constitutional. Such a ruling, if it permitted Congress to make an unconstitutional statute constitutional by a slight, essentially cosmetic change, would have tremendous social value. *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564, 588 (2012) (noting that the Act "describes the payment as a 'penalty,' not a 'tax'" but generously construing the penalty as a tax).

so, the court can decide the issue. When the reverse is true, the court can decline to act.

Of course, vesting courts with discretion over which issues to decide would give rise to the possibility that courts might exercise that discretion in favor of parties and causes that they like while declining to act on behalf of disfavored parties and causes. But this problem is not as great as it might seem. First, as noted earlier, if we trust courts to resolve the *merits* of issues wisely, we should be able to trust them to exercise wise discretion over which issues to decide. Second, courts would retain their duty to resolve issues presented in traditional Article III cases, so parties would not be at the mercy of courts as to whether they can demand enforcement of their rights. And finally, as noted in Part II's discussion of *Biden v. Nebraska*, one may well ask: What do we have now? In many contexts, courts exercise discretion over which issues to decide, even under the current system. As *Biden v. Nebraska* shows, the manipulability of justiciability doctrines often allows courts to reach or not reach issues based on the courts' own ideological preferences. So making this an official doctrine would, in many respects, only replace the current mask with the current reality.

CONCLUSION

The Article III justiciability requirements are a mask. They allow federal courts to pretend to merely decide cases as they come along. The reality is that the courts play a special role in interpreting and enforcing the Constitution and in policing government behavior. The reality is that an Article III case is often unnecessary to the performance of the judicial function. The reality is that courts already exercise some discretion as to which cases to decide. The Supreme Court should recognize reality, throw off the mask, and adjust its justiciability doctrines accordingly.