

NOTES

“TRICKLE DOWN” CONSTITUTIONAL INTERPRETATION: SHOULD FEDERAL LIMITS ON LEGISLATIVE CONFERRAL OF STANDING BE IMPORTED INTO STATE CONSTITUTIONAL LAW?

James W. Doggett

At both the federal and state levels of government, Congress and state legislatures have passed statutes conferring standing onto citizens to litigate in the public interest. These statutes allow citizens to assist in law enforcement and to hold the executive branch accountable to its statutory obligations. However, these conferrals of standing can be constitutionally controversial. At the federal level, the Supreme Court has ruled that statutory conferrals may sometimes impermissibly direct the federal courts to hear cases outside of the judicial power vested by Article III of the Federal Constitution. The Court has also hinted that such conferrals may infringe on the President’s authority over law enforcement. Since many state constitutions diverge from the Federal Constitution in important respects, one might expect state courts to reject the federal courts’ restrictions on legislative conferrals of standing. However, some state courts have imported the federal approach into their state constitutional law. This Note argues that state courts should be hesitant to restrict legislative conferrals of standing. Many state constitutions provide for checks on executive authority that do not exist at the federal level: The state executive is usually divided into separately elected, independent offices. Also, the justiciability rules that limit the role of state courts are typically looser than those restraining the federal courts. Within this context, legislative conferrals of standing—which allow citizens to check and supplement executive power—should frequently be uncontroversial at the state level.

INTRODUCTION

Should state constitutions be read to prevent legislatures from granting citizens broad rights to litigate on behalf of the public? At the federal level, the U.S. Supreme Court has confirmed that the Federal Constitution limits congressional power in this area, as it explained in *Lujan v. Defenders of Wildlife*¹ and *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.² First, even when statutes authorize private citizens to go to court on behalf of the public interest, litigants will often have to meet the standing requirements imposed by Article III.³ Al-

1. 504 U.S. 555 (1992).

2. 529 U.S. 765 (2000).

3. See *Lujan*, 504 U.S. at 576–78. For further discussion of federal standing requirements, see *infra* notes 19–23 and accompanying text.

though Congress may lift some standing requirements,⁴ the Constitution generally mandates that individuals must have suffered some sort of concrete injury in order to bring suit in court.⁵ Second, some legislative conferrals of standing⁶ may also infringe on the President's constitutional authority over law enforcement.⁷

Despite these limitations at the federal level, since state constitutions differ from the Federal Constitution in important respects,⁸ one might expect a different result among the states. Indeed, when faced with this question, many state appellate courts have concluded that state legislatures may constitutionally confer standing onto private citizens to represent the public interest in court.⁹ However, under the influence of federal precedent, some state appellate courts have ruled to the contrary.

4. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (discussing standing requirements that have been prudentially imposed by federal courts, but which are not constitutionally mandated).

5. See *Lujan*, 504 U.S. at 578. In *Stevens*, the Supreme Court explained that in certain limited circumstances, the federal government may assign an injury it has suffered to a private litigant, thus relieving the plaintiff from demonstrating standing herself. See *Stevens*, 529 U.S. at 773–74.

6. This Note uses the term “legislative conferrals of standing” to refer to causes of action in the federal and state courts that have been created by statute. Commentators have frequently used this term (or similar terms) to describe legislative action that directs the courts to hear a claim by certain plaintiffs. See William A. Fletcher, *The Structure of Standing*, 98 *Yale L.J.* 221, 233 (1988) [hereinafter Fletcher, *Structure*]; Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 *Mich. L. Rev.* 163, 179 n.79 (1992); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *Mich. L. Rev.* 689, 719 (2004). However, even if legislatures may constitutionally confer standing, there may still be other limits to legislative power over the courts. See *infra* note 240 and text accompanying notes 257–260.

7. See *Stevens*, 529 U.S. at 778 n.8; *Lujan*, 504 U.S. at 577; see also U.S. Const. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

8. Justiciability norms in state courts frequently differ from those that restrain the federal courts. See Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 *Harv. L. Rev.* 1833, 1844–76 (2001). Also, most state constitutions establish plural executives, dividing executive power among multiple, separately elected office holders. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *Yale L.J.* 2446, 2448 (2006). Generally, state constitutions have more in common with each other than they do with the Federal Constitution. G. Alan Tarr, *Understanding State Constitutions* 28 (1998) [hereinafter Tarr, *Understanding State Constitutions*].

9. See, e.g., *Nat'l Paint & Coatings Ass'n v. State*, 68 Cal. Rptr. 2d 360, 365 (Ct. App. 1997); *Nichols v. Kan. Governmental Ethics Comm'n*, 18 P.3d 270, 276–77 (Kan. Ct. App. 2001); *Minn. Pub. Interest Research Group v. Minn. Dep't of Labor*, 249 N.W.2d 437, 441 (Minn. 1976); *City of Picayune v. S. Reg'l Corp.*, 916 So. 2d 510, 525 (Miss. 2005); *Animal Legal Def. Fund v. Woodley*, 640 S.E.2d 777, 778 (N.C. Ct. App. 2007), appeal denied, 652 S.E.2d 254 (N.C. 2007); *Kellas v. Dep't of Corr.*, 145 P.3d 139, 141–42 (Or. 2006); *Hous. Auth. of Chester v. Penn. State Civil Serv. Comm'n*, 730 A.2d 935, 940–41 (Pa. 1999). Other courts, while not directly faced with determining the constitutionality of statutorily conferred standing, have suggested that standing requirements are not constitutionally mandated. See, e.g., *Trs. for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987); *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914, 919 (Ariz. 1985); *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991); *Hawkeye*

In *National Wildlife Federation v. Cleveland Cliffs Iron Co.*,¹⁰ the Michigan Supreme Court effectively ruled that it was outside of the scope of the state judiciary's authority to hear cases where plaintiffs could not demonstrate standing, despite a statute authorizing such a suit.¹¹ Additionally, in *Lyons v. Ryan*¹² and *Scachitti v. UBS Financial Services*,¹³ the Illinois Supreme Court held that certain legislative conferrals of standing may infringe on the authority of the state's Attorney General.¹⁴ When viewed together, these cases reveal the full separation of powers analysis that courts grappling with these issues must perform. While *Cleveland Cliffs* mostly focuses on the limits of the state judicial power, *Lyons* and *Scachitti* confront whether broad conferrals of standing might infringe on state executive power.

This Note will assess whether state courts should follow federal precedent and thus limit the power of state legislatures to confer standing. This is not a trivial question for state governments: Restricting legislative conferrals may allow the executive branch to ignore some statutory obligations¹⁵ and can prevent the legislature from authorizing private citizens to help supplement the executive's limited law enforcement resources.¹⁶

Part I will review the development of federal standing doctrine and the Supreme Court's recent treatment of legislatively conferred standing, focusing particularly on *Lujan* and *Stevens*. It will also explain the Supreme Court's decision in *ASARCO Inc. v. Kadish*, where the Court acted to protect the freedom of state courts to diverge from federal justiciability standards.¹⁷ Then, Part II will review case law in Michigan and Illinois, where courts have reached results similar to those in *Lujan* and *Stevens*, and explain the policy ramifications of restricting legislative conferrals of standing. Finally, Part III will argue that although divergences among the states prevent definite conclusions, state courts should generally not follow federal precedent and limit legislative conferrals of standing. Part III.A will explain that in many states, due to the division of executive authority among multiple office holders, state executive power is unlikely to be infringed by conferrals of standing onto private individu-

Bancorporation v. Iowa Coll. Aid Comm'n, 360 N.W.2d 798, 802 (Iowa 1985); *Roop v. City of Belfast*, 915 A.2d 966, 968 (Me. 2007).

10. 684 N.W.2d 800 (Mich. 2004). For a listing of other states where courts have limited legislative conferrals of standing, see *infra* note 100.

11. See *infra* Part II.A.

12. 780 N.E.2d 1098 (Ill. 2002).

13. 831 N.E.2d 544 (Ill. 2005).

14. See *infra* Part II.B.

15. See Richard J. Pierce, Jr., Comment, *Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power, 42 Duke L.J. 1170, 1200 (1993) (suggesting that effect of *Lujan* at federal level has been to confer "on agencies discretion to ignore many congressional policy decisions").

16. See *Nat'l Paint & Coatings Ass'n v. State*, 68 Cal. Rptr. 2d 360, 366 (Ct. App. 1997) (describing satisfaction of State Attorney General with privately filed suits enforcing California environmental statute).

17. 490 U.S. 605, 617 (1989).

als. Part III.B will then argue that state constitutions have often been read as vesting courts with judicial power that is broader in scope than the federal judicial power. It will also review the provisions of state constitutions relevant to this debate and find that, even if they are not conclusive, they should not be construed as blocking legislative conferrals. Since all state constitutions clearly differ from each other, the conclusions of this Note will be somewhat generalized. However, this Note demonstrates that state courts should give a hard look at how their own constitutions differ from the Federal Constitution before following federal precedent.¹⁸

I. CONGRESSIONALLY CONFERRED STANDING AT THE FEDERAL LEVEL AND STATE AUTONOMY TO VARY STANDING IN STATE COURTS

To fully appreciate why some state courts have been restricting legislatively conferred standing, it is first necessary to examine the trends at the federal level that have influenced them. First, Part I.A will provide a background discussion of federal standing law, focusing on its emergence in the early twentieth century, its subsequent development, and its current requirements. Part I.B will then discuss the decisions of the Supreme Court in *Lujan*, where the Court substantially curtailed congressional power to confer standing, and *Stevens*, where the Court somewhat relaxed its earlier prohibition. Finally, Part I.C will conclude by describing the Supreme Court's decision in *ASARCO*, where the Court protected the autonomy of states to vary standing requirements in their courts from federal norms.

A. *Federal Standing Doctrine and Lujan's Background*

The Supreme Court has described the "question of standing" as being, "[i]n essence . . . whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."¹⁹ In other words, standing is the key that opens access to the federal courts. While some standing requirements have been prudentially imposed by the courts,²⁰

18. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 766 (1992) (complaining that "to the extent that . . . a state constitutional discourse exists, its terms and conventions are often borrowed wholesale from federal constitutional discourse").

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

20. In *Allen v. Wright*, the Supreme Court provided a brief formulation of these prudential limitations:

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

468 U.S. 737, 751 (1984). However, courts sometimes waive these limitations. See, e.g., *Craig v. Boren*, 429 U.S. 190, 193-94 (1976) (allowing alcohol vendor to assert third-party

the core of the doctrine is often said to stem from Article III's restriction of the federal judicial power to the resolution of certain "Cases" and "Controversies."²¹ Currently, to satisfy Article III, plaintiffs in federal court must demonstrate that (1) they have suffered an actual or imminent injury to a concrete, legally protected interest, (2) their injury is fairly traceable to the challenged action of the defendant, and (3) their injury will likely be redressed by a favorable ruling.²² Thus, unless plaintiffs can satisfy these criteria, even suits that raise potentially cognizable legal claims will be dismissed.²³

Although at the moment the basic principles of standing doctrine seem relatively settled in the courts,²⁴ there is considerable academic disagreement over whether the Constitution should be read to impose standing requirements on litigants. Many commentators argue that

equal protection claim against statute that allowed women to purchase alcohol at earlier age than men).

21. U.S. Const. art. III, § 2, cl. 1; see also *Massachusetts v. EPA*, 127 S. Ct. 1438, 1452 (2007) ("Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'"); *FEC v. Akins*, 524 U.S. 11, 20 (1998) ("Article III, of course, limits Congress' grant of judicial power to 'cases' or 'controversies.'"). However, it is important to note that at times the Supreme Court has rooted standing in Article III more generally, relying less on the case and controversy language. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (asserting that limits on judicial power "depend[] largely upon common understanding of what activities are appropriate . . . to courts").

22. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan*, 504 U.S. at 560–61. However, in *Lujan*, the Supreme Court explained that when Congress has afforded citizens a right to mandate executive compliance with a procedural duty, litigants need not meet "all the normal standards for redressability and immediacy" when filing suit. *Id.* at 572 n.7; see also *Massachusetts*, 127 S. Ct. at 1453 (confirming *Lujan* on this point).

Requiring plaintiffs to demonstrate standing reflects a number of purposes, tied to both the constitutional and prudential underpinnings of the doctrine. Professor, now Judge, Fletcher has briefly summarized the traditional arguments for standing as being that it

ensur[es] that litigants are truly adverse and therefore likely to present the case effectively, ensur[es] that the people most directly concerned are able to litigate the questions at issue, ensur[es] that a concrete case informs the court of the consequences of its decisions, and prevent[s] the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches.

Fletcher, *Structure*, supra note 6, at 222 (footnotes omitted).

23. For example, it is often said that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." See, e.g., *Warth*, 422 U.S. at 500; *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) ("The 'legal interest' test goes to the merits. The question of standing is different."). Of course, disentangling the merits of a case from the standing of litigants may sometimes be challenging, if not impossible. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (noting that standing and merits questions frequently overlap).

24. Compare *Allen*, 468 U.S. at 751 (articulating standing requirements in 1984), with *Massachusetts*, 127 S. Ct. at 1453 (articulating standing requirements in 2007). Of course, even if there is agreement about the basic components of the federal standing test, there is frequent dispute over their application. See *infra* note 178 (discussing difficulty courts have had applying standing doctrine consistently).

standing is a relatively recent creation²⁵ that is out of step with “the relevant constitutional text and history,”²⁶ while others assert that the doctrine is grounded in constitutional values that have been long recognized by the courts.²⁷

The dispute over whether standing is constitutionally mandated comes into sharpest focus when one examines the role played by Congress in shaping standing requirements. If standing were entirely prudential and imposed by the courts as a means of judicial self-governance, then Congress could abrogate standing requirements and direct courts to hear claims by certain plaintiffs.²⁸ However, if the roots of standing are constitutional, then there are clearly limits to Congress’s freedom to confer standing by statute.²⁹

Questions over the scope of Congress’s authority³⁰ have arisen because of a number of federal statutes that direct the courts to hear suits filed by plaintiffs who might not be able to show an injury sufficient to demonstrate standing. First, many environmental statutes contain citizen suit provisions, which allow “any person” to bring a civil action against a noncompliant private party or against federal agencies for failure to carry out nondiscretionary duties.³¹ Second, four statutes authorize “qui tam” actions, which allow individuals to bring suit on behalf of the federal government to enforce federal law.³² Unlike plaintiffs filing citizen suits, qui

25. See, e.g., Fletcher, *Structure*, supra note 6, at 224.

26. Sunstein, supra note 6, at 167.

27. See Woolhandler & Nelson, supra note 6, at 692 (“[T]he nineteenth-century Supreme Court did see a constitutional dimension to standing doctrine.”); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881, 883 (1983) (linking standing doctrine to separation of powers principles dating from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). For further discussion of this academic debate, see *infra* note 34.

28. For example, the Supreme Court has established a prudential rule against deciding cases asserting claims outside of the “zone of interests” protected by a statute. In *Bennett v. Spear*, however, the Court ruled that the language of the Endangered Species Act (ESA)—allowing “any person” to bring suit under the Act—lifted this prudential requirement. 520 U.S. 154, 162–65 (1997); see also Fletcher, *Structure*, supra note 6, at 251 (“The Court has often stated that Congress can confer standing by statute, limited only by the Article III requirement that a plaintiff suffer ‘injury in fact’ or ‘distinct and palpable injury.’” (footnotes omitted)).

29. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–77 (1992) (rejecting congressional conferral of standing absent particularized injury).

30. See *infra* Parts I.B.1–2.

31. For example, the Clean Air Act provides that “any person may commence a civil action on his own behalf . . . against [the government] where there is alleged a failure . . . to perform any act or duty under this chapter which is not discretionary.” 42 U.S.C. § 7604(a) (2000). For similar provisions, see, e.g., Clean Water Act, 33 U.S.C. § 1365 (2000); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9654.

32. Of the four federal statutes authorizing qui tam actions today, the False Claims Act is the most frequently used. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 & n.1 (2000). The Act imposes civil liability upon “[a]ny person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United

tam plaintiffs are entitled to receive a portion of any monetary recovery resulting from the suit.³³

Prior to *Lujan* and *Stevens*, it was fairly settled that the Constitution placed some limitations upon Congress’s authority to confer standing, but it was unclear how far these restrictions reached.³⁴ During the 1960s and 1970s, as the Court began to articulate modern standing doctrine, it suggested that the scope of congressional power in this area might be quite broad. For example, in 1972 the Court indicated that outside of the well-established limits of Article III—which prevent the courts from rendering advisory opinions, entertaining “friendly” suits, or resolving “political questions”—“the question whether the litigant is a proper party to request an adjudication of a particular issue . . . is one within the power of Congress to determine.”³⁵ In 1975, however, the Court seemed to change tack in *Warth v. Seldin*, requiring that all litigants demonstrate “a distinct and palpable injury to [themselves],” even in situations where

States Government . . . a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a) (2000).

33. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 *Yale L.J.* 341, 341 (1989). The False Claims Act allows the plaintiff to recover between fifteen to thirty percent of the proceeds from the suit, in addition to attorney’s fees. 31 U.S.C. § 3730(d)(1)–(2).

34. It is beyond the scope of this Note to delve too deeply into the historical debate over standing. Although the term “standing” was not used by the Supreme Court until 1944, Sunstein, *supra* note 6, at 169; see *Stark v. Wickard*, 321 U.S. 288, 302 (1944), there are arguments resting on constitutional history that both favor and disfavor broad congressional power to confer modern standing onto litigants. For example, statutes authorizing qui tam actions have been on the books since the nation’s first decade. Sunstein, *supra* note 6, at 175. However, an equally strong American tradition has been the prohibition on the issuance of advisory opinions by the federal courts. Relying on earlier precedents, in 1911 the Supreme Court made clear that Article III does not permit Congress to pass statutes that effectively force courts to issue advisory opinions on the constitutionality of other laws. See *Muskat v. United States*, 219 U.S. 346, 356–62 (1911); *Woolhandler & Nelson*, *supra* note 6, at 721–23. For a more detailed discussion of the history of standing, see *Fletcher, Structure*, *supra* note 6, at 224–29; Sunstein, *supra* note 6, at 168–97. See generally *Woolhandler & Nelson*, *supra* note 6 (arguing that constitutional history does not foreclose acceptability of current standing doctrine). One likely reason the historical record has produced so little consensus is that standing is a judicial response to twentieth century “developments in the legal culture” like the administrative state and the recognition of new constitutional rights. See Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 126–27 (5th ed. 2003). Therefore, the historical record simply cannot be entirely dispositive.

35. *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citations and internal quotation marks omitted). Moreover, the Court supported its argument by citing to an article asserting broad congressional authority over standing. See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 *U. Pa. L. Rev.* 1033, 1043 (1968) (“The burden of my argument, so far, has been that there are no compelling constitutional reasons for denying jurisdiction of citizen and taxpayer actions The Court has clearly sanctioned statutory provisions allowing actions by plaintiffs whose legal status is not in issue.”).

Congress had not required such a finding.³⁶ *Warth*, however, did not clearly resolve the extent of Congress's authority to define what constitutes an injury in the context of a citizen suit provision,³⁷ leaving that question to the *Lujan* Court.

B. *Lujan* and *Stevens*

1. *Lujan* and *Citizen Suits*. — In 1992, after the Supreme Court handed down *Lujan*, one commentator wrote that it “may well be one of the most important standing cases since World War II.”³⁸ The case arose when the Secretary of the Interior rescinded an earlier rule requiring federal agencies to comply with the Endangered Species Act (ESA) while acting outside the boundaries of the United States.³⁹ When environmental groups challenged this decision, the Supreme Court held that the groups failed to satisfy usual standing requirements.⁴⁰ This left the question of whether the ESA's citizen suit provision⁴¹ alone was sufficient to confer standing.

The Court, speaking through Justice Scalia, rejected the argument that the citizen suit provision could constitutionally confer “upon all persons . . . an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law.”⁴² While the Court noted that Congress frequently confers actionable rights, it distinguished

36. 422 U.S. 490, 501 (1975). Even before *Sierra Club* and *Warth*, the Court had suggested such a requirement in *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (“The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact . . .”).

37. See *Warth*, 422 U.S. at 493 (involving claims under 42 U.S.C. §§ 1981, 1982, and 1983).

38. See Sunstein, *supra* note 6, at 165.

39. 16 U.S.C. §§ 1531–1544 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558–59 (1992). Specifically, the Act required that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species.” 16 U.S.C. § 1536(a)(2). Regulations had extended the applicability of this provision to actions taken abroad. *Lujan*, 504 U.S. at 558.

40. *Lujan*, 504 U.S. at 559–71. The Court found that the plaintiffs, who had previously traveled abroad to observe endangered species and who alleged that they planned to do so again, had not sustained a sufficient injury to establish standing. *Id.* at 563–64. Justice Scalia explained that “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.” *Id.* at 564. Additionally, a plurality of the Court suggested that plaintiffs could also not satisfy the redressability leg of the standing test, *id.* at 557, 568–71, since they could not guarantee that the “consultation[s]” between the Secretary and other agencies would have any impact on the endangered species. *Id.* at 568.

41. 16 U.S.C. § 1540(g). In part, the provision provides that “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” *Id.*

42. *Lujan*, 504 U.S. at 573.

the ESA citizen suit provision from those statutes that merely elevate "concrete, *de facto* injuries that were previously inadequate in law" to the "status of legally cognizable injuries."⁴³ In other words, there can be no constitutional cause of action without an injury, and Congress does not have unlimited power to define injuries.⁴⁴ The plaintiffs in *Lujan* simply could not prove they had been injured by the procedural failings of the rulemaking.⁴⁵

Lujan is significant not only for its holding that Congress has limited power to define injuries, but also for its underlying rationale.⁴⁶ Unsurprisingly, the Court held that standing cannot be waived by Congress because it derives from Article III's limitation of the judicial power to "Cases" and "Controversies," which maintains a "separate and distinct constitutional role" for the judiciary.⁴⁷ However, the Court expanded its analysis to justify standing by making reference to Article II:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."⁴⁸

43. *Id.* at 578.

44. However, Congress does have some power. Justice Kennedy, upon whose concurrence the *Lujan* majority relied, used the following formulation to describe congressional authority: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before [H]owever, Congress must . . . identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id.* at 580 (Kennedy, J., concurring). This point was recently underscored by the Court in its decision in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

Despite this concession to congressional authority, the Court has been criticized for arrogating excessive authority to the judiciary in this area. One commentator argued, "[I]n authorizing . . . judges to choose whether to characterize a particular form of injury or causal relationship in a manner that permits the judge to enforce or not to enforce a particular statutory command, [*Lujan*] gives courts discretion to decide which congressional policy decisions bind agencies." Pierce, *supra* note 15, at 1200.

45. See *supra* note 40.

46. See Sunstein, *supra* note 6, at 211–14.

47. *Lujan*, 504 U.S. at 576.

48. *Id.* at 577 (quoting U.S. Const. art. II, § 3). Although the Court had rejected this analysis once before, see *Flast v. Cohen*, 392 U.S. 83, 100–01 (1968), this move was not entirely surprising. Since *Flast*, the Court had occasionally justified standing requirements by evoking separation of powers. See *Allen v. Wright*, 468 U.S. 737, 761 (1984) ("The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' We could not recognize respondents' standing in this case without running afoul of that structural principle." (citation omitted)); *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (making similar argument). Additionally, a decade before *Lujan*, then-Judge Scalia had made very clear that he viewed standing as implicating broad separation of powers concerns. See Scalia, *supra* note 27, at 881–82.

Importantly, *Lujan* did not reveal whether this separation of powers analysis commanded the full support of the Court: Justice Scalia relied on Justices Kennedy and Souter for a majority, and their concurrence was notably silent on this question.⁴⁹ The dissent vehemently attacked the plurality's separation of powers analysis. Justice Blackmun noted that the real effect of the decision was not to restrain the courts, but rather to disempower Congress, which relied on citizen suits to police broad grants of authority to the Executive Branch.⁵⁰

While Justice Scalia's opinion rested on an expansive separation of powers rationale, he limited the potential scope of the Court's holding. He clarified that *Lujan* was not "a case where concrete injury [had] been suffered by many persons."⁵¹ This caveat has proved prescient, as the Court has since ruled that some widely shared injuries may indeed suffice to provide standing for plaintiffs.⁵² Importantly, Justice Scalia also noted that *Lujan* was not the "unusual case in which Congress [had] created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff."⁵³ In addition to this clear reference to *qui tam* actions, Scalia also cabined the decision by recognizing that "it is clear that in suits *against the Government*, at least, the concrete injury requirement must remain."⁵⁴ Although the Court has continued to apply its usual standing tests to citizen suit enforcement actions against private parties,⁵⁵ this reference could suggest that the same separation of powers concerns might

49. Although Justice Kennedy noted that he agreed "with the essential parts of the Court's analysis," his concurrence only referenced Article III in explaining the constitutional underpinnings of standing. *Lujan*, 504 U.S. at 579, 580 (Kennedy, J., concurring).

50. *Id.* at 602 (Blackmun, J., dissenting). It is unsurprising that this argument failed to convince Justice Scalia. He had earlier written, "Does what I have said mean that, so long as no minority interests are affected, important legislative purposes, heralded in the halls of Congress, can be lost or misdirected in the vast hallways of the federal bureaucracy? Of *course* it does—and a good thing, too." Scalia, *supra* note 27, at 897 (internal quotation marks and brackets omitted).

51. *Lujan*, 504 U.S. at 572.

52. Subsequently, in *FEC v. Akins*, 524 U.S. 11 (1998), the Court held that a citizen suit provision in the Federal Election Campaign Act allowed plaintiffs to bring a suit for the "informational injury" to all voters caused by the Federal Election Commission's failure to classify a group as a "political committee," subject to certain disclosure requirements. *Id.* at 13, 24. With Scalia dissenting, the Court reasoned that "the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes." *Id.* at 24. See also Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of Laidlaw*, 12 *Duke Envtl. L. & Pol'y F.* 119, 136–43 (2001) (explaining how Court's decision in *Laidlaw* rejected most restrictive lower court readings of *Lujan*).

53. *Lujan*, 504 U.S. at 573.

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

55. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 173, 180 (2000).

not arise when citizen suits do not explicitly interfere with the internal operations of the Executive Branch.⁵⁶

2. *Stevens and Qui Tam Actions*. — Eight years after *Lujan*, the Court finally had an opportunity to clarify the meaning of that decision for qui tam actions, which authorize private individuals to bring suit on behalf of the government.⁵⁷ In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, a former employee of the Vermont Agency of Natural Resources sued under the False Claims Act (FCA),⁵⁸ alleging that his prior employer had defrauded the Environmental Protection Agency (EPA) in the management of federal grants.⁵⁹ Although the Court, again speaking through Justice Scalia, eventually held that the FCA did not authorize suits against the states, it also held that the plaintiff did have standing to bring the suit.⁶⁰

The Court’s standing analysis proceeded in three steps.⁶¹ First, the Court observed that the United States had clearly suffered an “injury in fact”—“both the injury to its sovereignty arising from violation of its laws . . . and the proprietary injury resulting from the alleged fraud.”⁶² Second, the Court attempted to arrive at a formula that would allow the plaintiff to advance the government’s interest without having suffered any concrete injury himself. Justice Scalia noted that the plaintiff was not merely advancing the government’s interest alone since the statute granted “the [plaintiff] himself an interest *in the lawsuit*,” which he could continue to pursue even if the United States intervened in the suit.⁶³ Although in *Lujan*, Justice Scalia had suggested that the plaintiff’s monetary interest in the suit could suffice to satisfy standing,⁶⁴ he rejected that view in *Stevens*,⁶⁵ arguing instead that the government had partially assigned its interest in the suit to the plaintiff.⁶⁶ The Court concluded that allowing such assignments was consistent with its case law allowing “repre-

56. But see Sunstein, *supra* note 6, at 231–32 (“After *Lujan*, the citizen-suit provisions are probably unconstitutional even when the defendant is a private citizen or corporation.”).

57. See *supra* notes 32–33 and accompanying text.

58. 31 U.S.C. § 3730(b)–(h) (2000).

59. 529 U.S. 765, 765 (2000).

60. *Id.* at 787–88.

61. For a more complete analysis of the holding in *Stevens*, see Myriam E. Gilles, Representational Standing: *U.S. ex rel. Stevens* and the Future of Public Law Litigation, 89 Cal. L. Rev. 315, 332–40 (2001).

62. *Stevens*, 529 U.S. at 771.

63. *Id.* at 772.

64. See *supra* note 53 and accompanying text.

65. *Stevens*, 529 U.S. at 772. Justice Scalia wrote, “There is no doubt, of course, that as to this portion of the recovery . . . [the plaintiff] has a concrete private interest But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing.” *Id.* (internal quotation marks and citations omitted).

66. *Id.* at 773.

sentational standing” for assignees in the private law context.⁶⁷ Finally, to support this conclusion, the Court turned to the long history of *qui tam* actions in the United States, noting that “Article III’s restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”⁶⁸ Thus, the historical pedigree of *qui tam* actions appears to have shielded them from more exacting constitutional analysis.⁶⁹

Although *Stevens* finally addressed the constitutionality of *qui tam* actions, it left other important questions unresolved. First, the Court has yet to settle how much of a barrier Article II poses to congressional conferrals of standing.⁷⁰ Following *Lujan*, the Court suggested that standing derives exclusively from Article III, but that Article II could still be implicated when congressional conferrals of standing affect presidential powers.⁷¹ However, despite the fact that *qui tam* statutes allow private parties to perform the executive function of civil prosecution,⁷² the Court in *Stevens* “express[ed] no view on the question [of] whether *qui tam* suits violate Article II” since the FCA had not been challenged on that ground.⁷³ Thus, although the Court refused to address Article II in *Stevens*, and has similarly passed on this issue in recent standing cases involving citizen suits,⁷⁴ it remains unclear whether these concerns will resur-

67. *Id.* at 773–74.

68. *Id.* at 774–78 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)).

69. See Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. Kan. L. Rev. 383, 404–05 (2001).

70. *Id.* at 383–84.

71. Justice Scalia explained, “The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches. This case calls for nothing more than a straightforward application of our standing jurisprudence, which . . . derives from Article III and not Article II.” *Steel Co.*, 523 U.S. at 102 n.4. However, as in *Lujan*, the Court has occasionally used broader language that suggests that even if standing is rooted in Article III, it may have some structural underpinning as well. See *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

72. See *supra* note 32 and accompanying text. Some commentators have viewed privatized law enforcement as raising serious separation of powers concerns. See Harold J. Kent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793, 1794 (1993) (“In light of the policymaking inherent in enforcement of federal law, Article II prohibits Congress from vesting in private parties the power to bring enforcement actions on behalf of the public without allowing for sufficient executive control over the litigation.”).

73. 529 U.S. at 778 n.8. Prior to *Stevens*, the Fifth Circuit had struck down the *qui tam* provision of the FCA as a violation of separation of powers, but this decision was reversed en banc. *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 752, 758 (5th Cir. 2001) (en banc).

74. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); *id.* at 209 (Scalia, J., dissenting); *FEC v. Akins*, 524 U.S. 11, 19–26 (1998); *id.* at 36–37 (Scalia, J., dissenting).

face in the future. Second, *Stevens* also leaves open the possibility that the assignment of governmental injuries might provide Congress a backdoor means of conveying standing, even after *Lujan*. At least one commentator has argued that the impact of *Stevens* could be considerable,⁷⁵ but it seems possible that the Court could attempt to limit such conferrals to situations where the government's proprietary interests were injured,⁷⁶ as was the case in *Stevens*.⁷⁷ It is beyond the scope of this Note to explore these questions in depth,⁷⁸ but their continued existence reveals that the Court may not yet have had its final word on these issues.

Thus, although *Lujan* suggested that separation of powers created nearly insurmountable barriers to Congress's attempts to lift standing requirements, these concerns were diffused somewhat in *Stevens*. While the rationale behind *Lujan* and *Stevens* remains somewhat obscure, their holdings are not: Plaintiffs filing citizen suits remain bound to demonstrate standing, while plaintiffs filing qui tam actions may generally rely on the government's conferral of standing through injuries it has suffered.

C. ASARCO and Divergent Standing in State Courts

While the previous two sections focused on standing doctrine in the federal courts, this section will describe how the Supreme Court has reacted to standing requirements in state courts that diverge from those in federal court. Since state courts are not organized under the Federal Constitution, but rather under state constitutions, states have been free to vary justiciability standards in their courts from federal norms.⁷⁹ However, the Supreme Court has had occasion to speak on the propriety of divergent standing through its review of state court judgments resolving questions of federal law.⁸⁰

*ASARCO Inc. v. Kadish*⁸¹ is the leading case in this area. In *ASARCO*, private taxpayers and the Arizona Education Association brought suit in

75. Myriam Gilles argues that *Stevens* might allow Congress, within certain bounds, to authorize third-party "agents" not only to represent the government's proprietary interests in court (such as that suffered from fraud in the false claims context), but also its general sovereign interest in law enforcement. See Gilles, *supra* note 61, at 353–55, 360–64.

76. If the Court did take this approach, however, it would have to reconcile this limitation with the history of qui tam actions, which were used for a variety of purposes in early American history, many of which did not involve vindication of the government's proprietary interests. See Sunstein, *supra* note 6, at 175.

77. 529 U.S. at 771.

78. For further discussion of whether qui tam actions and citizen suit provisions violate Article II, see generally Johnson, *supra* note 69 (arguing that Take Care Clause only requires sufficient presidential control over law enforcement, not personal presidential enforcement).

79. See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

80. See 28 U.S.C. § 1257 (2000) (conferring jurisdiction on U.S. Supreme Court to review "[f]inal judgments . . . by the highest court of a State . . . where the validity of a treaty or statute of the United States is drawn in question").

81. 490 U.S. 605.

Arizona court, seeking a declaration that a state statute governing the lease of state lands violated federal law.⁸² Eventually, the plaintiffs prevailed in the Arizona Supreme Court, and the leaseholders whose leases stood to be invalidated by the decision appealed to the U.S. Supreme Court.⁸³ However, this presented a justiciability dilemma for the Supreme Court, since the plaintiffs would not have satisfied the standing requirements necessary to initially bring their case in federal court.⁸⁴ Although the Supreme Court recognized that hearing the case would allow the plaintiffs to obtain access to the federal courts they could not have achieved otherwise, it still ruled on the merits.⁸⁵ It resolved this conundrum by announcing the following rule:

When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.⁸⁶

Since the leaseholders petitioning for review had clearly suffered an injury from the state judgment potentially invalidating their leases, standing existed to hear the case.⁸⁷

Commentators have expressed unease about the result in *ASARCO*, however, pointing to several problems it creates. First, *ASARCO* creates an asymmetrical right of appeal: It bars appeals from plaintiffs claiming a federal right who have lost in state court, as “they never had, and [would] not have after the state court’s decision, any adversely affected interest.”⁸⁸ This is a somewhat perverse result, since state courts may be predisposed to uphold their own state’s laws against challenges under federal law.⁸⁹

82. *Id.* at 610. Upon Arizona’s admission to the Union, the federal government transferred some federally owned land to the new state and mandated that it be used to support “the common schools of the state . . . and for internal improvements” See *Kadish v. Ariz. State Land Dep’t*, 747 P.2d 1183, 1185 (Ariz. 1987), *aff’d sub nom. ASARCO*, 490 U.S. 605. These restrictions were codified in the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 61-219, § 24, 36 Stat. 557, 572–73, and in the Arizona Constitution. *ASARCO*, 490 U.S. at 610. In *ASARCO*, the plaintiffs alleged that Arizona’s leasing of the mineral rights for these lands to private parties violated the state’s obligations under federal law. *Id.*

83. *ASARCO*, 409 U.S. at 610.

84. *Id.* at 612–17.

85. *Id.* at 624.

86. *Id.* at 623–24.

87. *Id.* at 618–19.

88. William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 Cal. L. Rev. 263, 281 (1990) [hereinafter Fletcher, *State Court*].

89. *Id.* As Judge Fletcher explains, “[T]here has always been greater distrust of state court decisions sustaining state statutes against federal challenges than of decisions striking down state statutes.” *Id.* Indeed, the original Judiciary Act of 1789 limited the Supreme Court’s review of state court judgments to cases where the state court had *denied* a claim

Second, *ASARCO*'s protection of differential state standing requirements may distort congressional intent when federal causes of action are adjudicated in state court, as it could allow for more vigorous private enforcement than Congress envisioned.⁹⁰ This could also result in forum shopping, as plaintiffs attempt to avoid strict federal justiciability norms.⁹¹ To resolve these problems, these critics have suggested that federal standing requirements should be used in state court when considering questions of federal law.⁹²

However, since these concerns stem only from adjudicating federal law, these commentators have not suggested that federal standing should be imposed when considering issues of state law.⁹³ Indeed, state courts

based on federal law. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87; *Missouri ex rel. Carey v. Andriano*, 138 U.S. 496, 499–500 (1891) (“The object of the present judiciary act was not to give a right of review wherever the validity of an act of Congress was drawn in question, but to prevent the courts of the several States from impairing or frittering away the authority of the federal government”); Fletcher, *State Court*, supra note 88, at 281 n.89.

90. See, e.g., Paul J. Katz, Comment, Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-*Erie* Analysis, 99 Nw. U. L. Rev. 1315, 1317 (2005) (arguing that “Congress’s strong interest in the uniform enforcement of its laws militates toward a single standing threshold” for federal and state courts).

91. *Id.* at 1316 (“[A] state with a loose standing requirement will invite a flood of plaintiffs that may over-enforce a statute”); see generally Kevin M. Clermont, Federal Courts, Practice & Procedure: Reverse-*Erie*, 82 Notre Dame L. Rev. 1 (2006) (discussing reverse-*Erie* problem of deciding, in state court, when state law applies and when federal law applies). Importantly, defendants may not be able to remove a case to federal court if such removal would result in the case being dismissed due to the plaintiff’s inability to satisfy federal justiciability norms. See Christopher S. Elmendorf, Note, State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs, 110 Yale L.J. 1003, 1012 & n.56 (2001).

92. Fletcher, *State Courts*, supra note 88, at 303–04; Katz, supra note 90, at 1353. It is possible that state courts will face these questions when hearing cases filed under federal citizen suit provisions. However, such suits are rare in state court, and there is some uncertainty whether most federal citizen suit provisions grant state courts concurrent jurisdiction with the federal courts. For a discussion of these issues and a defense of the use of federal citizen suits in state court, see generally Elmendorf, supra note 91.

93. See Fletcher, *State Courts*, supra note 88, at 294 (arguing that state courts should “be required to follow article III standards of standing, ripeness, and mootness when deciding *federal* questions” (emphasis added)); Katz, supra note 90, at 1320 (suggesting that states might permissibly use nonfederal standing limits when faced with issues of state law that incorporate federal law).

State statutes and causes of action incorporating federal law or authorizing its enforcement present difficult questions beyond the scope of this Note. For example, some state citizen suit provisions suggest that they might be used to enforce not only state law, but also federal law. See N.J. Stat. Ann. § 2A:35A-4(a) (West 2000) (“Any person may commence a civil action in a court of competent jurisdiction against any other person alleged to be in violation of *any* statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment.” (emphasis added)).

First, if a state court wished to impose federal justiciability norms when deciding federal questions, it would need to determine whether a state statute or cause of action actually presented a federal question. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue*

should feel confident embracing standing doctrine that diverges from federal norms. In *ASARCO*, despite the problems described above, the Supreme Court sought to avoid a decision that would have the effect of imposing “federal standing requirements on the state courts whenever they adjudicate issues of federal law.”⁹⁴ Justice Kennedy wrote that imposing federal requirements would “denigrate the authority of the state courts” and “come at the cost of much disrespect to state-court proceedings.”⁹⁵ Thus, while the Federal Constitution imposes some constraints on the shape of state government,⁹⁶ it clearly does not mandate that state justiciability mirror federal justiciability. Instead, as *ASARCO* demonstrates, the Supreme Court will bend over backwards to guarantee a state’s freedom to vary its standing requirements.

II. CITIZEN SUITS AND QUI TAM ACTIONS IN THE STATE COURTS

As discussed above, since state court systems are not organized under the Federal Constitution, but rather under each state’s constitution, the Supreme Court’s recent standing jurisprudence does not bind state courts.⁹⁷ Unlike their federal counterparts, many state appellate courts have not restricted legislative power to confer standing on particular

Eng’g & Mfg., 545 U.S. 308, 319–20 (2005) (suggesting that a “contested federal issue at the heart of [a] state-law . . . claim” may sometimes present a federal question sufficient to allow removal to federal court).

Second, a state citizen suit enforcing federal law could conceivably infringe on federal executive power, just as a federal citizen suit might. Cf. *supra* notes 48 and 70–74 and accompanying text. That said, this is an area of some controversy, and it is unclear how a unitary federal executive can be squared with the traditional role of states in enforcing some federal law. See, e.g., Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. Kan. L. Rev. 1075, 1078 (1997) (arguing that direct state enforcement of federal law would be impermissible assuming a unitary executive, but that executive power would not be offended by lack of control over state regulation pursuant to federal standards).

Finally, it is unlikely a state court could ever mandate a federal agency’s compliance with federal law. Cf. *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 600 (1821) (blocking issuance of writ of mandamus from state court to compel federal action).

94. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 620 (1989). The Supreme Court recognized that dismissing the case for want of jurisdiction could have the effect of robbing the judgment of the Arizona Supreme Court of its preclusive effect in federal court, forcing a choice between binding effect and state justiciability. *Id.* at 622–23.

95. *Id.* at 622–23.

96. While the Guaranty Clause of the Federal Constitution establishes that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government,” U.S. Const. art. IV, § 4, the federal courts have largely ruled claims under it nonjusticiable, *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980). However, this rule is not entirely absolute: For example, the Supreme Court has held that state legislative districts not apportioned on a population basis violate the Equal Protection Clause. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Baker v. Carr*, 369 U.S. 186, 237 (1962). For further discussion of how the Federal Constitution may mandate some separation of powers at the state level, see generally Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 *Roger Williams U. L. Rev.* 51 (1998).

97. See *supra* Part I.C.

plaintiffs.⁹⁸ Given the significant structural differences between the federal and state constitutions,⁹⁹ this divergent result might be expected. However, voicing concerns similar to those raised in *Lujan* and *Stevens*, certain state courts have begun to express skepticism toward legislative conferral of standing.¹⁰⁰ This Part will summarize recent developments in two states where courts have taken variations on this approach and explore the practical implications of these decisions.

Part II.A will examine *National Wildlife Federation v. Cleveland Cliffs Iron Co.*,¹⁰¹ a case in which the Michigan Supreme Court relied on *Lujan* to strongly suggest that a citizen suit provision in a state environmental law was unconstitutional. Then, Part II.B will turn to two Illinois decisions—*Lyons v. Ryan* and *Scachitti v. UBS Financial Services*—where that state's supreme court considered whether a state statute authorizing qui tam actions unduly infringed on the power of the state's Attorney General.¹⁰² Together, the cases demonstrate how the concerns raised by the U.S. Supreme Court in *Lujan* and *Stevens* have played out in state court. Finally, Part II.C will explore the practical implications of deci-

98. See supra note 9.

99. See infra Part III.

100. In addition to the two states discussed at length in this Note, legislative conferrals of standing have been limited in other states as well. For example, although a North Dakota statute provides that "[a]ny party to any proceeding heard by an administrative agency" may appeal an agency's decision, N.D. Cent. Code § 28-32-42(1) (2001), the North Dakota Supreme Court has blocked certain appeals, noting that "the limits of judicial power to review agency and executive action are marked by several doctrinal boundaries, including the concept of standing," *Shark v. U.S.* West Commc'ns, 545 N.W.2d 194, 196 (N.D. 1996). Similarly, the Idaho Supreme Court has ruled that a statute allowing any "qualified elector" to bring suit to challenge the constitutionality of approved ballot initiatives prior to elections is unconstitutional. *Noh v. Cenarrusa*, 53 P.3d 1217, 1218–22 (Idaho 2002) (quoting Idaho Code Ann. § 34-1809 (1997)). Although this decision might be best characterized as resting more on ripeness concerns than standing, the state's supreme court declared unequivocally that "Idaho has adopted the federal justiciability requirement" and that legislatures "may not circumvent it." *Id.* at 1220.

Other state courts have incorporated some form of the federal injury-in-fact requirement into their state constitutional doctrine as well. See, e.g., *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 550 S.E.2d 287, 291–92 (S.C. 2001); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Town of Parker v. Milton*, 726 A.2d 477, 480 (Vt. 1998); *Coleman v. Sopher*, 459 S.E.2d 367, 372 n.6 (W. Va. 1995). Some states, while constitutionalizing the injury requirement, have retained the freedom to apply it more liberally than the federal courts. See, e.g., *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 436–37 & nn.7–8 (Colo. 2000) (noting that injuries in federal court must be "concrete and particularized" and "actual or imminent," but that Colorado's "standing doctrine does not require these refinements"); *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 967, 972 (Utah 2006) (explaining that Utah applies "traditional" federal test, but also allows litigants to demonstrate standing through "alternative test" when "issues of significant public importance" are at stake).

101. 684 N.W.2d 800 (Mich. 2004).

102. *Scachitti v. UBS Fin. Servs.*, 831 N.E.2d 544 (Ill. 2005); *Lyons v. Ryan*, 780 N.E.2d 1098 (Ill. 2002).

sions limiting legislative power to confer standing, explaining the policy arguments for and against citizen involvement in law enforcement.

A. *Michigan*: Cleveland Cliffs

Like *Lujan* and many other federal standing cases,¹⁰³ *National Wildlife Federation v. Cleveland Cliffs Iron Co.* developed out of an environmental dispute.¹⁰⁴ The case arose when a mining company applied for a permit from the Michigan Department of Environmental Quality to expand its operations in the state's Upper Peninsula.¹⁰⁵ After the permit was issued, a conservation group challenged the action by filing suit under the Michigan Environmental Protection Act (MEPA), which allows "any person" to maintain an action for the protection of the state's natural resources.¹⁰⁶ The case resulted in a sharply divided court¹⁰⁷ and a particularly strange majority opinion. The court found that the plaintiffs could satisfy the state's standing requirements without reliance on MEPA's citizen suit provision, and purported to reach no other issue.¹⁰⁸ However, the opinion only momentarily addresses that subject,¹⁰⁹ with

103. See Percival & Goger, *supra* note 52, at 191–92; *supra* notes 39–40 and accompanying text.

104. 684 N.W.2d 800. *Cleveland Cliffs* has attracted some academic attention. For a more detailed discussion of *Cleveland Cliffs*'s background and its impact in Michigan, see generally Heather Terry, Comment, Still Standing but "Teed Up": The Michigan Environmental Protection Act's Citizen Suit Provision After *National Wildlife Federation v. Cleveland Cliffs*, 2005 Mich. St. L. Rev 1297. For additional discussion of the case's holding, see generally Jennifer M. Minuchi, Judicial Branch Standing—The Decision to Apply Federal Judicial Standing in a State Forum and Its Impact on a Government by, of, and for the People. *National Wildlife Federation v. Cleveland Cliffs Iron Company*, 684 N.W.2d 800 (Mich. 2004), 36 Rutgers L.J. 1487 (2005). When the case was before the Michigan Supreme Court, it also garnered considerable interest within Michigan, generating multiple amicus briefs and some press coverage. See Terry, *supra*, at 1298.

105. *Cleveland Cliffs*, 684 N.W.2d at 804.

106. The Act specifically provides that:

The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

Mich. Comp. Laws Ann. § 324.1701(1) (West 1999).

Suits under the Act are not premised on a violation of law, but rather on a showing of environmental harm, the exact meaning of which the Act does not clearly specify. Terry, *supra* note 104, at 1304.

107. The court effectively divided 4-3 but was unanimous in holding that the plaintiffs had standing. *Cleveland Cliffs*, 684 N.W.2d at 826, 839.

108. *Id.* at 814–15 (majority opinion). The situation can be contrasted with that in *Lujan*. In that case, the U.S. Supreme Court found that the plaintiffs could not satisfy federal standing requirements, and thus had to determine whether the ESA's citizen suit provision alone was sufficient to confer standing. See *supra* notes 40–41 and accompanying text.

109. 684 N.W.2d at 814–15.

the great bulk of its twenty-three pages devoted to demonstrating that MEPA's conferral of standing is unconstitutional.¹¹⁰

Before examining the arguments advanced by the Michigan Supreme Court, it is helpful to first examine an earlier case, which sets the stage for the decision. Three years before *Cleveland Cliffs*, in *Lee v. Macomb County Board of Commissioners*, the Michigan Supreme Court had imported the federal standing test as explained in *Lujan* into Michigan law.¹¹¹ Although the opinion in *Lee* was relatively brief, it was the first time that the court had explicitly determined that standing in Michigan courts is not a prudential limitation,¹¹² but rather part of the "constitutional architecture whereby governmental powers are divided between the three branches of government."¹¹³ The court reasoned that federal standing limitations had been based on the Judicial Vesting Clause, the Case and Controversy Clause, and broader concerns about separation of powers.¹¹⁴ It then noted that the Michigan Constitution, in addition to having a similar judicial vesting clause,¹¹⁵ also contained an express mandate for separation of powers.¹¹⁶ Given these similarities, it found that the test elucidated by the Supreme Court in *Lujan* not only established the "irreducible constitutional minimum" that plaintiffs in federal courts must satisfy, but also the minimum necessary in Michigan courts.¹¹⁷

Given the ruling in *Lee*, the outcome of *Cleveland Cliffs* was predictable, but the Michigan Supreme Court used the case to deepen and expand on its earlier analysis. After a lengthy discussion of the general principles linking standing and separation of powers,¹¹⁸ the court turned to explain why any divergences between the Federal and Michigan Constitutions were irrelevant for the question at hand.¹¹⁹

110. See *id.* at 805–14, 815–26. The court may have felt it could not leave its rationale unexplained, especially since it had requested briefing on the constitutionality of MEPA's citizen suit provision. *Id.* at 837 (Weaver, J., concurring in result only).

111. 629 N.W.2d 900, 907–08 (Mich. 2001).

112. See *id.* at 909 (Weaver, J., concurring) (noting that Michigan's "standing requirements [had previously] been based on prudential, rather than constitutional, concerns").

113. *Id.* at 905 (majority opinion).

114. *Id.* (quoting U.S. Const. art. III, § 1 (Judicial Vesting Clause), 2, cl. 1 (Case and Controversy Clause)).

115. Mich. Const. art. VI, § 1 ("The judicial power of the state is vested exclusively in one court of justice . . .").

116. *Id.* art. III, § 2 ("The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."); see *Lee*, 629 N.W.2d at 906 (asserting that these state constitutional provisions support importing federal standing requirements into state constitutional law).

117. *Lee*, 629 N.W.2d at 907 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

118. *Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 805–11 (Mich. 2004).

119. *Id.* at 811–14.

First, the court reasoned that the vesting of “judicial power” under the equivalent clauses of both constitutions places a restriction on the judicial branch, limiting its “scope of authority” to exercises of power that are “judicial” in nature.¹²⁰ The court explained that although both constitutions leave “judicial power” undefined, its meaning is the same in each and can be discerned from how it has “informed the practice of both federal and state judiciaries for centuries.”¹²¹

Second, it argued that the other branches are without power to redefine the extent of the judicial power. It found support for this position in three provisions of the Michigan Constitution, which “confer upon the judiciary three specific authorities potentially beyond the traditional ‘judicial power.’”¹²² For example, article III, § 8 allows the legislature or governor to request advisory opinions on the constitutionality of legislation in certain circumstances.¹²³ The court concluded that, if the judicial power were legislatively malleable, such authorizations would be unnecessary.¹²⁴

Third, the court found that the lack of a “case and controversy” clause in the Michigan Constitution, similar to that in its federal analogue, was irrelevant to its analysis.¹²⁵ The court explained that the Federal Case and Controversy Clause did not define the scope of the federal “judicial power,” but rather is a “provision defining the *limited* judicial power of the federal judiciary, in contrast to the *plenary* judicial power of the state judiciary.”¹²⁶ While this explanation may be somewhat

120. *Id.* at 811.

121. *Id.* at 811, 813. The court further explained that the term was left undefined in the 1963 Michigan Constitution because its meaning “was sufficiently well understood by scholars, lawyers, judges, and even laymen of the time as not to require further elucidation.” *Id.* at 813 n.16. Later, the court clarified that it viewed conferral of standing via citizen suits to be outside of the historical scope of the “judicial power.” See *id.* at 823–24.

122. *Id.* at 812.

123. Mich. Const. art. III, § 8. For two other instances, see *id.* art. IX, § 32 (conferring standing upon all taxpayers in certain situations); *id.* art. XI, § 5 (conferring standing upon all citizens to enforce civil service laws). In her opinion dissenting from the court’s analysis, Justice Kelly noted that one could draw the opposite conclusion from these provisions, i.e. that the “state’s judicial power is broad.” *Cleveland Cliffs*, 684 N.W.2d at 841 n.5 (Kelly, J., concurring in result only).

124. *Cleveland Cliffs*, 684 N.W.2d at 812 & n.13 (majority opinion).

125. *Id.* at 812–13. The Federal Clause reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

126. *Cleveland Cliffs*, 684 N.W.2d at 812.

obscure, the court clarified later in the opinion that by calling the state judicial power "plenary," it meant that "[t]he subject-matter jurisdiction of state courts is 'plenary.'"¹²⁷ Essentially, the court argued that the primary function of the Federal Clause is to describe the types of cases over which federal jurisdiction extends,¹²⁸ and that since the state's jurisdiction is "plenary," there is no need for such a clause in the Michigan Constitution.¹²⁹ Thus, its absence in the state constitution should not be ascribed any special significance.

Although the court unanimously concluded that plaintiffs had standing, three justices strongly disagreed with the majority's discussion of MEPA's constitutionality.¹³⁰ These justices also raised an additional constitutional argument, asserting that the majority failed to account for another provision of the Michigan Constitution.¹³¹ Article IV, § 52 requires that the legislature "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."¹³² Justice Weaver went as far as to argue that this mandate for legislative action, exercised via the MEPA citizen suit provision, obviated the need for any standing analysis at all.¹³³

Therefore, largely relying on federal case law and separation of powers analysis, the Michigan Supreme Court struck down MEPA's citizen suit provision as an impermissible legislative attempt to waive a constitutional requirement.

B. *Illinois: Lyons and Scachitti*

While *Cleveland Cliffs* largely focused on whether state constitutional restrictions on the judicial power should limit legislatively conferred standing, in *Lyons v. Ryan*¹³⁴ and *Scachitti v. UBS*,¹³⁵ the Illinois Supreme Court faced a different question: Does state executive authority place any limits on legislative power to confer standing?

1. *Lyons v. Ryan*. — The litigation in *Lyons* emerged out of the scandals surrounding George Ryan, the former Governor and Secretary of State of Illinois, who has since been convicted and sentenced for felonies

127. *Id.* at 821.

128. *Id.* at 813 ("That art. III, § 2 variously employs the terms 'cases' and 'controversies' is not to confer a particular meaning upon the 'judicial power,' but merely is to employ words that are necessary to the syntax of allocating the 'judicial power' between the federal and state governments.").

129. *Id.* at 812 ("The state judicial power, as with the state legislative power, is plenary, requiring no affirmative grant of authority in the state Constitution.").

130. See *supra* note 107.

131. *Cleveland Cliffs*, 684 N.W.2d at 826 (Weaver, J., concurring in result only); *id.* at 841 (Kelly, J., concurring in result only).

132. Mich. Const. art. IV, § 52.

133. See *Cleveland Cliffs*, 684 N.W.2d at 826 (Weaver, J., concurring in result only).

134. 780 N.E.2d 1098 (Ill. 2002).

135. 831 N.E.2d 544 (Ill. 2005).

stemming from corruption during his years in office.¹³⁶ The case involved an attempt by Illinois citizens and taxpayers, acting on behalf of the State, to recover campaign contributions that had allegedly been provided to Ryan in exchange for issuing commercial driver's licenses to unqualified drivers.¹³⁷

The plaintiffs in *Lyons* had two lines of attack against Governor Ryan. First, as taxpayers, they claimed to have authority to seek the imposition of constructive trusts on the funds and benefits obtained by Ryan as a result of his alleged fraud.¹³⁸ Second, they brought an action under article XX of the Illinois Code of Civil Procedure, which allows "any private citizen" to seek the restitution of fraudulently obtained public funds on behalf of the State.¹³⁹ This provision of the state code is probably best characterized as a variety of citizen suit, and not a *qui tam* action, since it provides for fraudulently obtained funds and civil penalties to be paid to the State, with the plaintiff only entitled to remuneration for litigation expenses.¹⁴⁰

Before addressing the plaintiffs' statutory claim, the court first considered their common law claims brought as general taxpayers, concluding that they lacked standing to assert them.¹⁴¹ Under Illinois law, individuals have standing to bring "taxpayer actions" to enjoin misuse of public funds when their financial interests as taxpayers are directly at stake.¹⁴² However, the court held that when the State is the real party in interest, and the claimed injury is not "personal" to taxpayers, litigants do not have standing to bring so-called "taxpayer derivative action[s]."¹⁴³ The court determined that the State was clearly the real party at interest in the plaintiffs' suit, and not taxpayers, since the campaign contributions in question had no impact on the public treasury, and since whatever public funds were incidentally used in the fraud would likely have been

136. Monica Davey & Gretchen Ruethling, *Former Illinois Governor Is Convicted in Graft Case*, N.Y. Times, Apr. 18, 2006, at A14.

137. *Lyons*, 780 N.E.2d at 1100.

138. *Id.* at 1101–02. Courts impose constructive trusts when the possession of certain property by an individual would result in unjust enrichment if he or she were allowed to retain it. See Restatement (First) of Restitution § 160 (1937).

139. 735 Ill. Comp. Stat. Ann. 5/20-104(b), 20-102 (West 2002); *Lyons*, 780 N.E.2d at 1101.

140. 735 Ill. Comp. Stat. Ann. 5/20-103, 20-104(b); *Scachitti*, 831 N.E.2d at 556 ("Claims brought under section 20-104(b) of article XX are not '*qui tam*' actions because the purported statutory grant of standing does not . . . provide that the private citizen share in the recovery.")

141. *Lyons*, 780 N.E.2d at 1102–05.

142. *Scachitti*, 831 N.E.2d at 550; see also 735 Ill. Comp. Stat. Ann. 5/11-301. For further discussion of taxpayer standing in the state courts, see *infra* notes 219–220 and accompanying text.

143. *Lyons*, 780 N.E.2d at 1102.

expended anyway.¹⁴⁴ Consequently, the plaintiffs' action was "derivative" in nature, and they lacked standing to assert their claims as taxpayers.¹⁴⁵

In order to consider the propriety of a grant of statutory standing in such a situation, the court had to review the state's case law in this area.¹⁴⁶ Illinois's restriction on derivative taxpayer standing emerges from the provisions of the state's constitution granting authority to its Attorney General.¹⁴⁷ The state's constitution has been interpreted as forbidding the Illinois General Assembly from conferring onto others the Attorney General's "exclusive" power to conduct the state's legal affairs when the State is "the real party at interest."¹⁴⁸ This interpretation originated in *Fergus v. Russel*,¹⁴⁹ a 1915 case in which the Illinois Supreme Court struck down a statute that attempted to transfer all of the Attorney General's powers concerning insurance to the state's Insurance Superintendent. In that case, the court determined that the Illinois Constitution vested the Attorney General with the traditional powers of the office that existed at common law, and that while the legislature could add to these powers, it could not subtract from them.¹⁵⁰

Faced with the precedent in *Fergus*, the *Lyons* court's analysis of the plaintiffs' statutory claim against Ryan was relatively brief. Since it had already determined that the State was the real party in interest concerning Ryan's alleged fraud, and since only the Attorney General was authorized to litigate on behalf of such an interest, the court struck down article XX's broad grant of standing as being unconstitutional.¹⁵¹

2. *Scachitti v. UBS*. — Three years after *Lyons*, the Illinois Supreme Court was dealt a somewhat less politicized opportunity to clarify how much the Attorney General's powers restrict legislative authority to confer standing. In *Scachitti*, a group of private citizens filed suit against vari-

144. Id. at 1104–05.

145. Id.

146. Id. at 1102–05.

147. Ill. Const. art. V, § 15 ("The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law."); see *Lyons*, 780 N.E.2d at 1102–03. However, standing requirements in Illinois courts do not derive entirely from the Illinois Constitution's grant of authority to the Attorney General. In other contexts, the Illinois Supreme Court has explained that litigants in state court must demonstrate "some injury in fact to a legally cognizable interest," while noting that state standing requirements may frequently be looser than their federal analogues. *Greer v. Ill. Hous. Dev. Auth.*, 524 N.E.2d 561, 574–75 (Ill. 1988).

148. *Lyons*, 780 N.E.2d at 1102, 1105.

149. 110 N.E. 130 (Ill. 1915).

150. Id. at 144–45. While *Fergus* was decided under the state's 1870 constitution, and Illinois enacted a new constitution in 1970, its supreme court subsequently held in *People ex rel. Scott v. Briceland* that *Fergus* remained good law. 359 N.E.2d 149, 154 (Ill. 1976).

151. *Lyons*, 780 N.E.2d at 1105–06. The court distinguished *Lyons* from a previous case, *City of Chicago ex rel. Cohen v. Keane*, in which it had found no problem with a provision of the Illinois Municipal Code that authorized citizens to bring suit against individuals defrauding municipalities. 357 N.E.2d 452, 457 (Ill. 1976). The court explained that in *Keane*, the City of Chicago had been the real party in interest, not the State, and that thus the Attorney General's authority had not been infringed. *Lyons*, 780 N.E.2d at 1104.

ous financial services companies that had allegedly overcharged the State while organizing the refinancing of the debt.¹⁵² While the plaintiffs in *Scachitti* brought causes of action similar to those in *Lyons*, premised on taxpayer standing and article XX of the Illinois Code of Civil Procedure, the *Scachitti* plaintiffs also brought a qui tam action under the state's Whistleblower Reward and Protection Act.¹⁵³

The *Scachitti* court dismissed the plaintiffs' common law and article XX causes of action, finding that both were "derivative" actions that were identical to those considered in *Lyons*.¹⁵⁴ However, while in *Lyons* the court used fairly absolute language to describe the restrictions on standing for derivative actions,¹⁵⁵ its approach in *Scachitti* was considerably different. Rather than blocking legislative conferral of standing completely, it suggested that the legislature could "cure section 20-104(b) by providing the Attorney General with the ability to maintain effective control over article XX litigation."¹⁵⁶

The court then proceeded to the plaintiffs' qui tam action, finding that the Whistleblower Act's conferral of standing was constitutional.¹⁵⁷ First, the court noted that since the Act allows a private person to "bring a civil action for a violation of [the Act] for the person and for the State,"¹⁵⁸ it would adopt the finding of the U.S. Supreme Court in *Stevens* that the "qui tam plaintiff is a partial assignee of the state's claim."¹⁵⁹ Consequently, it held that the State and the qui tam plaintiff were each "real part[ies] in interest" in the suit.¹⁶⁰ Second, the court found that, unlike article XX, the Whistleblower Act grants the Attorney General sufficient control over litigation initiated by qui tam plaintiffs so as not to infringe on his constitutional authority.¹⁶¹ While there are various differences between the two statutes,¹⁶² the court found that the most significant diver-

152. *Scachitti v. UBS Fin. Servs.*, 831 N.E.2d 544, 547–49 (Ill. 2005).

153. 740 Ill. Comp. Stat. Ann. 175/1 to /8 (West 2002 & Supp. 2007); *Scachitti*, 831 N.E.2d at 548–49.

154. *Scachitti*, 831 N.E.2d at 552–56.

155. *Lyons*, 780 N.E.2d at 1102 ("Where, as here, the state is the real party in interest, individual taxpayers have no standing to bring the cause of action.").

156. *Scachitti*, 831 N.E.2d at 556.

157. *Id.* at 556–63.

158. 740 Ill. Comp. Stat. Ann. 175/4(b)(1) (emphasis added).

159. *Scachitti*, 831 N.E.2d at 558.

160. *Id.* at 559. It is unclear whether this determination by the court has any relevance. Given its ruling on completely "derivative" actions under article XX, whether a legislative conferral of standing is constitutional appears not to rest on whether the plaintiff is a "real party at interest," but instead on the extent of control over third-party litigation granted to the Attorney General. See *supra* notes 154–156 and accompanying text.

161. *Scachitti*, 831 N.E.2d at 559–61.

162. For example, if the Attorney General intervenes in a suit originally commenced under section 104(b) of article XX by a third party, the involvement of the third party in the case is over. *Id.* at 555. However, under the Whistleblower Act, the qui tam plaintiff has a limited right to continued participation following the intervention of the Attorney General. *Id.* at 557.

gence was the Attorney General's power under the Whistleblower Act to dismiss a qui tam suit at any time and to overrule any decision by a qui tam plaintiff to dismiss the action.¹⁶³ To support its approval of the qui tam provision, the court analogized the situation before it to that in *People v. Illinois State Toll Highway Commission*,¹⁶⁴ where it held constitutional a statute that granted the State Highway Commission the authority to appoint counsel who remained under the control of the Attorney General.¹⁶⁵

Overall, the effect of *Scachitti* is to weaken what initially appeared to be a categorical restriction in *Lyons* on legislative conferral of standing to individuals who are not "real parties in interest."¹⁶⁶ Instead of a bright-line rule, the Illinois Supreme Court has shifted to a more flexible focus on whether particular conferrals of standing allow sufficient executive control so as not to violate separation of powers.

C. *The Policy Implications of Cleveland Cliffs and Scachitti*

Thus, federal limitations on congressionally conferred standing have trickled down into the interpretation of certain state constitutions, although the effect has not been completely uniform. The *Cleveland Cliffs* court found *Lujan's* reasoning generally persuasive and held that the judicial power in Michigan does not extend to hearing cases in which plaintiffs cannot demonstrate that they have suffered a particularized injury.¹⁶⁷ On the other hand, considering whether legislative conferrals of standing infringe on the state executive power, the *Scachitti* court held that as long as the State Attorney General is given sufficient control over privately initiated litigation, they do not.¹⁶⁸ This section will now explore the practical effects of decisions like these, which limit the authority of state legislatures to confer standing onto private citizens to litigate in the public interest.

Citizen suits and qui tam actions can serve two primary functions in the architecture of state government. First, in an age of broad statutory delegations to executive branches, citizen suits have provided a means of checking executive power by compelling agency compliance with legislative objectives.¹⁶⁹ Given the problems many part-time, term-limited state

163. *Id.* at 560. Under article XX, once the Attorney General has opted not to intervene or to settle within a sixty day period following initial notice of the suit, his or her authority over the litigation comes to an end. See 735 Ill. Comp. Stat. Ann. 5/20-104(b) (West 2002).

164. 120 N.E.2d 35, 45-46 (1954).

165. *Scachitti*, 831 N.E.2d at 561-62.

166. See *supra* notes 155-156 and accompanying text.

167. See *supra* Part II.A.

168. See *supra* Part II.B.

169. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 601-02 (Blackmun, J., dissenting) (suggesting that effect of *Lujan* is to allow agencies to ignore "'particular, statutorily prescribed procedure[s]'" (quoting *id.* at 576 (plurality opinion))); Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*,

legislators have effectively overseeing the state executive,¹⁷⁰ enlisting the assistance of the public may be unusually important at the state level. Second, citizen suits and qui tam actions can be an important means of supplementing government's enforcement authority.¹⁷¹ For example, at the federal level, the filing of environmental citizen suits has in recent years easily outpaced EPA's referrals for enforcement to the Department of Justice.¹⁷² Of course, the relative success of federal citizen suits suggests that the imposition of federal standing requirements may not unduly hamper public interest litigation. However, to the extent this has been true at the federal level, it stems partially from a series of Supreme Court opinions that have made it somewhat easier to demonstrate standing.¹⁷³ It is unclear how long this trend will continue.¹⁷⁴

Most of the arguments against broad legislative conferrals of standing rest on fears that they strip the executive of control over law enforcement and burden the judicial system. Commentators fear "needless law-

10 Widener L. Rev. 353, 383–85 (2004) (explaining that suits to compel agency action increase agency accountability and provide counterweight to regulatory capture, but at cost of reduced agency autonomy); Pierce, *supra* note 15, at 1200 (suggesting that effect of *Lujan* at federal level has been to confer "on agencies discretion to ignore many congressional policy decisions" and to take "from Congress the power to make many judicially enforceable policy decisions").

170. See Thomas H. Little & David B. Ogle, *The Legislative Branch of State Government: People, Process, and Politics* 27 (2006) ("Institutional memory is a thing of the past in [term-limited legislatures], whose inexperienced members operate at great disadvantage in trying to respond to experienced and savvy bureaucrats or lobbyists—none of whom are constrained by term limits on their service."); Hershkoff, *supra* note 8, at 1891–92 ("[T]he legislative office in some states is only a part-time job, giving rise to concerns of dual office-holding and conflicts of interests."); Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 *Wm. & Mary L. Rev.* 1273, 1277 (2005) ("State legislatures lack the well-developed capacity of Congress to conduct their own investigations by means of committees with investigatory staffs and subpoena power.").

171. For a discussion of states with citizen suit provisions and other similar actions, see Susan George et al., *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 *U. Balt. J. Envtl. L.* 1, 14–25 (1997). At least fifteen states have general citizen suit provisions granting private citizens a role in enforcing state environmental laws. *Id.* at 14. Additionally, at least eighteen states authorize qui tam suits or other related actions. Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 *Colum. L. Rev.* 949, 956 (2007).

172. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 *Widener L. Rev.* 1, 4–5 (2003). By 2003, more than 2,000 environmental citizen suits had been filed since the passage of the first environmental citizen suit provision in 1970. *Id.* at 3.

173. See *supra* note 52. Importantly, some states, while adopting the federal injury requirement, have retained the freedom to apply it more liberally. See *supra* note 100.

174. The Supreme Court's most recent standing case, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), could be read as confirming the trend toward more permissive standing. However, by limiting itself to ruling that the State of Massachusetts had standing, the Court suggested its continuing unease with citizen-led enforcement. See *id.* at 1453–55 ("We stress . . . the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.").

suits . . . flooding the judiciary"¹⁷⁵ and a loss of prosecutorial discretion that would be harmful since "[f]ew would equate sound policy with the maximum enforcement authorized by law, even if sufficient funds existed."¹⁷⁶ There may also be policy concerns about broad conferrals that are unique to the state level. For example, the existence of looser standing in state courts could encourage forum shopping, with litigants attempting to avoid the stricter justiciability requirements of federal court.¹⁷⁷ Moreover, there may be efficiency gains from uniformity in the standards used across the American judicial system.¹⁷⁸

However, even if these policy concerns have force, they should only influence courts as far as they are constitutionally salient. Otherwise, policy judgments should be left to legislatures.¹⁷⁹ Indeed, courts should be hesitant to block legislative innovation in this area,¹⁸⁰ particularly since the primary motivation behind the Supreme Court's decision in *ASARCO* seems to have been its desire to protect the autonomy of states to diverge from federal practices.¹⁸¹ That said, as *Cleveland Cliffs* and *Scachitti* demonstrate, concerns about infringing on executive authority or authorizing courts to take on nonjudicial functions may be constitutionally rele-

175. Kimberly M. Large, Comment, The Mischaracterization of Justice Scalia as Environmental Foe: What Harm to Standing Following the Court's Stance in *Laidlaw Environmental v. Friends of the Earth?*, 10 *Widener L. Rev.* 561, 575–76 (2004); see also Hershkoff, *supra* note 8, at 1932 ("Justiciability doctrine serves a signaling function that deters or encourages the filing of claims . . .").

176. See Kent & Shenkman, *supra* note 72, at 1803.

177. See *supra* note 91 and accompanying text.

178. For example, the Virginia General Assembly has limited judicial review of decisions of the State Water Control Board to circumstances where plaintiffs can demonstrate standing under Article III of the Federal Constitution. See Va. Code Ann. § 62.1-44.29 (West 2007).

However, the force of arguments for uniformity is considerably weakened by the difficulties federal courts have had in applying standing doctrine consistently. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . ."); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 164–65 (4th Cir. 2000) (Luttig, J., concurring in the judgment) (complaining of inconsistency in Supreme Court's articulation of standing doctrine). If constitutionally permissible, the clearest means of achieving bright-line rules would be to defer to legislative judgments about who is entitled to bring a cause of action. Cf. Fletcher, *Structure*, *supra* note 6, at 223–24 (noting "wildly vacillating results" in standing cases and suggesting that "Congress should have essentially unlimited power to define the class of persons entitled to enforce [statutory] dut[ies]").

179. For arguments concerning how legislatures might better limit or expand *qui tam* actions, see generally Broderick, *supra* note 171 (arguing that greater executive control over privately initiated *qui tam* actions is beneficial).

180. Cf. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

181. See *supra* notes 94–96 and accompanying text.

vant. Nevertheless, as Part III will reveal, these decisions may overstate the extent to which broad legislative conferrals of standing are inconsistent with state constitutions.

III. THE BARRIERS TO LEGISLATIVELY CONFERRED STANDING AT THE STATE LEVEL

As we have seen, the *Cleveland Cliffs* and *Scachitti* courts ruled that their state constitutions may block some legislative conferrals of standing. This Part will assess whether other state courts should follow these decisions and hold that their state constitutions restrict legislative conferrals of standing. Before beginning, a word should be said about the difficulties surrounding this type of analysis. Obviously, since each state has its own distinctive constitution, there can be no conclusive answer to the question of what barriers to legislative conferrals of standing should exist at the state level. However, since state constitutions generally share more in common with each other than they do with the Federal Constitution,¹⁸² a generalized analysis of this question may be helpful, particularly since many state courts have focused so extensively on federal developments when shaping state constitutional law.¹⁸³

The limitations placed on state legislatures in this area largely derive from two constitutional sources:¹⁸⁴ the vesting of power over law enforcement in the executive branch, and limitations on the exercise of judicial power.¹⁸⁵ Part III.A will first address whether legislatively conferred standing infringes on executive power, and then Part III.B will consider whether it impermissibly directs courts to act outside of the scope of state judicial power. Together, these two sections will demonstrate that citizen suits and *qui tam* actions should generally be compatible with state constitutional law.

A. *Conferrals of Standing and the Plural Executive*

In *Lujan*, the Supreme Court suggested that congressional conferral of standing infringes on executive power,¹⁸⁶ and although the implica-

182. Tarr, *Understanding State Constitutions*, supra note 8, at 28. For a general discussion of these divergences, see *id.* at 6–28. Also, see generally 3 *State Constitutions for the Twenty-first Century* (G. Alan Tarr & Robert F. Williams eds., 2006) (describing organization of and powers under state constitutions).

183. See supra note 18 and accompanying text.

184. The assignment of law enforcement power to private individuals may raise some due process concerns, see *Nat'l Paint & Coatings Ass'n v. State*, 68 Cal. Rptr. 2d 360, 367 (Ct. App. 1997), but this issue will not be discussed in this Note. Additionally, to the extent that there are state constitutional analogues to the Federal Appointments Clause, U.S. Const. art. II, § 2, cl. 2, there may be further concerns not discussed in this Note. See *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757–58 (5th Cir. 2001).

185. There can be some overlap between these issues, but as Justice Scalia has suggested, they can be viewed as being analytically distinct. See supra note 71.

186. See supra note 48 and accompanying text.

tions of this holding remain unsettled,¹⁸⁷ we have seen that some state courts have found *Lujan's* reasoning persuasive.¹⁸⁸ However, as the decisions of the Illinois Supreme Court in *Lyons* and *Scachitti* suggest, even if similar issues arise at the state level, they play out somewhat differently.

Executive power at the state level differs considerably from that at the federal level. While the Federal Constitution creates a unitary executive, at least in that it provides for the election of a single chief executive, almost all state constitutions create plural executives, providing for the separate election of multiple executive officers.¹⁸⁹ As *Scachitti* indicates, the Attorney General will often be the most relevant among these officers for an analysis of conferral of standing, since he or she is usually charged with the responsibility of being the state's chief legal officer.¹⁹⁰ Despite the relative independence attorneys general enjoy due to their direct election, the scope of their freedom can be unclear, since state constitutions often use terminology for gubernatorial power similar to that used in the Federal Constitution to describe presidential power.¹⁹¹ Similarly, the scope of legislative power over the role of the Attorney General may also be disputed, since some state constitutions have been interpreted as vesting certain inherent powers in the office that cannot be stripped stat-

187. See *supra* notes 71–74 and accompanying text.

188. See *supra* notes 100, 111–117 and accompanying text.

189. Marshall, *supra* note 8, at 2448. For example, typical executive offices that are separately elected at the state level are treasurer, auditor, attorney general, superintendent of schools, and secretary of state. Patrick C. McGinley, Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?, 99 W. Va. L. Rev. 721, 722 (1997). Only three state constitutions—those of New Jersey, Alaska, and Hawaii—grant the governor the power to appoint all executive officers. *Id.* at 724 n.5.

In addition to the separate election of department heads, many state constitutions also provide for the separate election of district attorneys. See Joan E. Jacoby, The American Prosecutor: From Appointive to Elective Status, Prosecutor, Sept.–Oct. 1997, at 25, 28–29 (detailing emergence of elected district attorneys across United States). As with the controversies surrounding the authority of the attorneys general, the powers of the district attorneys are also disputed, with some states granting governors and attorneys general control over them. See John A. Horowitz, Note, Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty, 65 Fordham L. Rev. 2571, 2584–91 (1997) (detailing gubernatorial and attorney general power in New York, California, and Colorado to “supersede” district attorneys in certain prosecutions).

190. Marshall, *supra* note 8, at 2452. For a description of the history of attorneys general, see Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268–70 (5th Cir. 1976) (discussing the office generally and specifically in Florida); Marshall, *supra* note 8, at 2449–52. Not all attorneys general free from gubernatorial selection are popularly elected. In Maine, the legislature appoints the position, while in Tennessee, the state's supreme court chooses. McGinley, *supra* note 189, at 755 n.125.

191. Marshall, *supra* note 8, at 2452–53 & n.33. States sometimes use differing terminology. For example, while the Michigan Constitution simply provides that “[t]he executive power is vested in the governor,” Mich. Const. art. V, § 1, the West Virginia Constitution clarifies that “[t]he *chief* executive power shall be vested in the governor, who shall take care that the laws be faithfully executed,” W. Va. Const. art. VII, § 5 (emphasis added).

utorily.¹⁹² Thus, to demonstrate that broad conferrals of standing will generally not infringe on state executive power, this section will first examine the extent of legislative power over attorneys general and then the scope of gubernatorial power over the office.

1. *Legislative Power over Attorneys General.* — First, despite what *Lyons* and *Scachitti* might seem to indicate, most state constitutions are not interpreted as vesting the Attorney General with broad irrevocable power that the legislature may not abrogate. In Illinois, even if the executive is plural in nature, the specific powers of the Attorney General are unitary, in that the office cannot be stripped of control over certain core functions, such as litigation when the State is the real party at interest.¹⁹³ However, Illinois's position here seems to be somewhat extreme, since in most states the bulk of the Attorney General's powers are viewed as being grounded in common law and statutory authority that the legislature can revoke.¹⁹⁴ This is not to say that when the office is constitutionally established that legislative power is without limit, but generally partial reassignment of control over particular litigation would not seem to raise significant problems.¹⁹⁵

Placing this into context with conferral of standing, one would generally expect that the greater a state legislature's control over the Attorney General's power, the fewer constitutional concerns one would have about broad conferrals of standing onto private parties. Since in many states legislatures are free to restrict the scope of the Attorney General's powers or reassign some of them to other parts of the plural

192. See *supra* Part II.B (discussing inalienable powers of Attorney General in Illinois). The Office of Attorney General is created by statute in six states—Alaska, Hawaii, Indiana, Oregon, Vermont, and Wyoming—and is established constitutionally in the remainder. Scott M. Matheson Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. Fla. J.L. & Pub. Pol'y 1, 2 n.2 (1993).

193. See *supra* Part II.B.

194. See *Shevin*, 526 F.2d at 268 (“There is and has been no doubt that the legislature may deprive the attorney general of specific powers”); Matheson, *supra* note 192, at 4 (“It is well-established in most states that the legislature may restrict or withdraw common law authority vested in the attorney general.”). But see 7 Am. Jur. 2d *Attorney General* §§ 6–7 (2007) (explaining that “[g]enerally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official” but also citing to restrictions on legislative power over Attorney General in Illinois).

195. Patrick McGinley has attempted to demonstrate that the scope of the constitutional powers of the Attorney General are broad indeed, see McGinley, *supra* note 189, at 766–68, but he generally fails to cite cases that demonstrate that loss of some control over litigation would be constitutionally significant, *id.* at 759–63. For example, in *Blair v. Marye*, the Virginia Supreme Court held only that it would be unconstitutional to strip the Attorney General of his *entire* salary. 80 Va. 485, 490–91 (1885). Also, in *Hudson v. Kelly*, the Arizona Supreme Court struck down a statute it characterized as effectively “destroy[ing]” the constitutional office of State Auditor, but it distinguished the situation as not being one “where the only question before the court was the power of the legislature to place the control of one certain piece of litigation in hands of a person other than the attorney general.” 263 P.2d 362, 367 (Ariz. 1953).

executive, one would not be excessively concerned that partial assignment of the office's powers to the public would erode its authority.

2. *Gubernatorial Control of Attorneys General*. — Even if the Attorney General's powers are not offended by conferral of standing, gubernatorial power may be. In some states, despite the plural executive, courts have found that the Governor is vested with "unitary" powers similar to those exercised by the President.¹⁹⁶ However, states have differed considerably over the extent to which the Attorney General's authority as legal officer must be subject to gubernatorial control. For example, in *Feeney v. Commonwealth*, the Massachusetts Supreme Judicial Court ruled that the Attorney General's statutory authority allowed him to appeal a case on behalf of the state's Civil Service Commission despite disapproval of that executive agency.¹⁹⁷ However, in *People ex rel. Deukmejian v. Brown*, the California Supreme Court held that the Governor's constitutional obligation to "see that the law is faithfully executed" allowed him to restrict the Attorney General from bringing suit against another part of the executive branch.¹⁹⁸ Generally, the more state courts have interpreted the power of the Attorney General as being subject to gubernatorial control, the more one would also expect courts to demand that some executive control be exercised over litigants that the legislature has authorized to sue in the public interest or on behalf of the State.¹⁹⁹

196. See *supra* note 191 and accompanying text.

197. 366 N.E.2d 1262, 1265, 1267 (Mass. 1977). Although both "the Governor and the [Commission]" opposed pursuing an appeal, both houses of Massachusetts's legislature passed resolutions urging the Attorney General to continue. *Id.* at 1264.

A more recent case in this vein is *People ex rel. Salazar v. Davidson*, in which the Colorado Supreme Court ruled that the Attorney General had authority to sue the state's Secretary of State to enjoin implementation of a new redistricting plan. 79 P.3d 1221, 1231 (Colo. 2003). See also *Shevin*, 526 F.2d at 274 (determining that under Florida law, Attorney General may bring suit on behalf of government agencies without "specific authorization" and that "this simply is not an extremely close question").

198. 624 P.2d 1206, 1209–10 (Cal. 1981) (quoting Cal. Const. art. V, § 1). For a more general discussion of these issues, see Marshall, *supra* note 8, at 2453–61. He characterizes the "majority rule" as being that the Attorney General has independent discretion over the position he or she takes in court, and also that he or she may bring suits against other parts of the executive branch. *Id.* at 2456, 2458. Although Marshall explains that many states also allow the Attorney General independence in bringing civil and criminal enforcement suits, he refrains from expressing an opinion as to whether such independence is common in most states. *Id.* at 2460–61.

199. Admittedly, things may play out differently in court. For example, as we have seen, California is a state in which the Attorney General has been held to be under some gubernatorial control. Nevertheless, in *National Paint & Coatings Ass'n v. State*, the California Court of Appeal held that a provision of the state's Safe Drinking Water and Toxic Enforcement Act that authorized private parties to bring enforcement actions did not infringe on executive authority. 68 Cal. Rptr. 2d 360, 365–67 (Ct. App. 1997). Interestingly, the Act's citizen suit provision seemed to be similar to that struck down in *Lyons*. See *id.* at 362; *supra* notes 162–163 and accompanying text. Importantly, however, the California Court of Appeal dismissed the challenge to the provision's constitutionality largely on the basis of insufficient factual proof of any conflict with the Attorney General's

3. *Conclusion.* — In many states, legislatures have extensive control over the Attorney General's powers, while governors do not control the Attorney General's exercise of these powers. Given this landscape, legislative conferral of standing at the state level should not raise separation of powers concerns as serious as those at the federal level. In other words, if executive authority is not already infringed by the legislature's broad power to vest some responsibility for litigation on behalf of the State out of gubernatorial control, it seems unlikely that citizen suit and *qui tam* provisions would be problematic either.²⁰⁰ Given the goals behind divided executive authority, this should not be surprising. Plural executives are intended to weaken executive power by dividing it and by providing additional checks on potential abuses of executive power.²⁰¹ Citizen suit and *qui tam* provisions merely fit into a state constitutional framework that already presupposes a chief executive weaker than our Federal President.

Given the generalized nature of this analysis, it is certainly possible that legislative conferral of standing may still infringe on executive authority in many states. However, it is important to note that even if the executive power is infringed by conferrals of standing, the typical remedy has not been a wholesale prohibition on this exercise of legislative authority. Instead, courts have suggested that if conferrals are reformulated to allow greater executive control of litigation, this will be sufficient to remedy any constitutional failings.²⁰² While such an approach could allow the executive to block private suits to compel its compliance with

authority. *Nat'l Paint*, 68 Cal. Rptr. 2d at 366. Thus, the court seemed to leave open the possibility that the statute could be found constitutionally infirm upon sufficient evidence.

200. Of course, even if executive power is not infringed by dividing enforcement authority within the executive branch, there may be concerns about private overenforcement of the law. This was a concern of the *Cleveland Cliffs* court when it struck down MEPA's citizen suit provision. See *Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 825 (Mich. 2004). However, whatever concerns arise over private enforcement could be addressed by allowing greater executive control over private litigation. See *infra* note 202 and accompanying text.

201. See Marshall, *supra* note 8, at 2451 (“[T]he states’ purpose [in creating plural executives] was to weaken the power of a central chief executive and further an intrabranch system of checks and balances.”). The trend in state constitutional law since independence has been toward strengthening gubernatorial power, but more than two-thirds of states still directly elect at least four separate executive officials. Tarr, *Understanding State Constitutions*, *supra* note 8, at 17; Thad Beyle, *The Executive Branch*, in *3 State Constitutions for the Twenty-first Century*, *supra* note 182, at 67, 67–69.

202. See *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753–57 (5th Cir. 2001) (finding that *qui tam* provision of False Claims Act does not violate separation of powers, “especially given the control mechanisms inherent in the FCA”); *Nat'l Paint*, 68 Cal. Rptr. 2d at 366 (declining to strike down citizen suit provision because evidence suggested Attorney General exercised sufficient control over litigation); *Scachitti v. UBS Fin. Servs.*, 831 N.E.2d 544, 556 (Ill. 2005) (suggesting that citizen suit provision could be made constitutionally acceptable by granting Attorney General more control over litigation).

legislative mandates, it would be less detrimental for enforcement suits against private parties.²⁰³

B. *Conferrals of Standing and the State Judiciary*

Of course, even if executive power at the state level is not a barrier to legislative conferral of standing, legislatures cannot authorize the judiciary to exercise power that is outside of the courts' constitutional mandate.²⁰⁴ This is a concern at the federal level, and perhaps even more so among the states, since forty state constitutions contain clauses that explicitly call for separation of powers.²⁰⁵ Therefore, it is necessary to determine whether the *Cleveland Cliffs* court was correct to construe the state judicial power as excluding cases in which plaintiffs cannot demonstrate an injury sufficient to prove standing. As we have seen, the Michigan Supreme Court determined that the scope of the Michigan judicial power is the same as that at the federal level,²⁰⁶ finding that the divergences between the Federal and Michigan Constitutions do not undermine this conclusion.²⁰⁷

In order to judge the relevance of *Cleveland Cliffs* for observers in other states, this section will first judge the merit of the Michigan Supreme Court's claims about the scope of the state judicial power. Then, it will address certain divergences between the federal and state constitutions, such as the lack of state provisions explicitly incorporating the federal case and controversy requirement, the prevalence of open courts provisions in state constitutions, and the issuance of advisory opinions by some state courts.

1. *Interpreting the Judicial Power.* — A central argument advanced by the *Cleveland Cliffs* court is that the Michigan judicial power corresponds with that granted to the federal courts.²⁰⁸ Although this claim did not have any explicit support in either the text of Michigan's constitution or

203. For example, governors vested with control over privately initiated litigation could simply direct a plaintiff to drop a suit to compel action the governor did not wish to undertake. See supra note 169 and accompanying text (discussing suits to force executive compliance with nondiscretionary duties); cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("[I]t is clear that in suits *against the Government*, at least, the concrete injury requirement must remain." (emphasis added)).

204. Cf. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998) ("The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches.").

205. See Tarr, *Understanding State Constitutions*, supra note 8, at 14.

206. See supra notes 120–121 and accompanying text.

207. See supra notes 122–129 and accompanying text.

208. *Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 813 (Mich. 2004); see supra notes 120–121. The Vermont Supreme Court has adopted a similar approach to construing that state's judicial power. See *Parker v. Town of Milton*, 726 A.2d 477, 480 (Vt. 1998) ("The judicial power, as conferred by the Constitution of this State upon this Court, is the same as that given to the Federal Supreme Court by the United States Constitution" (quoting *In re Constitutionality of House Bill 88*, 64 A.2d 169, 174 (Vt. 1949))).

the records of its drafting in 1961,²⁰⁹ the court justified this move by asserting that the meaning of “judicial power” was “sufficiently well understood by scholars, lawyers, judges, and even laymen of the time as not to require further elucidation.”²¹⁰ As a factual matter, this claim is almost certainly false. Michigan’s constitution was drafted during a period of considerable debate and uncertainty about the scope of the federal judicial power, during which the “prevailing view” was that standing was “only a nonconstitutional rule of self-restraint.”²¹¹

This misstep by the Michigan Supreme Court is a helpful demonstration of the difficulties state courts face in interpreting the scope of the state judicial power and shaping standing requirements. Although the historical record may prove fruitful in delineating the state judicial power,²¹² in many cases the record will be unclear as it was in Michigan.²¹³ If courts then try to harmonize standing with the federal approach, they must recognize that federal standing requirements have been a moving target over the past century,²¹⁴ with confusion lingering today over the situations in which legislative conferral of standing is acceptable.²¹⁵

Despite these interpretative problems, courts can at least be confident that the meaning of “judicial power” within the United States is far

209. The court explained that “there is virtually no discussion concerning the [extent of the judicial power] in the ‘Official Record’ of the Michigan constitutional convention of 1961, or in source materials surrounding Michigan’s earlier constitutions.” *Cleveland Cliffs*, 684 N.W.2d at 813 n.16.

210. *Id.*

211. *Flast v. Cohen*, 392 U.S. 83, 92 n.6 (1968). The mood of this period in American constitutional history is well captured by the decision of the Minnesota Supreme Court in *Minnesota Public Interest Research Group v. Minnesota Department of Labor*, where it relied almost entirely on U.S. Supreme Court precedent to determine that standing could be abrogated by statute. 249 N.W.2d 437, 441–42 (Minn. 1976).

212. Since many state constitutions were drafted much more recently than the Federal Constitution, “meaningful historical research” may often be easier at the state level. Gardner, *supra* note 18, at 811. In addition to the historical records produced by drafting a constitution, longstanding judicial practice and the statutory record in particular states may reveal what drafters viewed as being within the scope of judicial power. For example, North Carolina has had a statute authorizing “any private citizen of [a] county” to bring suit abating a public nuisance for nearly a century without real controversy (at least as to the authority of private citizens to file suit). N.C. Gen. Stat. § 19-2.1 (2005); see Act of March 11, 1913, ch. 761, § 26, 1913 N.C. Sess. Laws 1563, 1570; State ex rel. Summrell v. Carolina-Va. Racing Ass’n, 80 S.E.2d 638, 640–41 (N.C. 1954). In such situations, one would not expect other legislative conferrals of standing to raise serious constitutional questions.

213. When clear intent is lacking, other factors may make the work of the court difficult as well. The frequency of amendments to state constitutions may complicate attempts to ascertain a coherent philosophy of government from the documents, and unreflective borrowing of language from other state constitutions may muddy the waters further. See Tarr, *Understanding State Constitutions*, *supra* note 8, at 191–94, 205–08.

214. See *supra* notes 34–37 and accompanying text.

215. See *supra* notes 70–78 and accompanying text.

from monolithic,²¹⁶ with considerable differences separating state and federal courts.²¹⁷ For example, examining standing alone, many state courts have found that their state constitutions do not prevent them from hearing cases where plaintiffs likely could not satisfy the federal injury requirement.²¹⁸ Similarly, while the federal courts have largely denied citizens standing to challenge governmental action based on their status as taxpayers,²¹⁹ state courts have generally recognized taxpayers' standing to bring suit against state government.²²⁰ Thus, the "judicial power" clearly does not come "one size fits all," but is rather a concept open to multiple interpretations.

This should not be surprising, since courts play a different role in state government than they do at the federal level. While the power of the federal courts to create common law is limited and disputed,²²¹ state

216. See Hershkoff, *supra* note 8, at 1909–14 (describing scholarly disagreement over meaning of "judicial function"). Hershkoff notes that James Madison once observed: Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

Id. at 1909 (quoting *The Federalist* No. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961)).

217. See Linde, *supra* note 170, at 1274–75 (discussing divergent justiciability norms and larger role for state courts in settling interbranch disputes).

218. See *supra* note 9. Admittedly, however, some state courts have reached the opposite conclusion, see *supra* note 100, but this merely confirms the contested nature of the scope of judicial power.

219. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 477–82 (1982) (limiting taxpayers' ability to challenge government action on basis that it violates Establishment Clause). Taxpayer actions are defined as "proceedings brought by one or more taxpayers . . . similarly situated within a taxing district or area, . . . for the purpose of seeking relief from illegal or unauthorized acts of public bodies or public officials which acts are injurious to their common interests as such taxpayers." Susan L. Parsons, Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 *Temple L.Q.* 951, 951–52 (1986) (quoting 74 *Am. Jur.* 2d *Taxpayers' Actions* § 1 (1974)). They can serve a variety of purposes, such as "contesting the validity of municipal or state legislation, restraining governmental malfeasance, contesting the performance of illegal contracts, challenging the levy and disposition of taxes, and enjoining the unlawful expenditure of public funds." *Id.* at 952. For example, the plaintiffs in *Lyons* and *Scachitti* brought common law taxpayer actions, which were dismissed in both cases. See *supra* notes 141–143, 153–154 and accompanying text.

220. See Hershkoff, *supra* note 8, at 1854–56; Varu Chilakamarri, Comment, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 *Animal L.* 251, 254–55 (2004) (discussing taxpayer standing in state court). There are, of course, differences among the states regarding taxpayer standing, with some states adopting a more permissive approach than others. See *id.* at 259–64.

221. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."); Thomas W. Merrill, *The Judicial Prerogative*, 12 *Pace L. Rev.* 327, 329–32 (1992) (discussing limits on federal common law).

courts have considerable authority to shape economic and social policy by developing the common law, thus “blur[ring] the lines of separation of powers within and among state institutions.”²²² Similarly, many state constitutions grant citizens substantive rights, the enforcement of which calls on further judicial involvement in policymaking.²²³ The role of state courts is also expanded by the existence of plural state executives,²²⁴ which require courts to resolve intragovernmental disputes alien to the federal context.²²⁵ Finally, many state constitutions increase popular control over the courts through judicial elections.²²⁶ The relative accountability of state courts is particularly relevant for interpreting the scope of the state judicial power since federal justiciability norms partially derive from doubts about the democratic legitimacy of the federal courts.²²⁷

222. See Hershkoff, *supra* note 8, at 1889 & n.296.

223. See, e.g., Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 Rutgers L.J. 1057, 1077 (1993) (noting that “[t]he constitutions of all fifty states contain education clauses,” the great majority of which “are phrased as positive mandates”).

In *Cleveland Cliffs*, Judge Weaver argued that the provision of the Michigan Constitution mandating that the legislature provide “for the protection of the air, water and other natural resources of the state from pollution” allowed the legislature to confer standing to private litigants to protect the environment. See *Nat’l Wildlife Fed’n v. Cleveland Cliffs Mining Co.*, 684 N.W.2d 800, 826 (Mich. 2004) (Weaver, J., concurring in result only) (quoting Mich. Const. art. IV, § 52); *supra* notes 130–133 and accompanying text. Responding to Judge Weaver, the *Cleveland Cliffs* majority noted that there are other affirmative legislative obligations in the Michigan Constitution, and that it would be odd to assume that they allowed the legislature to escape compliance with other constitutional requirements, be it standing or due process. *Id.* at 817–18 (majority opinion). The majority is certainly correct that such provisions do not authorize state legislatures to violate constitutional norms to achieve certain substantive goals. However, they may indeed suggest that state constitutional norms vary from those associated with the Federal Constitution: Since substantive provisions grant state courts responsibilities that diverge from those of the federal courts, cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”), they may suggest divergent justiciability to aid in carrying out those responsibilities.

224. See *supra* note 189 and accompanying text.

225. See G. Alan Tarr & Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* 44 (1988) (“[W]hereas federal courts have developed the ‘political questions’ doctrine to avoid impinging on coordinate branches of the national government, such separation-of-powers concerns seldom affect state courts.”); Linde, *supra* note 170, at 1276–78 & n.17 (“Lacking another central deciding authority, litigation between state agencies and cities, school districts, and other local authorities is commonplace.”).

226. See Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 Ala. L. Rev. 397, 414 (1999) (noting that judges face election in thirty-nine states); Hershkoff, *supra* note 8, at 1887–88.

227. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“[Standing doctrine] is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”). Admittedly, however, there may still be concerns about the legitimacy of state courts. Judicial elections do not always guarantee a democratic check

Thus, the judicial power granted to state courts simply cannot be easily equated with that granted to the federal courts by Article III: State courts frequently hear cases the federal courts would not, and operate with greater democratic and policymaking legitimacy. As a result, they should generally be much more comfortable accepting legislative conferrals of standing than have been the federal courts.

2. *Cases and Controversies.* — An important textual difference between the federal and many state constitutions is that state courts are generally not constrained by the language limiting federal courts to the resolution of "Cases" and "Controversies."²²⁸ The Case and Controversy Clause in Article III, Section 2 of the Federal Constitution serves two primary purposes. First, it prescribes the subject matter jurisdiction of the federal courts, leaving many cases to be resolved in the state courts.²²⁹ Second, its references to "Cases" and "Controversies" have also been used to help shape the justiciability rules that limit federal courts' exercise of judicial power.²³⁰ As a result of this second function—defining justiciability—many commentators have suggested that the lack of case and controversy language in state constitutions should be read to suggest a broader scope of the judicial power in state courts.²³¹

As has been described, the *Cleveland Cliffs* court argued that the absence of this language in the Michigan Constitution should not be read as suggesting looser justiciability because the sole purpose of the federal

on the courts, and to the extent they do, this may not always be a positive development. See Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 *Clev. St. L. Rev.* 531, 548–49 (2004).

228. U.S. Const. art. III, § 2; see Richard Briffault & Laurie Reynolds, *State and Local Government Law* 54 (6th ed. 2001).

229. It is generally assumed that the jurisdictional descriptions of Article III are not self-executing and that Congress must thus confer jurisdiction onto the federal courts. See *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512–13 (1869) (noting congressional power over Supreme Court's appellate jurisdiction).

230. See, e.g., *FEC v. Akins*, 524 U.S. 11, 20 (1998) ("Article III, of course, limits Congress' grant of judicial power to 'cases' or 'controversies.'"); *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'"); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970) ("Article III . . . restricts judicial power to 'cases' and 'controversies.'"); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937) (noting that Congress limited applicability of Declaratory Judgment Act only to "cases of actual controversy" and thus statute was constitutional); *Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.'"). But see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) ("To be sure, [the Constitution] limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' but an executive inquiry can bear the name 'case' . . . and a legislative dispute can bear the name 'controversy.'").

231. See Tarr & Porter, *supra* note 225, at 42–43; Hershkoff, *supra* note 8, at 1879–80; Linde, *supra* note 170, at 1283.

clause is describing federal subject matter jurisdiction.²³² This approach, however, ignores that a century of jurisprudence has made “Cases” and “Controversies” the touchstone for American justiciability.²³³ Given the importance these words have taken on in American legal discourse, and given the divergences between the federal and state judicial powers,²³⁴ the failure of state constitutions to explicitly incorporate them should be read as additional authority for courts to diverge from federal practices.

That said, the jurisdictional clauses of many state constitutions contain language which, like that in Article III, Section 2, could be read to suggest certain justiciability standards. For example, the California Constitution refers exclusively to the adjudication of “causes” rather than “cases,” perhaps implying a rejection of federal justiciability standards.²³⁵ The constitutions of many other states, however, speak of courts exercising jurisdiction over “cases,” which could be read as a reference to the case and controversy language of the Federal Constitution.²³⁶ It is difficult to know how best to interpret these references,²³⁷ which may be more terms of convenience than terms of art. However, even when constitutions make use of the term “case,” they should not necessarily be read as incorporating federal justiciability: Just as there is no monolithic “judicial power,”²³⁸ there is similarly no monolithic conception of what consti-

232. See *Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 812–13 (Mich. 2004); *supra* notes 125–129 and accompanying text.

233. See *supra* note 230. Strangely, despite adopting this line of argument, the *Cleveland Cliffs* court had difficulty restraining itself from using this terminology in its opinion, noting once that “[t]he requirement of a genuine case or controversy as a precondition for the exercise of the ‘judicial power’ is not a mere fine point of constitutional law.” 684 N.W.2d at 808.

234. See *supra* Part III.B.1.

235. See, e.g., Cal. Const. art. VI, § 12(a) (“The Supreme Court may, before decision, transfer to itself a *cause* in a court of appeal.” (emphasis added)).

236. See, e.g., Alaska Const. art. IV, § 15 (“The [supreme court] shall make and promulgate rules . . . in civil and criminal cases in all courts.”); Kan. Const. art. III, § 2 (“All cases shall be heard with not fewer than four justices sitting”); N.C. Const. art. IV, § 12, cl. 5 (“The General Assembly may by general law provide that the jurisdictional limits may be waived in civil cases.”); Or. Const. art. VII, § 5, cl. 7 (“In civil cases three-fourths of the jury may render a verdict.”).

Some state courts have made note of these references to cases when considering these questions. For example, the Georgia Court of Appeals has recognized that “[t]hroughout Article VI of the Georgia Constitution, jurisdictional authority is given over ‘cases.’ ‘Cases’ are live disputes, actual controversies.” *In re I.B.*, 464 S.E.2d 865, 866–67 (Ga. Ct. App. 1995) (footnotes omitted). Additionally, the West Virginia Supreme Court has somewhat misleadingly characterized a restriction on its appellate jurisdiction to “civil cases at law where the matter in controversy . . . is of greater value or amount than three hundred dollars,” W. Va. Const. art. III, § 3, cl. 1, as creating a “controversy requirement” that mandates that litigants show standing. *Coleman v. Sopher*, 459 S.E.2d 367, 372 n.6 (W. Va. 1995).

237. For example, what conclusions should one draw from the Michigan Constitution? It refers to the adjudication of “cases” in some contexts, see Mich. Const. art. VI, § 15, while in others referring to “cases and matters,” see *id.* § 13.

238. See *supra* Part III.B.1.

tutes a "case." If there were, the considerable acceptance of taxpayer standing at the state level would be impossible.²³⁹ Thus, while claims about the lack of case and controversy language in state constitutions may be somewhat overstated, this should not block state courts from recognizing legislative conferrals of standing.²⁴⁰

3. *Open Court Provisions.* — State courts have also often looked to state constitutional provisions that have no clear federal analogue to help construe the scope of the state judicial power. Thirty-nine states have "open courts" provisions, which prevent legislatures from blocking citizens' access to state courts to seek remedies for certain injuries.²⁴¹ For example, the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."²⁴² Since this provision explicitly references injuries, as do open courts clauses in many other state constitutions,²⁴³ Texas courts have relied on this clause to mandate that all plaintiffs in state court demonstrate an injury similar to that required in federal court.²⁴⁴

239. See *supra* notes 219–220 and accompanying text.

240. There is one textual argument that state courts have used to uphold legislative conferrals of standing that courts may wish to avoid. Standing and other justiciability requirements are often viewed as being jurisdictional in nature, see, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000), and many state constitutions grant state legislatures extensive power over defining the jurisdiction of state courts, see, e.g., Alaska Const. art. IV, § 1 ("The jurisdiction of courts shall be prescribed by law."); G. Alan Tarr, *The Judicial Branch*, in *3 State Constitutions for the Twenty-first Century*, *supra* note 182, at 85, 90–91. Some state courts have relied on these jurisdictional provisions to show that the scope of state judicial power is broader than that at the federal level. See *Nichols v. Kan. Governmental Ethics Comm'n*, 18 P.3d 270, 277 (Kan. Ct. App. 2001) (explaining that Federal Case and Controversy Clause does not apply, but rather Kansas Constitution, which provides that "[t]he district courts shall have such jurisdiction in their respective districts as may be provided by law" (quoting Kan. Const. art. III, § 6(b))); *Hous. Auth. of Chester v. Penn. State Civil Serv. Comm'n*, 730 A.2d 935, 940–41 (Pa. 1999) (finding Federal Case and Controversy Clause inapplicable, but noting that Pennsylvania Constitution vests it with "such jurisdiction as shall be provided by law" (emphasis omitted) (quoting Penn. Const. art. V, § 2)).

However, such arguments may prove too much: If interpreted too broadly, these provisions could allow legislatures to confer any function onto the courts, which could be contrary to the spirit of clauses vesting the courts with judicial power. Also, as Justice Scalia has observed, "Jurisdiction . . . is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). The drafters of state constitutions may simply not have intended the phrase to refer to justiciability in this context.

241. See Hershkoff, *supra* note 8, at 1880; David Schuman, *The Right to a Remedy*, 65 *Temp. L. Rev.* 1197, 1201–05 (1992) (referring to open courts provisions as "remedy clauses" or "remedy guarantees").

242. *Tex. Const. art. I, § 13.*

243. See Schuman, *supra* note 241, at 1201–02.

244. See *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury.").

Although these provisions have been interpreted differently in various states,²⁴⁵ state courts should not follow the Texas approach and read them as blocking legislative conferrals of standing. Recognizing that the legislature may not rescind certain causes of action remedying traditional injuries does not suggest that the legislature cannot create any causes of action protecting nontraditional injuries.²⁴⁶ Moreover, the enactment of these provisions was generally motivated by concerns that the legislature, and sometimes even the courts, might *block* access to justice.²⁴⁷ Thus, rather than restricting legislative conferrals, if anything, they suggest a constitutional mood favorable to broad access to courts.

4. *Advisory Opinions.* — Beyond open courts provisions, another relevant difference between the federal and state judiciaries is that the constitutions of eight states, including Michigan, authorize their courts to issue advisory opinions.²⁴⁸ In three states the function is statutorily assigned,²⁴⁹ while in others courts issue advisory opinions without explicit constitutional or statutory authorization.²⁵⁰ Interestingly, the *Cleveland Cliffs* court construed the permissibility of advisory opinions in Michigan as restricting legislative conferral of standing,²⁵¹ while other courts have relied on the impermissibility of such opinions to reach the same conclusion.²⁵² Both of these approaches can be criticized.

For the *Cleveland Cliffs* court, the explicit constitutional authorization of advisory opinions suggested a narrow scope to the judicial power, since arguably such authorization would otherwise have been unnecessary.²⁵³

245. See Schuman, *supra* note 241, at 1203–17 (discussing variations in interpretation, ranging from states where provisions only establish procedural protections to those where clauses limit legislatures' substantive power to withdraw common law causes of action).

246. *Id.* at 1208 (“Thus, a legislature cannot eliminate remedies for trespass or breach of contract. It has a free hand, however, with respect to remedies for such modern inventions as invasion of privacy or negligent infliction of emotional distress.”).

247. *Id.* at 1199–201. Professor Schuman cautions against easy generalizations about the historical rationale behind these provisions. See *id.* Regardless of whether they are viewed as protecting against legislative or judicial interference with justice, however, their underlying purpose seems to be safeguarding access to courts.

248. Hershkoff, *supra* note 8, at 1845. In addition to Michigan, those states are Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota. *Id.*; see Jonathan D. Persky, Note, “Ghosts That Slay”: A Contemporary Look at State Advisory Opinions, 37 Conn. L. Rev. 1155, 1166–68 (2005).

249. These states are Alabama, Delaware, and Oklahoma. Hershkoff, *supra* note 8, at 1845–46; Persky, *supra* note 248, at 1168–69.

250. Hershkoff, *supra* note 8, at 1846; Persky, *supra* note 248, at 1169. For an example of a state court granting an advisory opinion despite lacking jurisdiction to issue a binding decision, see Scheibel v. Pavlak, 282 N.W.2d 843, 848–51 (Minn. 1979).

251. See *supra* notes 123–124 and accompanying text.

252. See, e.g., *Utsey v. Coos County*, 32 P.3d 933, 936–39, 944–45 (Or. Ct. App. 2001) (*en banc*). Importantly, the Oregon Supreme Court has abrogated *Utsey* and rejected its restrictions on legislative conferral of standing. See *Kellas v. Dep't of Corr.*, 145 P.3d 139, 141–42 (Or. 2006).

253. See *supra* notes 122–124 and accompanying text.

However, this approach assumes that such explicit authorizations operate against the backdrop of a clearly defined, restrictive state judicial power, which, as has been demonstrated, simply does not exist.²⁵⁴ Indeed, in other contexts, Michigan courts have rejected the notion that constitutional clauses concerning state justiciability import federal justiciability norms: The Michigan Constitution expressly confers standing onto taxpayers in some situations,²⁵⁵ but this has not prevented state courts from continuing to recognize taxpayer standing in other situations.²⁵⁶ Thus, a grant of one power to state courts may not necessarily mean the prohibition of another.

On the other hand, in states where advisory opinions have been rejected, legislative conferrals of standing might be viewed as backdoor attempts to evade this restriction. However, many courts and commentators have noted that issuing advisory opinions is analytically distinct from adjudicating cases where the plaintiff cannot satisfy the federal injury requirement.²⁵⁷ Most state courts recognize advisory opinions as an extra-judicial function carried out by individual judges, not a particular court, and as nonbinding on future litigation.²⁵⁸ Alternatively, as we have seen, adjudication where plaintiffs have not demonstrated standing can still fit cleanly within the judicial power,²⁵⁹ with adverse parties litigating nonhypothetical disputes, the resolution of which will bind the parties going forward.²⁶⁰ Consequently, even if the judiciary of a particular state has a tradition of avoiding advisory opinions, state legislatures should be free to confer standing legislatively.

5. *Conclusion.* — In many states, the state judicial power has been interpreted as imposing looser justiciability standards on state courts than

254. See *supra* Part III.B.1.

255. See Mich. Const. art. IX, § 32 ("Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article . . .").

256. See, e.g., *Beattie v. E. China Charter Twp.*, 403 N.W.2d 490, 494 (Mich. Ct. App. 1987).

257. See *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914, 919 (Ariz. 1985) (applying prudential tests that diverge from federal standing test to avoid issuing "advisory opinions"); *Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y.*, 275 A.2d 433, 437–38 (N.J. 1971) (noting that although New Jersey courts do not apply federal standing doctrine, they still "will not render advisory opinions"); Fletcher, *Structure*, *supra* note 6, at 247–50 (explaining that "standing doctrine as presently formulated is not an essential, or even a particularly good, protection against advisory opinions"); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 603, 644–45, 649–51 (1992) (criticizing courts for using term "advisory opinion" as rhetorical "slogan," divorced from analysis).

258. See Persky, *supra* note 248, at 1205–06, 1209–14.

259. See *supra* note 9 and accompanying text.

260. See *Utsey v. Coos County*, 32 P.3d 933, 966 n.15 (Or. Ct. App. 2001) (en banc) (Armstrong, J., dissenting) ("The decision would do more than give either the neighbor or petitioner advice about the relevant land use law; it would enforce that law by requiring the local government to comply with it.").

those constraining the federal courts.²⁶¹ Although many state constitutions explicitly mandate separation of powers,²⁶² powers are allocated differently at the state level, with greater checks on executive authority²⁶³ and a broader role for the courts.²⁶⁴ For example, many state courts have long been willing to extend standing to taxpayers to challenge executive action, even when the federal courts have not and when state legislatures have not authorized suit.²⁶⁵ Citizen suits and qui tam actions merely build on this tradition, while retaining legislative discretion to limit suits if policy choices prove misguided.²⁶⁶ And while the textual provisions of state constitutions may not clearly resolve the scope of state judicial power, they often suggest citizens should have freer access to courts at the state level.²⁶⁷ Thus, state courts should be reluctant to follow federal precedent, *Cleveland Cliffs*, or *Scachitti*, and thereby limit the choice of legislatures to authorize citizen suits and qui tam actions.²⁶⁸

CONCLUSION

The U.S. Supreme Court has placed considerable limitations on the freedom of Congress to confer standing onto private individuals to litigate in the public interest. Generally, regardless of statutory conferrals, all litigants in federal court must demonstrate standing personally, although the Court's decision in *Stevens* provides a partial exception to this rule. The Court has also suggested that conferrals of standing may impermissibly allow private individuals to infringe on the President's duty to enforce the law.

While many state courts have not followed federal precedent in this area, others have. The *Cleveland Cliffs* court found that cases where plaintiffs have not satisfied the federal injury requirement lie outside the scope of Michigan's judicial power. Also, the *Scachitti* court ruled that granting private citizens uncontrolled authority over public litigation may infringe on the powers of the State Attorney General.

Although variation between state constitutions may prevent this Note's conclusions from applying to all states, state courts should be hesitant to follow either federal precedent or the *Cleveland Cliffs* and *Scachitti* courts. In many states, broad legislative authority over the Attorney General, combined with limited gubernatorial control over that office,

261. See *supra* Part III.B.1 and note 9 and accompanying text.

262. See *supra* note 205 and accompanying text (noting that forty state constitutions contain clauses explicitly calling for separation of powers).

263. See *supra* notes 189, 201 and accompanying text (discussing plural executives).

264. See *supra* notes 221–227 and accompanying text.

265. See *supra* notes 219–220 and accompanying text (discussing taxpayer standing).

266. See *supra* notes 179–181 and accompanying text (discussing judicial deference to legislative policy judgments).

267. See *supra* Parts III.B.2–3.

268. See *supra* note 170 and accompanying text (discussing importance of citizen suits given difficulty of part-time, term-limited legislatures effectively overseeing state executives).

suggests that allowing some private control over public litigation is unlikely to infringe on state executive power. Similarly, many state constitutions are more favorable to looser standing requirements than is the Federal Constitution. The scope of judicial power has frequently been interpreted as being broader at the state level than in the federal courts, and textual provisions in state constitutions do not block legislative conferrals, but rather suggest their permissibility.

Citizen suits and *qui tam* actions help check executive power by allowing citizens to force executive compliance with legislative mandates and by supplementing the executive's law enforcement authority. Since executive authority is more restrained under state constitutions—which divide executive power and allow citizens freer access to courts—than under the Federal Constitution, conferrals of standing by state legislatures should frequently be uncontroversial. Given the U.S. Supreme Court's explicit approval of state divergence from federal norms in this area, state courts should be hesitant to limit legislative experimentation.