

July 2020

Circumventing Standing to Appeal

Ryan W. Scott

Follow this and additional works at: <https://scholarship.law.ufl.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Ryan W. Scott, *Circumventing Standing to Appeal*, 72 Fla. L. Rev. 741 (2020).

Available at: <https://scholarship.law.ufl.edu/flr/vol72/iss4/2>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

CIRCUMVENTING STANDING TO APPEAL

*Ryan W. Scott**

Abstract

The requirement of *standing to sue* in federal court is familiar, but the related requirement of *standing to appeal* within the Article III judiciary is badly undertheorized. The Supreme Court's opinions suggest (at least) four constitutional rationales. Standing to appeal might serve the same functional purposes as standing to sue, or it might follow from the fact that appeals involve two separate courts, or it might be triggered because the underlying case or controversy has become moot, or because it has reached the point of final judgment.

Compounding the confusion, the requirement of standing to appeal can have troubling consequences in the cases in which it arises most frequently: when state officials refuse to defend state law against constitutional attack and decline to appeal from an adverse judgment. In an era of political polarization, state attorneys general increasingly find it tempting to abandon the defense of laws supported by the opposing party. Standing doctrine makes that situation worse, affording state officials the opportunity to short-circuit appellate review for self-serving or partisan reasons.

After critically examining the possible constitutional theories, this Article concludes that the requirement of standing to appeal is best explained by the finality of the judgment and the conclusion of the underlying "case" or "controversy." On that account, however, Congress is not powerless to facilitate appellate review, even in the absence of an appeal by an injured party. Congress plays a primary role in determining when a legal judgment becomes final, and it already postpones the point of finality through a wide range of procedural devices. Consistent with the Constitution, Congress could provide for *automatic* appeals by operation of statute, for example, whenever a district court enters an injunction against the enforcement of state law, or for *judge-initiated* appeals in the discretion of the appellate court, on its own motion or at the suggestion of the district court or a party.

* Professor and Associate Dean for Academic Affairs, Indiana University Maurer School of Law, Bloomington. The author would like to thank participants in faculty workshops, including the Seventh Circuit Judicial Conference and the Big Ten Junior Scholars Conference, for valuable comments on earlier drafts. Special thanks to Kevin LeRoy and Trevor Waliszewski for outstanding research assistance and continuing support throughout the development of this Article.

INTRODUCTION	742
I. STANDING TO APPEAL: A NECESSARILY CONCISE HISTORY	750
A. <i>Appeals from Outside the Article III Judiciary (1940s–1986)</i>	751
B. <i>Appeals Within the Article III Judiciary (1986–1987)</i>	753
C. <i>Appeals in an Age of Acquiescence (2013–present)</i>	756
II. THREE (WRONG) THEORIES OF STANDING TO APPEAL	759
A. <i>The Functional Theory of Standing to Appeal</i>	759
1. Functional Justifications for Standing	760
2. Standing to Appeal and the Separation of Powers	763
3. Standing to Appeal and the Adversary Process	765
B. <i>The Separate-Courts Theory of Standing to Appeal</i>	768
1. Separate Courts and the Text and Structure of Article III	768
2. Separate Courts and Supreme Court Practice	771
C. <i>The Mootness Theory of Standing to Appeal</i>	773
III. FINALITY AND STANDING TO APPEAL	777
A. <i>The Finality Theory of Standing to Appeal</i>	778
B. <i>Congress and Finality</i>	780
1. How Congress Extends the Life of Cases	781
2. Certification and the Transfer of Cases Without an Appeal	785
C. <i>Congress and Standing to Appeal</i>	790
CONCLUSION	795

INTRODUCTION

The requirement of *standing to sue* in federal court, grounded in Article III’s case-or-controversy requirement, has been a familiar feature of litigation in federal court for decades. Recently, however, questions concerning *standing to appeal* in federal court have exploded in frequency and importance. In its last Term alone, the Supreme Court

issued three appellate standing rulings,¹ including the June 2019 dismissal of an appeal in *Virginia House of Delegates v. Bethune-Hill*,² which struck down Virginia's electoral map as the product of racial gerrymandering.³ That followed on the heels of major standing-to-appeal decisions a few years earlier in the same-sex marriage cases *Hollingsworth v. Perry*⁴ and *United States v. Windsor*.⁵

Although the requirement of standing to appeal is firmly established, it is also surprisingly undertheorized. The Court's opinions suggest at least four possible constitutional rationales. Standing to appeal might be required because it serves the same functional purposes as standing to sue, such as safeguarding the separation of powers or improving the adversary process.⁶ Or it might be required because an appeal moves a case between separate courts, and every federal court is independently bound to decide only "cases" or "controversies."⁷ Or it might be required because, once the parties who are personally injured by a judgment have chosen not to appeal, the case becomes moot.⁸ Or it might be required because the underlying judgment has become final and the lack of standing to appeal confirms that the case or controversy is over.⁹

Compounding the theoretical confusion, the requirement of standing to appeal can have troubling consequences in the cases in which it arises most frequently: when state officials refuse to defend state law against constitutional attack and refuse to appeal from an adverse judgment enjoining its enforcement. State attorneys general typically bear responsibility for defending state laws under constitutional challenge,¹⁰ and historically they have done so as a matter of routine.¹¹ In the last

1. See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1413–14 (2019).

2. 139 S. Ct. 1945, 1949–50 (2019); *id.* at 1949–50.

3. *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 181 (E.D. Va. 2018), *appeal dismissed sub nom.* *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

4. 570 U.S. 693 (2013).

5. 570 U.S. 744 (2013).

6. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542–43 (1986); *infra* Section II.A.

7. See *Bender*, 475 U.S. at 541–42; *infra* Section II.B.

8. See *Perry*, 570 U.S. at 705; *infra* Section II.C.

9. See *Karcher v. May*, 484 U.S. 72, 83 (1987); *infra* Section III.A.

10. Emily Myers, *Conduct of Litigation*, in *STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES* 88 (Emily Myers ed., 3d ed. 2013) (describing the defense of state statutes against constitutional attack as "[a] litigation function peculiarly within the jurisdiction of the [state] attorney general").

11. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2134–37 (2015) (analyzing decades

decade, however, state attorneys general increasingly have acquiesced in constitutional challenges by refusing to defend state law.¹² Sometimes that decision is justified,¹³ but the practice also carries significant risks. Almost all state attorneys general are elected,¹⁴ and their personal and partisan interests may color the decision to defend. Deepening political polarization makes it increasingly tempting for state attorneys general to win political favor with their ideological base by refusing to defend laws championed by political opponents.¹⁵

The requirement of standing to appeal makes the problem worse. When executive officials abandon the field, the defense of state law typically falls to third-party intervenors like legislators, interest groups, and private citizens who volunteer to serve as defendants because they support the challenged law.¹⁶ Such intervenor-defendants, however, frequently have no personal stake in the outcome and therefore lack standing to appeal from any adverse judgment. As a consequence, state officials have the power to short-circuit appellate review by declining to appeal, even if reasonable arguments in defense of state law are available and appellate review would be valuable.¹⁷

Consider, for example, the high-profile redistricting case resolved by the Supreme Court in June 2019. In *Bethune-Hill v. Virginia State Board of Elections*,¹⁸ a group of voters challenged a state redistricting map drawn by the Republican-controlled legislature, but the elected state

of evidence from state attorney general opinions and practices, and concluding that before 2008, the defense of state law was “remarkably routine” and nondefense of state law “seemed non-politicized”).

12. *Id.* at 2138–42.

13. See Ryan W. Scott, Essay, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 84–85 (2014) (arguing that, in the federal system, executive nondefense is valuable in narrow circumstances because it avoids the more serious interbranch conflict caused by executive nonenforcement).

14. Emily Myers, *Origin and Development of the Office*, in STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES, *supra* note 10, at 12 (“The attorney general is . . . elected in 43 states.”).

15. Devins & Prakash, *supra* note 11, at 2150–53 (predicting that duty-to-defend issues will arise with greater frequency, particularly in “purple” states in which no party holds a stable, long-term political advantage over the other).

16. See Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1542 (2012) (describing parties who intervene on the side of the defendant as “volunteer defendants”).

17. See Scott, *supra* note 13, at 87–88 (summarizing key purposes of appellate review, including the correction of errors, the clarification of law, the promotion of uniformity, and the mitigation of costs).

18. 326 F. Supp. 3d 128 (E.D. Va. 2018).

attorney general, a Democrat, mounted no defense of the law.¹⁹ Instead, part of the state legislature intervened as a defendant and carried the “laboring oar” for the defense throughout the litigation.²⁰ A three-judge district court ruled in favor of the plaintiffs, with two judges (who happened to be Democratic appointees²¹) finding the map unconstitutional and one judge (who happened to be a Republican appointee²²) dissenting.²³ The state attorney general declined to appeal²⁴ and indeed publicly celebrated the injunction against his clients.²⁵ When the legislature sought review in the U.S. Supreme Court, its appeal was dismissed for lack of standing.²⁶ According to the Court, only the Democratic attorney general had the power to appeal from the judgment widely hailed as a “win for Democrats.”²⁷

Or consider *Greenbaum v. Bailey*,²⁸ in which a group of plaintiffs brought a First Amendment challenge against a campaign-finance law enacted by the City of Albuquerque, New Mexico.²⁹ The incumbent Republican mayor was himself the subject of a complaint under the law, and the campaign committee of a Democratic rival intervened to take up the law’s defense.³⁰ When the district court judge (who happened to be a

19. *Id.* at 139 (noting that the state defendants “declin[ed] to present an independent substantive defense”), *appeal dismissed sub nom. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

20. *Va. House of Delegates*, 139 S. Ct. at 1950.

21. See *Arenda L. Wright Allen*, BALLOTPEDIA, https://ballotpedia.org/Arenda_L._Wright_Allen [<https://perma.cc/L29X-ZEYL>]; *Barbara Keenan*, BALLOTPEDIA, https://ballotpedia.org/Barbara_Keenan [<https://perma.cc/24KH-WCZX>].

22. See *Robert Payne (Virginia)*, BALLOTPEDIA, [https://ballotpedia.org/Robert_Payne_\(Virginia\)](https://ballotpedia.org/Robert_Payne_(Virginia)) [<https://perma.cc/VH98-GEPS>].

23. *Bethune-Hill*, 326 F. Supp. 3d at 136–37, 181.

24. *Va. House of Delegates*, 139 S. Ct. at 1950.

25. See News Release, Office of Attorney Gen., Commonwealth of Va., Statement of Attorney Gen. Mark R. Herring on Supreme Court Win in Redistricting Case (June 17, 2019) (calling the dismissal of the appeal “a big win for democracy” and condemning the state house of delegates for “wast[ing] millions of taxpayer dollars and months of litigation in a futile effort to protect racially gerrymandered districts”).

26. *Va. House of Delegates*, 139 S. Ct. at 1956.

27. See, e.g., *id.* at 1950; Robert Barnes & Laura Vozzella, *High Court Dismisses Challenge to Findings of Racial Gerrymandering in Virginia*, WASH. POST (June 18, 2019, 5:17 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-dismisses-challenge-to-findings-of-racial-gerrymandering-in-virginia-districts/2019/06/17/aal1f02d2-8618-11e9-98c1-e945ae5db8fb_story.html [<https://perma.cc/5PWL-NDPF>].

28. 781 F.3d 1240 (10th Cir. 2015).

29. *Id.* at 1241.

30. *Id.* at 1241–42; see also Kaveh Mowahed, *ABQ Election 2013: Mayor, City Council, Bonds*, KUNM (Oct. 7, 2013), <https://www.kunm.org/post/abq-election-2013-mayor-city-bonds>.

Republican appointee³¹) struck down the law as unconstitutional, city officials declined to appeal, and an appeal by the rival campaign was then dismissed for lack of standing.³² According to the court, only the mayor's office had the power to appeal from the judgment invalidating the campaign-finance law that the mayor was accused of violating.³³

The decision whether to appeal is a complex one that may be informed by a range of legitimate factors, and this Article should not be misunderstood as accusing the state officials in those cases of acting improperly.³⁴ The cases powerfully illustrate, however, why political incentives might infect the decision not to appeal, especially when insulated from review by standing doctrine. The danger cuts across party lines, imperiling hard-fought legislative victories on a wide range of politically controversial subjects.³⁵

To date, the Court has shrugged off those concerns, noting that states have the power to circumvent the requirement of standing to appeal by amending state law. No one doubts that a state suffers an Article III injury when a district court enters a judgment striking down state law. When state officials acquiesce in such a judgment, an intervenor-defendant can establish standing to appeal by demonstrating that state law expressly authorizes the party to litigate on behalf of the state.³⁶ Statutes of that kind are exceedingly rare, however, particularly in light of the exacting standard for authorization articulated by the Court.³⁷ Moreover, state laws that assign litigation authority are hardly immune from self-serving partisanship. In Wisconsin, the Republican legislature and outgoing governor drew widespread criticism in December 2018 when they stripped state executive officials of the power to settle or dismiss civil

council-bonds [<https://perma.cc/6XKE-EEDN>] (providing greater detail about the political climate during the 2013 mayoral election in New Mexico).

31. *Christina Armijo*, BALLOTPEDIA, https://ballotpedia.org/Christina_Armijo [<https://perma.cc/7E3R-W9VE>].

32. *Greenbaum*, 781 F.3d at 1240–41.

33. *Id.* at 1244.

34. In *Virginia House of Delegates*, for example, my own view is that the district court's judgment was correct, and state officials might reasonably have viewed an appeal as needlessly delaying the development of a new reapportionment plan.

35. See *infra* notes 96–103 and accompanying text.

36. See *infra* notes 115–16 and accompanying text.

37. See Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 76–77 (2014).

actions without legislative approval,³⁸ hastily passing the bills during the “lame duck” period after a Democrat was elected governor.³⁹

This Article sketches out an alternative approach. It first provides a detailed examination of various constitutional theories that might explain the requirement of standing to appeal.⁴⁰ It concludes that, although Congress cannot override Article III, Congress has the power to circumvent the requirement of standing to appeal by creating mechanisms for review that do not depend on an appeal by any party. Those procedural devices might prove valuable for cases in which state officials decline to appeal from a judgment invalidating state law.

The strongest theory to explain a constitutional requirement of standing to appeal rests on the finality of the judgment (call it the “finality theory” of standing to appeal). When the time to file an appeal has expired, and no party whose injury forms part of the case or controversy has requested further review, the judicial department has finally resolved the case. Only by establishing standing to appeal can an appellant demonstrate that the controversy remains unresolved, based on a continuing claim of unredressed injury. Yet Congress enjoys a broad power to define when a case or controversy reaches the point of finality⁴¹ and an equally broad power “[t]o constitute [courts] inferior to the

38. See WIS. STAT. § 165.08 (2019).

39. See Mitch Smith & Monica Davey, *Wisconsin’s Scott Walker Signs Bills Stripping Powers from Incoming Governor*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/wisconsin-governor-scott-walker.html?auth=link-dismiss-google1tap> [<https://perma.cc/GUV2-L5UB>].

40. Previous literature has paid scant attention to the constitutional basis for standing to appeal. See, e.g., Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 842–43, 846–47 (2004) (considering the possibility that standing to appeal might be a prudential requirement, but dismissing that view in light of functional concerns about the adversary process); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 251, 254–55 (1990) (noting that the right to intervene in an appeal is based on “the idea” of an Article III case); Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1296–97 (2011) (discussing separation of powers as a basis for standing to appeal briefly towards the end of the article). Most scholarship focuses on the more ambitious claim that *all* standing has no proper basis in the Constitution. See, e.g., Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 597–98 (2012); Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 616–18 (2009); Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 968 (2008); Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court’s Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1334 (2005); Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 1007, 1011.

41. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226–27 (1995).

supreme Court” and to define their relationship to one another.⁴² Indeed, Congress already postpones the point of finality, even over the objection of the parties, through a host of procedural devices. It authorizes federal courts to disapprove dismissals and settlements agreed upon by the parties in certain classes of cases, including class actions, shareholder derivative actions, and criminal prosecutions.⁴³ It permits courts of appeals to review panel decisions en banc, at their own initiative.⁴⁴ Most strikingly, for over 200 years, it has authorized courts of appeals to “certify” questions to the U.S. Supreme Court, which in turn has enjoyed the power to assume jurisdiction over the entire case.⁴⁵

By the same logic, two procedural mechanisms could facilitate appellate review even in the absence of an appeal by a party with standing. The first is *automatic transfer*: Congress could specify that in some category of cases, such as cases in which a district court enjoins the enforcement of state law on federal constitutional grounds, the case transfers to the court of appeals for mandatory review by operation of statute. The second is *judge-initiated transfer*: Congress could authorize the courts of appeals, in their discretion, to grant review of district court judgments on their own motion, either *sua sponte* or at the suggestion of the district court or any party. In each case, standing to appeal would not be required because appellate review would not be conditioned upon an appeal.

In reaching that conclusion, the Article also considers and critiques three other theories of standing to appeal, each of which suffers from serious defects. First, the Court has offered various functional justifications for requiring standing, and the requirement of standing to appeal might serve those same purposes (call this the “functional theory”).⁴⁶ But requiring standing to appeal actually works at cross-purposes with the key functional justifications for standing, grounded in the separation of powers. Dismissing an appeal, while leaving a district court judgment intact, hardly extracts the federal judiciary from the controversy. To the contrary, it means that a single federal judge may hold the effectively unreviewable power to resolve the case, creating an even greater risk of judicial overreach.⁴⁷

42. U.S. CONST. art. I, § 8; *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816).

43. See *infra* notes 269–75 and accompanying text.

44. See *infra* notes 277–81 and accompanying text.

45. See *infra* Section III.B.2.

46. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542–43 (1986).

47. See *infra* notes 147–53 and accompanying text.

Second, an appeal moves a case from one federal court to another, and if every appeal marks the end of one “case” or “controversy” and the beginning of a new one, then a fresh showing of standing would follow from the independent obligation of each federal court to assure itself of jurisdiction (call this the “separate-courts theory”).⁴⁸ But that is plainly wrong. Article III’s case-or-controversy requirement limits “the judicial Power of the United States”⁴⁹ as a whole, not the disaggregated power of individual courts or layers of appellate review.⁵⁰ The suggestion that a constitutional “case” ends whenever it moves from one court to another is also incompatible with Supreme Court decisions concerning the retroactive effect of legal change and the power of Congress to revise final judgments.⁵¹

Third, under the Court’s mootness decisions, a case or controversy must persist throughout the course of the litigation, and the entry of a judgment coupled with the acquiescence of the losing party might render further proceedings moot (call this the “mootness theory”).⁵² This theory has superficial appeal, as the acceptance of an adverse judgment is analogous to other actions by the parties that moot the controversy, like the voluntary dismissal of a complaint or a complete settlement.⁵³ More precisely, however, the acceptance of an adverse judgment does not render the case moot; it means that the case is over. Mootness refers to the *premature* death of a case or controversy, before the judicial department finally resolves it. When an appeal from a court’s judgment is dismissed because the appellant lacks standing, the case has run its full course.⁵⁴

This Article proceeds in three parts. Part I provides a (necessarily) concise history of Article III standing to appeal. After summarizing the basic requirements of standing to sue, it describes the extension of those principles to appellants beginning in the mid-1980s as well as the flurry of recent standing-to-appeal decisions. Part II considers and critiques three potential theories that explain the requirement of standing to appeal: the functional theory, the separate-courts theory, and the mootness theory. It argues that all three are unpersuasive. Part III describes the finality theory, which offers the strongest basis for a constitutional requirement of standing to appeal. It also explains why, consistent with

48. See *Bender*, 475 U.S. at 541.

49. U.S. CONST. art. III, § 1.

50. See *infra* Section II.B.1.

51. See *infra* Section II.B.2.

52. See *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).

53. See *infra* notes 218–24 and accompanying text.

54. See *infra* notes 225–29 and accompanying text.

that theory, Congress retains the power to circumvent that requirement, and it sketches out the features of two mechanisms for appellate review that would not depend on an appeal by a party with standing.

I. STANDING TO APPEAL: A NECESSARILY CONCISE HISTORY

By now the basic components of Article III standing are well-established.⁵⁵ A plaintiff who files suit in federal court must satisfy three standing requirements: (1) a personal injury-in-fact that is (2) traceable to the actions of the defendant and (3) redressable through a favorable judgment.⁵⁶ The Supreme Court has held that those requirements derive not from the common law or from any act of Congress, but from Article III of the Constitution.⁵⁷ One important consequence of standing doctrine is that federal courts cannot issue advisory opinions.⁵⁸ Another is that federal courts cannot entertain “public rights” lawsuits against government officials filed by citizens⁵⁹ or taxpayers⁶⁰ who have not suffered any personal injury. In addition, because standing is anchored in Article III, Congress lacks power to override those requirements by conferring standing to sue on non-injured parties.⁶¹ Although the doctrine and rationales of standing have continued to evolve, as discussed below,

55. Over thirty years ago, Professor William Fletcher memorably described its basic elements as “numbingly familiar.” William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

56. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

57. *Id.* at 560.

58. *See Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (explaining that no justiciable controversy exists when the parties ask for an advisory opinion); Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782–1793, at 488–89 (Henry P. Johnston ed., 1891) (declining a request from the Washington administration to give advisory opinions on abstract questions of law).

59. *Allen v. Wright*, 468 U.S. 737, 754 (1984) (“[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216–21 (1974).

60. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599–600 (2007) (plurality opinion); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). Although the Court has carved out an exception to the general rule against taxpayer standing for Establishment Clause challenges, *see Flast v. Cohen*, 392 U.S. 83, 105–06 (1968), the Court’s recent decisions have narrowed that exception considerably, *see, e.g., Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 138–43 (2011).

61. *Lujan*, 504 U.S. at 573–78.

the basic requirement that a plaintiff must have *standing to sue* in federal court had emerged at least by the early twentieth century.⁶²

By contrast, the law of Article III *standing to appeal* is a relatively recent, almost accidental development. The extension of standing requirements to appellants developed in three stages:

- In the first stage (from the 1940s through 1986), the Court extended standing requirements to appeals *from outside the Article III judiciary*, such as appeals from state courts or federal agencies.
- In the second stage (from 1986 to 1987), the Court further extended standing requirements to appeals *within the Article III judiciary*, such as appeals from a federal district court to a court of appeals, and from the courts of appeals to the U.S. Supreme Court.
- In the third stage (from 2013 to the present), state officials' acquiescence in constitutional challenges has generated a flurry of decisions on appellate standing, altering some of the doctrine's key features.

A. *Appeals from Outside the Article III Judiciary (1940s–1986)*

The first stage of development in the Supreme Court's appellate standing cases involved appeals from *outside the Article III judiciary*. That issue arises primarily in two contexts: Supreme Court direct review of state court judgments and federal court review of Article I courts and federal agencies. In both settings, the Court has required standing to appeal because the appellant was invoking the jurisdiction of a federal court for the first time, and the Article III judiciary may decide only cases and controversies.

Since its inception, the U.S. Supreme Court has enjoyed jurisdiction to review the final judgments of state courts on questions of federal law.⁶³

62. The Court's first explicit reference to "standing" as a distinct constitutional requirement appears in *Stark v. Wickard*, 321 U.S. 288 (1944). Therefore, some scholars trace standing's history to the 1940s. See Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992). For a formidable account of modern standing doctrine as continuous with a longer doctrinal tradition, see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 712 (2004).

63. See 28 U.S.C. § 1257(a) (2018) (authorizing the Supreme Court to review, by writ of certiorari, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" in which federal questions arise); Judiciary Act of 1789, ch. 20, § 25, 1

But state courts are not bound by Article III, and many state courts adjudicate lawsuits brought by citizens or taxpayers who would lack standing in federal court. In the 1940s and 1950s, as standing doctrine began to take shape, the Court determined that parties appealing from a state court judgment must satisfy the same standing requirements as plaintiffs who file in federal district court.⁶⁴

The Court later reached the same conclusion in cases on appeal from Article I courts and federal agencies. Since 1946, the Administrative Procedure Act (APA)⁶⁵ has authorized any person “adversely affected or aggrieved” by federal agency action to file suit in federal district court to review that action,⁶⁶ and various other federal statutes allow parties to obtain direct review of agency action in federal courts of appeals.⁶⁷ Since 1970, the Court has consistently held that, in addition to satisfying any statutory requirements, a party seeking review of an agency action in federal court must satisfy the standing requirements of Article III.⁶⁸ Given the overlap between Article III’s injury-in-fact requirement⁶⁹ and APA “aggrieved party” status,⁷⁰ the Court’s discussion sometimes blurs the two together. But the Court has made clear that even parties who lawfully participate in agency proceedings or decision-making may lack standing to file an action for judicial review in an Article III court.⁷¹

Stat. 73, 85–86 (authorizing review by writ of error for a slightly narrower class of federal questions).

64. *See, e.g., Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (asserting that although state courts are free to issue opinions “under such circumstances that it can be regarded only as advisory,” an appeal to the U.S. Supreme Court requires a showing of standing “because our own jurisdiction is cast in terms of ‘case or controversy’”); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (*per curiam*); *Coleman v. Miller*, 307 U.S. 433, 437–46 (1939).

65. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

66. 5 U.S.C. § 702 (2018).

67. 16 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3940 (3d ed. 2012) (noting that, beginning in 1914, Congress “frequently” has provided for direct review of administrative actions in the courts of appeals).

68. *See, e.g., INS v. Chadha*, 462 U.S. 919, 935, 939–40 (1983); *Barlow v. Collins*, 397 U.S. 159, 164 (1970); *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151–52 (1970).

69. *See* note 56 and accompanying text.

70. *See* 5 U.S.C. § 702.

71. *See, e.g., Dir., Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Drydock Co.*, 514 U.S. 122, 128–30 (1995); *Sierra Club v. Morton*, 405 U.S. 727, 731–34 (1972); *see also KERM, Inc. v. FCC*, 353 F.3d 57, 59–60 (D.C. Cir. 2004) (“That a petitioner participated in administrative proceedings before an agency does not establish that the petitioner has constitutional standing to challenge those proceedings in federal court.”); *Wilcox Elec., Inc. v. FAA*, 119 F.3d 724, 727 (8th Cir. 1997) (recognizing that sometimes “parties who lack Article III

The requirement of standing to appeal *from outside the Article III judiciary* makes sense by a straightforward analogy to standing for plaintiffs. In both cases, the party seeks, for the first time, to invoke the jurisdiction of the Article III judicial department. As the Court explained in *ASARCO Inc. v. Kadish*,⁷² any party who “seek[s] entry to the federal courts for the first time in the lawsuit” must prove standing.⁷³

B. Appeals Within the Article III Judiciary (1986–1987)

In the second stage of development, the Court extended its standing decisions to parties who appeal *within the Article III judiciary*. Although the Court began imposing explicit “standing” requirements in the early twentieth century, it was not until a pair of decisions in 1986 that the Court first held that a party must have standing to appeal from a federal district court to a federal court of appeals.⁷⁴ But, even then, the issue arose unexpectedly and was resolved with little consideration.

The relatively slow emergence of the requirement of standing to appeal should come as no surprise. Most appeals, after all, are initiated by a party that has lost in district court and therefore has obvious standing to appeal. When a plaintiff loses, the injury that established standing to sue remains unredressed. When a defendant loses, the judgment against the defendant inflicts a new injury. Sometimes both parties are dissatisfied with some aspect of the judgment, and each has standing to file a cross-appeal. Because appellate review could reverse or modify the judgment, redressing any of those injuries, standing to appeal is usually straightforward.

More difficult appellate standing questions arise, however, when the defendants are government officials who acquiesce in an adverse judgment and some other party—such as a third-party intervenor—seeks to appeal instead. The leading decision is *Bender v. Williamsport Area*

standing with respect to a certain dispute will have standing to litigate that dispute in an agency adjudication,” but that review in an Article III court requires a showing of constitutional standing).

72. 490 U.S. 605 (1989).

73. *Id.* at 618; *see id.* at 612 (requiring standing for “the parties who seek now for the first time to invoke the authority of the federal courts in the case”); *id.* at 619 (requiring standing for “the parties first invoking the authority of the federal courts”).

74. The Court came close in *Bryant v. Yellen*, 447 U.S. 352 (1980), which concluded that a group of farmworkers who had intervened as defendants in the district court had “standing” to appeal when the United States declined to do so, *see id.* at 366–68. The opinion contains no discussion of Article III or constitutional standing decisions, however, and in a footnote the Court cited only a passage discussing prudential standing limits. *See id.* at 367 n.17 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (noting the Court’s discussion of limits on “generalized grievances” in *Warth*).

School District,⁷⁵ in which the plaintiffs won a federal district court judgment against a school district and school board.⁷⁶ The defendants acquiesced in that judgment and chose not to appeal, but one member of the school board, acting alone, appealed to the Third Circuit.⁷⁷ That court reversed, and the U.S. Supreme Court granted certiorari.⁷⁸ Before reaching the merits, however, the Court *sua sponte* inquired into the board member's standing to bring the initial appeal.⁷⁹ Neither the parties nor the United States as amicus curiae had briefed that question, with all agreeing (in footnotes) that the case was properly before the court of appeals.⁸⁰ Yet in a 5–4 opinion by Justice Stevens, the Court held that the board member lacked standing to appeal, rejecting his claims of injury as an individual, as a (now former) member of the board, and as a parent.⁸¹ That decision, along with two others decided later in the same Term,⁸² established for the first time that all “persons seeking appellate review” must meet Article III standing requirements, even within the federal judiciary.⁸³

Unsurprisingly, given the manner in which the issue arose, the basis for the requirement of standing to appeal was poorly explained. In dissent, Chief Justice Burger reasoned that such a showing should not be necessary: “Once the jurisdiction of the district court over a particular dispute is established, it seems clear that the same dispute between the same parties will remain within the Article III powers of the courts on appeal.”⁸⁴ Although the majority did not respond to that argument directly, it suggested two possible reasons for requiring standing to

75. 475 U.S. 534 (1986).

76. *Id.* at 539.

77. *Id.*

78. *Id.* at 539–40.

79. *Id.* at 540–41.

80. See Brief for Respondent, *Bender*, 475 U.S. 534 (No. 84-773), 1984 WL 565896, at *6 n.3; Brief for Petitioners, *Bender*, 475 U.S. 534 (No. 84-773), 1985 WL 669815, at *8 n.7; Brief for United States as Amicus Curiae Supporting Petitioners, *Bender*, 475 U.S. 534 (No. 84-773), 1985 WL 669817, at *5 n.5.

81. *Bender*, 475 U.S. at 543–49. The Court held that the board member's claim of injury as a parent faltered because it did not appear in the record. See *id.* at 548–49.

82. See *Maine v. Taylor*, 477 U.S. 131, 136–37 (1986); *Diamond v. Charles*, 476 U.S. 54, 68–71 (1986); see also *Karcher v. May*, 484 U.S. 72, 81, 83 (1987) (deciding a similar issue in the following Term).

83. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

84. *Bender*, 475 U.S. at 551 (Burger, C.J., dissenting); see also *id.* at 555 (Powell, J., dissenting) (agreeing with the Chief Justice that the board member “has standing to appeal” and with “much of his dissenting opinion,” but writing separately to address the merits).

appeal. First, it stressed that the jurisdictional limits of Article III bind “every federal court” and that the court of appeals therefore had an independent obligation to assure itself of standing.⁸⁵ Second, it pointed to the functional value of standing requirements in general, which improve the adversary process by “ensur[ing] that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts.”⁸⁶ Justice Marshall, whose concurring opinion was essential to the outcome, offered yet another explanation. In his view, the original controversy had ended when the district court entered its judgment and the government defendants elected not to appeal, leaving “nothing left to litigate between those parties.”⁸⁷ The appellant must prove standing, he explained, because the appeal was—for Article III purposes—an effort to initiate a new case or controversy, separate from the one litigated in the district court.⁸⁸ This Article elaborates upon each of those theories below, but it is striking that, from the moment of its origin, a majority of the Court could not agree on a single underlying theory for the requirement of standing to appeal.

Nonetheless, later in the same Term, the Court doubled down. In *Diamond v. Charles*,⁸⁹ the Court extended the standing requirement to parties appealing from a federal court of appeals to the U.S. Supreme Court.⁹⁰ The district court struck down a state law restricting abortion, and state officials declined to appeal from the adverse judgment.⁹¹ The would-be appellant, a physician, had no interest in the case beyond his personal opposition to abortion and his desire to defend the law.⁹² The Court made clear that the appellate standing requirement is anchored in the Constitution; it assumed, for the sake of argument, that the physician had properly intervened as a defendant under Federal Rule of Civil Procedure 24(a)(2), but nonetheless dismissed the appeal.⁹³

85. *Id.* at 541 (majority opinion) (explaining that the appellate court must “satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review” (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934))).

86. *Id.* at 541–42; *see id.* at 542–43 (excerpting discussion of the adversary-process function of standing from *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

87. *Id.* at 549 (Marshall, J., concurring).

88. *Id.*

89. 476 U.S. 54 (1986).

90. *See id.* at 61.

91. *See id.* at 60–61.

92. *See id.* at 64–67.

93. *See id.* at 68–69.

C. Appeals in an Age of Acquiescence (2013–present)

In *Bender* and *Diamond*, the Court established that all appeals to a federal court require a distinct showing of Article III injury. Perhaps surprisingly, the issue lay dormant for decades. In the quarter-century from 1988 to 2012, the Court decided just one case concerning standing to appeal within the federal judiciary.⁹⁴ But that changed drastically in the last few years, as appellate standing questions have arisen with greater frequency and importance. Standing to appeal was hotly contested in two high-profile same-sex marriage cases in 2013,⁹⁵ and the Court decided three more standing-to-appeal issues in the 2018–2019 Term alone.⁹⁶

The driving force behind the growing importance of standing to appeal is acquiescence by state officials in constitutional challenges to state laws. The trend cuts across parties and extends to a range of hot-button political issues. In same-sex marriage litigation, attorneys general in seven states have agreed with plaintiffs that their states' laws violated the Constitution.⁹⁷ In the last decade, state officials have acquiesced in constitutional challenges to laws involving voting rights,⁹⁸ gun control,⁹⁹ education reform,¹⁰⁰ campaign finance,¹⁰¹ search and seizure policies,¹⁰²

94. See *Camreta v. Greene*, 563 U.S. 692, 700–01 (2011) (discussing review sought by the government after prevailing on qualified immunity grounds in the court of appeals). In one other case, the Court reiterated the rule of *Bender* in dictum without reaching the issue. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64–67 (1997).

95. See *United States v. Windsor*, 570 U.S. 744, 755 (2013); *Hollingsworth v. Perry*, 570 U.S. 693, 700–01 (2013).

96. See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–56 (2019); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 (2019); see also *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736–37 (2016) (deciding a standing-to-appeal issue in a case involving racial gerrymandering).

97. Jordan E. Pratt, Peer Review Article, *Disregard of Unconstitutional Laws in the Plural State Executive*, 86 Miss. L.J. 881, 882–83 (2017) (noting that same-sex marriage litigation has “ushered in a new trend” of executive nondefense).

98. See *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1227 (Colo. 2003) (en banc).

99. See *In re Wheeler*, 81 A.3d 728, 734–35 (N.J. App. Div. 2013); Salvador Rizzo, *Christie Declines to Defend N.J. Gun Laws, Sparking Criticism*, STAR-LEDGER (Dec. 31, 2013), http://www.nj.com/politics/index.ssf/2013/12/chris_christie_declines_to_defend_nj_gun_laws_sparking_criticism.html [https://perma.cc/F483-BVS8].

100. See Sch. Bd. of Norfolk v. Opportunity Educ. Inst., Nos. CL13–6955, CL14–1002, 2014 WL 8239967, at *4 & n.2 (Va. Cir. Ct. June 10, 2014).

101. See *Greenbaum v. Bailey*, 781 F.3d 1240, 1241–42 (10th Cir. 2015).

102. See *Buquer v. City of Indianapolis*, No. 1:11-cv-00708–SEB–MJD, 2013 WL 1332137, at *1 (S.D. Ind. Mar. 28, 2013).

and many others.¹⁰³ This acquiescence may take a variety of forms—refusing to defend, refusing to enforce, refusing to appeal, putting up only token resistance, etc.¹⁰⁴—but in a growing number of cases, state officials actively cooperate in efforts to strike down state laws as unconstitutional.

Legal scholars have expressed concern about this trend. Acquiescence by executive officials can undermine democratic decision-making by abandoning laws that in fact pass constitutional muster.¹⁰⁵ It can create opportunities for arbitrariness and unfairness in enforcement.¹⁰⁶ It may undermine the separation of powers by affording executive officials multiple opportunities, beyond the constitutional power to veto, to defeat laws they oppose.¹⁰⁷ And because litigation decisions can be used strategically to impress or reward favored constituencies, outside interests have strong incentives to lobby state officials, increasing the risk of improper influence or corruption.¹⁰⁸

Whatever its other consequences, however, acquiescence in constitutional challenges has catapulted questions of standing to appeal to prominence for the first time in decades. The Court's recent appellate standing decisions began in 2013 with the same-sex marriage cases *Hollingsworth v. Perry*¹⁰⁹ and *United States v. Windsor*,¹¹⁰ and have continued into 2019 with the hotly contested redistricting case *Virginia House of Delegates v. Bethune-Hill*.¹¹¹ Two aspects of the decisions in this period deserve special emphasis.

First, in the Court's latest decisions, standing to appeal often boils down to a question of *state* law. In *Perry*, the plaintiffs sued California

103. See 1000 Friends of Wis. Inc. v. U.S. Dep't of Transp., 860 F.3d 480, 481–482 (7th Cir. 2017); Sea Shore Corp. v. Sullivan, 158 F.3d 51, 54–55 (1st Cir. 1998); Appling v. Doyle, 826 N.W.2d 666, 667 n.2 (Wis. Ct. App. 2012).

104. See Lisa F. Grumet, *Hidden Nondefense: Partisanship in State Attorneys General Amicus Briefs and the Need for Transparency*, 87 FORDHAM L. REV. 1859, 1859–60 (2019) (criticizing state attorneys general for signing amicus briefs that urge the invalidation of other states' laws when their own state law would be affected); Rena M. Lindevaldsen, *The Erosion of the Rule of Law When a State Attorney General Refuses to Defend the Constitutionality of Controversial Laws*, 21 BARRY L. REV. 1, 2–3 (2015) (describing lackluster defenses mounted by state attorneys general).

105. See Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 270 (2014) (explaining how executive nonenforcement of laws undermines democracy).

106. See Michael T. Morley, *Reverse Nullification and Executive Discretion*, 17 U. PA. J. CONST. L. 1283, 1332 (2015).

107. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 571 (2012) (describing, but not endorsing, this view).

108. See Morley, *supra* note 106, at 1332; Shaw, *supra* note 105, at 269.

109. 570 U.S. 693 (2013).

110. 570 U.S. 744 (2013).

111. 139 S. Ct. 1945 (2019).

officials challenging the constitutionality of a statewide ballot measure prohibiting same-sex marriage.¹¹² The state attorney general refused to defend the law and refused to appeal after the district court struck it down as unconstitutional.¹¹³ Instead, a group of private citizens who had served as official sponsors of the ballot measure intervened as defendants and sought review in the Supreme Court.¹¹⁴ Consistent with *Bender*, the Court held that the intervenor-defendants lacked standing to appeal in their own right because they had suffered no personal injury.¹¹⁵ But everyone agreed that the district court judgment had inflicted a judicially cognizable injury on the state, making it crucial to determine whether state law authorized the sponsors to litigate on the state's behalf.¹¹⁶ The Court held that state law granted the sponsors no such power, announcing a stringent requirement that standing to appeal on behalf of a state depends upon a formal state-law agency relationship between the state and the appellant.¹¹⁷

In *Virginia House of Delegates*, the Court similarly held that the state legislative body lacked standing to appeal because it lacked authorization under state law, citing a state statute that broadly assigns “legal process” on behalf of the state to the attorney general.¹¹⁸ Previously, the Court indicated that a party could appeal on behalf of a state if it had a prior practice of defending the state's interests in state court.¹¹⁹ The decision *Virginia House of Delegates* all but closed that door, however, holding that only state court litigation in the precise posture of an appeal might be relevant and even then it cannot override a statutory designation.¹²⁰ The combined effect of the two decisions, in cases where state officials decline to appeal, places decisive weight on whether state law authorizes

112. See *Perry*, 570 U.S. at 702.

113. See *id.*

114. See *id.*

115. See *id.* at 705–07. The Court dismissed the case for lack of jurisdiction and vacated the Ninth Circuit's judgment but left the district court's order intact. See *id.* at 715.

116. See *id.* at 709–10, 712–14 (explaining why state law does not make initiative sponsors “agents” of the state); *id.* at 716 (Kennedy, J., dissenting) (“Proper resolution of the justiciability question requires, in this case, a threshold determination of state law.”).

117. See *id.* at 709–10, 712–714 (majority opinion). The Court held that only “state officers” may represent the interests of states and only as part of an agency relationship as defined in the Third Restatement of Agency. See Scott, *supra* note 13, at 75–78 (describing both of those restrictions as “aggressive and questionable extensions of the Court's previous decisions”).

118. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–52, 1956 (2019).

119. See *Karcher v. May*, 484 U.S. 72, 81–82 (1987).

120. See *Va. House of Delegates*, 139 S. Ct. at 1952.

the intervenor-defendant to represent the state explicitly in a state statute, in a manner that creates a strong form of agency relationship.¹²¹

Second, the Court's recent decisions have suggested yet another rationale for the requirement of standing to appeal, one that links it with the law of mootness. In *Perry*, the Court introduced the standing-to-appeal discussion by noting that Article III requires "that an 'actual controversy' persist throughout all stages of the litigation."¹²² That language comes from case law on mootness, and the Court has since repeated it when explaining the standing-to-appeal requirement,¹²³ most recently in *Virginia House of Delegates*.¹²⁴ Although all three decisions use the phrase "standing to appeal," the reference to mootness suggests an alternative underlying theory for the requirement of standing to appeal.

II. THREE (WRONG) THEORIES OF STANDING TO APPEAL

As the capsule history above reveals, the requirement of standing to appeal within the federal judiciary emerged almost by accident and without a consistent explanation of the constitutional basis for that requirement. Part II explores in turn three possible, but ultimately unpersuasive, theories of standing to appeal recognized to some degree by the Supreme Court: (1) the functional theory, which proposes that standing to appeal serves the same purposes as standing to sue; (2) the separate-courts theory, which proposes that every move from one court to another marks the beginning of a new case or controversy, necessitating a fresh showing of standing; and (3) the mootness theory, which proposes that the losing party's decision not to appeal from a district court renders the case moot. Each of those theories suffers serious defects. Part III settles on a fourth: the finality theory, which proposes that in the absence of an appeal by a party with standing, the constitutional case or controversy has ended.

A. *The Functional Theory of Standing to Appeal*

One theory that might explain the requirement of standing to appeal is purely functional, rather than formal. Although the requirement of standing to sue derives from the "case"-or-"controversy" language of Article III, the Court frequently describes standing as essential to serve

121. See also *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399, 1399–1400 (2017) (Roberts, C.J., concurring) (noting the "blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law").

122. *Perry*, 570 U.S. at 705 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013)).

123. See *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016).

124. *Va. House of Delegates*, 139 S. Ct. at 1950–51.

various purposes. The majority opinion in *Bender* appeared to advance this theory, suggesting that standing to appeal was required because standing requirements in general improve the quality of the adversary process.¹²⁵

The functional theory, however, gets it exactly backwards. The most important function of standing is to safeguard the separation of powers, and a distinct requirement of standing to appeal does nothing to constrain judicial power. Although a requirement of standing to appeal might plausibly serve to improve the adversary process, that cannot explain why the Court treats standing to appeal as a constitutional imperative.

1. Functional Justifications for Standing

The Supreme Court often has defended the requirement of standing to sue on the ground that it performs a variety of valuable functions. Although its emphasis has shifted over time, its cases tend to emphasize two functions: (1) safeguarding the separation of powers; and (2) improving the quality of the adversary process.¹²⁶ Standing, by these accounts, promotes either judicial self-restraint or judicial self-improvement.

First, and most prominently, the Court has explained standing requirements as a product of the separation of powers. On this account, standing confines the judiciary to its proper and limited role, preventing the courts from usurping the powers of other branches of government.¹²⁷ Without strict standing requirements, the Court has warned, federal judges would become “roving commissions,” routinely called upon to resolve politically sensitive questions at the behest of concerned

125. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541–42 (1986) (reciting that it “ensure[s] that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts”); see *supra* notes 84–86 and accompanying text.

126. The Court has occasionally referred to other functions of standing doctrine, such as the channeling or conservation of scarce judicial resources. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973). Those rationales, however, appear in the Court’s opinions far less frequently than the others, particularly in the Roberts Court. See *infra* notes 137–39 and accompanying text.

127. See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (“The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.”); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (describing standing as “crucial in maintaining the ‘tripartite allocation of power’ set forth in the Constitution” (quoting *Valley Forge Christian Coll.*, 454 U.S. at 474)); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (describing standing as necessary to respect “the proper—and properly limited—role of the courts in a democratic society”).

citizens.¹²⁸ Respect for the democratic process thus requires that courts act only when strictly necessary.¹²⁹ Standing doctrine enforces those limits by narrowing the class of persons entitled to invoke the power of the federal courts to the kind of disputes the courts have historically resolved.¹³⁰ Call this the “separation-of-powers function”: Standing as a form of judicial self-restraint.¹³¹

Second, the Court has sometimes described standing doctrine as a means of improving the adversary process for the benefit of the courts. When the plaintiff has suffered a personal injury traceable to the defendant’s actions, the parties have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.”¹³² In an adversary system, the parties bear primary responsibility for building a factual record, framing the legal issues in the case, and advancing the best arguments in support of their positions. Without a personal stake in the case, litigants may not perform that function with sufficient vigor.¹³³

Relatedly, the Court has described standing as a means of highlighting the consequences of judicial actions “in a concrete factual context,” rather than “in the rarified atmosphere of a debating society,”¹³⁴ and as a means of framing the relief to be granted in narrow terms directed to particular facts.¹³⁵ Standing thus helps judges to improve their work product. Call

128. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973) (“[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.”); John Marshall, Sec’y of State, Speech (Mar. 7, 1800), in 4 *THE PAPERS OF JOHN MARSHALL* 95 (Charles T. Cullen ed., 1984) (warning that “[i]f the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision” and “almost every subject on which the executive could act,” destroying the separation of powers as “the other departments would be swallowed up by the judiciary”).

129. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974) (stating that standing ensures that “there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party”).

130. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components*, 572 U.S. 118 (2014); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

131. For a sophisticated examination of distinct strands of separation-of-powers reasoning—separately evaluating, among other things, the “pro-democracy” and “anticonscription” functions of standing—in the Court’s standing opinions, see Heather Elliott, *The Functions of Standing*, 61 *STAN. L. REV.* 459, 468 (2008).

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

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

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

135. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

this the “adversary-process function”: Standing as a form of judicial self-improvement.¹³⁶

Of those rationales, the separation-of-powers function has emerged as the most important, as noted above. Thirty years ago, the Court described Article III standing as “built on a single basic idea—the idea of separation of powers.”¹³⁷ It has since repeatedly described “[t]he law of Article III standing” as “built on separation-of-powers principles.”¹³⁸ Today, when the Court offers a functional explanation of the role of standing, it relies exclusively on the separation of powers. The Roberts Court has handed down thirteen decisions that discuss the functions or purposes of standing doctrine. Eleven of them—including four unanimous opinions—describe standing as grounded exclusively in the separation of powers, with no mention of other purposes.¹³⁹

To be sure, the adversary-process function enjoyed a heyday during the Warren Court. In *Baker v. Carr*¹⁴⁰ in 1962, the Court described “the

136. Professor Elliott describes the adversary-process function as another type of separation-of-powers argument. See Elliott, *supra* note 131, at 467–72. In my view, the adversary-process rationale does not emanate from the separation of powers. As Professor Elliott acknowledges, “separation-of-powers rhetoric is sparse” in cases that defend standing on those grounds, and the rationale has nothing to do with interbranch conflict. *Id.* at 472. The Court appears to have embraced this view as well, downgrading the requirement of concrete adversity to a matter of “prudential” rather than constitutional standing in *United States v. Windsor*, 570 U.S. 744 (2013).

137. *Allen v. Wright*, 468 U.S. 737, 752 (1984), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

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

139. See *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (unanimous); *Lexmark Int’l, Inc.*, 572 U.S. at 125 (unanimous); *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013); *Clapper*, 568 U.S. at 408; *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598–99 (2007) (plurality opinion); *Lance v. Coffman*, 549 U.S. 437, 440–41 (2007) (per curiam); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–42 (2006) (unanimous). The lone exception is *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the majority alluded to the separation-of-powers function but emphasized the importance of standing to the adversary process. See *id.* at 516–18. Another eleven of the Roberts Court’s standing decisions simply restate and apply the well-settled requirements without explaining their origins or function. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 n.1 (2018); *Janus v. AFSCME*, 138 S. Ct. 2448, 2462 (2018); *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 982–83 (2017); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2663 (2015); *Bond v. United States*, 564 U.S. 211, 225 (2011); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 732–33 (2008); *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273–75 (2008).

140. 369 U.S. 186 (1962).

gist of the question of standing” as “adverseness,” praising standing as a means of sharpening the presentation of issues.¹⁴¹ And in *Flast v. Cohen*¹⁴² in 1968, the Court listed both the separation of powers and the adverse presentation of issues as “implicit policies embodied in Article III,” but described standing doctrine as a product only of adversary-process concerns.¹⁴³ Over the last few decades, however, the Court has deemphasized those functions and highlighted the separation-of-powers rationale. In 1998, the Court explicitly repudiated *Flast*’s “parsimonious” account of the functions of Article III standing, explaining that it had since “yielded” to one anchored in the separation of powers.¹⁴⁴ Today the adversary-process function is almost entirely absent from the Court’s opinions.¹⁴⁵

2. Standing to Appeal and the Separation of Powers

The Court in *Bender* suggested that the same functional theories that underlie the requirement of standing to sue also explain the requirement of standing to appeal.¹⁴⁶ As to the separation-of-powers function, however, that theory gets it backwards. Requiring standing to appeal does nothing to restrain the power of the judicial department and indeed risks accentuating judicial power by foreclosing the possibility of appellate review.

The separation-of-powers function views standing as a form of judicial self-restraint. Standing prevents the courts from exceeding their properly limited role by transforming into “roving commissions” that routinely interfere with legislative and executive action.¹⁴⁷ But if the requirement of *standing to sue* performs that function, an additional

141. *Id.* at 204.

142. 392 U.S. 83 (1968).

143. *Id.* at 96, 99–101 (discussing the rule against advisory opinions and the functions served by standing doctrine, and concluding that “whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems”). The channeling function, by far the least well-developed, pops up in only a few scattered opinions. For the lone extended discussion of the channeling function, see *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472–73 (1982).

144. *Spencer v. Kemna*, 523 U.S. 1, 11–12 (1998); *see also* *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (concluding that “*Flast* erred in assuming that assurance of ‘serious adversarial treatment’ was the only value protected by standing” and explaining that the “separation-of-powers component” of standing “is where the ‘actual injury’ requirement comes from”).

145. In the last thirty years, only one decision has characterized standing primarily as a means to ensure a vigorous adversary presentation of the issues. *See Massachusetts v. EPA*, 549 U.S. 497, 516–17 (2007).

146. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541–42 (1986).

147. *See supra* notes 127–30 and accompanying text.

requirement of *standing to appeal* adds nothing. After all, dismissing an appeal from one Article III court to another does nothing to extract the “judicial department” from the controversy. To the contrary, by leaving the judgment of the lower court intact—right or wrong—it ensures that the judiciary will conclusively resolve the case.¹⁴⁸ There is no small irony when the Court stresses the separation of powers in cases applying the requirement of standing to appeal. When state officials acquiesce in a questionable adverse judgment from a district court, doubling down by dismissing an intervenor-defendant’s appeal for lack of standing is hardly an act of judicial modesty.

It might be argued that a requirement of standing to appeal promotes judicial self-restraint because appellate decisions have more far-reaching consequences than district court judgments.¹⁴⁹ District court rulings, after all, affect only the parties before them and are not binding in any other case, even before the same judge.¹⁵⁰ The decisions of federal courts of appeals, by contrast, serve as binding precedent in future cases before the court of appeals and in district courts within that circuit,¹⁵¹ and U.S. Supreme Court decisions establish precedent binding in all federal and state courts.¹⁵² If the Supreme Court had not dismissed the appeal in *Perry*, for example, its holding would have affected the rights of same-sex couples not just in California, but across the country.

That reasoning does not extend, however, to decisions that permanently enjoin the enforcement of state law. If the legal issues in the case apply only to a particular state law, limiting the precedential effect of the decision does nothing to limit judicial power. The issue will not arise again—especially if the district court issues a statewide or nationwide injunction, effectively giving a single judge the final word.¹⁵³ If, on the other hand, the legal issues do apply to other laws in other states, then confining the precedential effect of the judgment merely delays their resolution by the judicial branch. Perhaps that kind of delay could affect

148. See Scott, *supra* note 13, at 86–87 (arguing that *Windsor* and *Perry* consolidated, rather than expanded, judicial power in constitutional litigation); Steinman, *supra* note 40, at 845.

149. Cf. WRIGHT ET AL., *supra* note 67, § 3533.10 (noting that an “[a]ppellate decision . . . is more likely to have consequences for the law and for the public generally”).

150. *Id.* § 3533.10.2 (“In the federal system, a district-court decision and opinion command only such precedential force as the cogency of the opinion merits.”).

151. See Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 545 (1989). But see *id.* at 545 n.13 (noting two narrow exceptions to the binding effect of appellate court decisions).

152. See U.S. CONST. art. III, § 1.

153. For a critical assessment of that practice, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418–19 (2017).

the outcome; changes in their membership, for example, might make judges on the federal courts of appeals more or less receptive to a constitutional challenge. Judges delayed, however, are not judges restrained. The same-sex marriage cases offer a powerful illustration: the appellate standing decision in *Perry* postponed consideration of the merits, but the Court swiftly reached them in *Obergefell v. Hodges*.¹⁵⁴

At the same time, the requirement of standing to appeal runs the risk of expanding judicial power, working at cross-purposes with the separation-of-powers function. The threat of reversal on appeal itself promotes judicial discipline,¹⁵⁵ and the standing requirement weakens it. When state executive officials acquiesce in a challenge to state law, for example, they may signal their position to the district court in the early stages of the litigation in a variety of ways. In those cases, there is no real threat of appellate review—and the judge knows it. No doubt federal judges take their oaths seriously. But granting a single judge the exclusive and unreviewable power to decide the fate of a politically controversial law is a strange way to promote judicial self-restraint.

3. Standing to Appeal and the Adversary Process

Another functional explanation of standing, the adversary-process function, views standing as a form of judicial self-improvement. On this account, parties who have suffered a personal injury have a concrete stake in the outcome and will do a better job of framing legal arguments, developing a factual record, and highlighting the practical consequences of judicial decisions.¹⁵⁶ In *Bender*, the Court suggested that if those functional considerations explain the requirement of standing to sue, then they likewise justify a requirement of standing to appeal.¹⁵⁷

As a preliminary matter, permit me a blunt editorial comment: The adversary-process function of standing is preposterous, and it always has been. Intuitively, it perhaps makes sense that parties will be better motivated to litigate cases in which they have a concrete interest.¹⁵⁸ By reference to that objective, however, standing doctrine is wildly

154. 135 S. Ct. 2584 (2015).

155. See RICHARD A. POSNER, HOW JUDGES THINK 70–71, 141 (2008); Stephanos Bibas et al., Essay, *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1371 (2009). But see Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 92 (1985); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 579 (2003).

156. See *supra* notes 132–35 and accompanying text.

157. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541–42 (1986).

158. See Elliott, *supra* note 132, at 474.

overinclusive and underinclusive. It routinely shuts the courthouse doors to plaintiffs who have suffered no personal injury but who have retained outstanding counsel and are prepared to litigate their cases fully and passionately,¹⁵⁹ yet it welcomes into court parties with personal but trivial claims and little incentive to take them seriously.¹⁶⁰ If courts were serious about preserving the integrity of the adversary process, they would insist that plaintiffs and their counsel make a minimal showing of adequacy, analogous to the adequacy requirements for named plaintiffs and class counsel in class actions.¹⁶¹ Standing is a crude instrument, and improving the adversary process is a makeweight explanation for it. Perhaps that is why, as noted above, the Supreme Court has all but abandoned the adversary-process function as a justification for standing in the last thirty years.¹⁶²

Nonetheless, if the needs of the adversary system provide a partial justification for the requirement of standing to sue, they might likewise be offered as an explanation for the requirement of standing to appeal. After all, judges at the appellate level, like trial judges, benefit from vigorous advocacy and the crisp framing of legal issues. For several reasons, however, the need for a strong personal stake to protect the adversary process is less urgent on appeal. First, at the appellate stage, courts have the benefit of trial court proceedings involving adverse parties, including a fully developed factual record and an initial presentation of the legal issues.¹⁶³ Second, nonparties frequently file amicus curiae briefs in cases on appeal, shoring up imperfect advocacy by the parties.¹⁶⁴ Indeed, the extensive participation of amici curiae in

159. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881–82 (1983).

160. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 322 (2008).

161. See FED. R. CIV. P. 23(a)(4), (g)(1)(B).

162. See *supra* notes 140–45 and accompanying text.

163. Cf. *Ross v. Moffitt*, 417 U.S. 600, 614–16 (1974) (holding that indigent criminal defendants have no right to appointed counsel when seeking discretionary review from a state court of last appeal, based in part on the fact that they already have the benefit of a record from the trial court and briefs written by appointed counsel at trial and on direct appeal).

164. See FED. R. APP. P. 29 (setting rules for briefing and other participation by amici curiae in the federal courts of appeals). The Federal Rules of Civil Procedure, which govern proceedings in federal district court, make no explicit provision for participation by an amicus curiae. See Carl Tobias, *Resolving Amicus Curiae Motions in the Third Circuit and Beyond*, 1 DREXEL L. REV. 125, 128, 138 (2005) (acknowledging that Federal Rule of Appellate Procedure 29 “governs amicus curiae practice” and contains more “general and open-ended” criteria for amici curiae participation in comparison to Federal Rule of Civil Procedure 24, which alternatively sets forth criteria for “intervenor” filing).

cases before the Supreme Court and federal courts of appeals suggests that the judiciary considers the parties' personal stake neither necessary nor sufficient to ensure an optimal presentation of the issues on appeal.¹⁶⁵ Differences between the trial and appellate contexts, then, make the personal stake of an appellant at least marginally less important.

But there is a more serious problem. The Supreme Court has expressly downgraded the adversary-process rationale for standing to a merely prudential concern. It therefore cannot justify a constitutional requirement of standing to appeal. In *United States v. Windsor*,¹⁶⁶ the Court considered whether the United States had standing to appeal from a district court judgment, even though the Executive Branch had acquiesced in the challenge and agreed the law was unconstitutional.¹⁶⁷ Because the government sought no redress from the judgment against it,¹⁶⁸ the case raised precisely the kind of adversarial-process concerns that the Court cited as the functional justification for requiring standing to appeal in *Bender*.

Nonetheless, the Court held that Article III standing was proper.¹⁶⁹ The district court's judgment ordering the government to pay money damages, which had not yet been paid, satisfied the injury-in-fact requirement and ensured a live controversy.¹⁷⁰ The Court acknowledged the potential risks of hearing "friendly" or non-adversary appeals, but it deemed those concerns irrelevant to Article III, invoking the distinction between constitutional standing and "prudential" standing, a set of judicially self-imposed limits.¹⁷¹ Preserving the integrity of the adversarial process on appeal, the Court explained, is important but does not implicate *constitutional* concerns.¹⁷² After weighing the competing prudential considerations, the Court concluded that accepting jurisdiction

165. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3, 35–37 (2011) (documenting the Supreme Court's extensive reliance on amicus briefs while pointing out the tension between that practice and the "adversarial ideal" that underlies the standing doctrine).

166. 570 U.S. 744 (2013).

167. See *id.* at 753–56.

168. See *id.* at 756.

169. See *id.* at 757.

170. See *id.* at 757–58 (reasoning that the fact "[t]hat the Executive [Branch] may welcome this order . . . does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not").

171. *Id.* at 756–57, 759–60 (citation omitted).

172. See *id.* at 759 (describing how the rule that a prevailing party cannot appeal "does not have its source in the jurisdictional limitations of Art. III" (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333–34 (1980))).

was appropriate because the participation of an intervenor-defendant as amicus curiae would ensure a crisp presentation of the issues.¹⁷³

The posture of *Windsor* was unusual, and the decision may not purge considerations of adverseness from the standing inquiry entirely. The Court squarely held, however, that the constitutional requirement of *standing to appeal* is not linked to the adverse positions of the parties.¹⁷⁴ That purpose must be accomplished, if at all, by prudential and other sub-constitutional rules. As a result, the adversary-process function cannot explain the requirement of standing to appeal. Because requiring standing to appeal does nothing to promote the separation of powers, and any value it has for the adversary process lacks constitutional currency, the functional theory is unpersuasive.

B. *The Separate-Courts Theory of Standing to Appeal*

Another possible explanation for the requirement of standing to appeal begins from the fact that an appeal involves two separate courts. Every federal court has an independent obligation to assure itself of its own jurisdiction,¹⁷⁵ and every federal court is bound by the “case”-or-“controversy” language of Article III, which serves as the basis for standing requirements.¹⁷⁶ On this theory, a fresh showing of standing is required on appeal because every appeal marks the beginning of a new case or controversy within the meaning of Article III. The appeal may involve the same parties and the same claim of injury, but whenever a case moves from one federal court to another, it begins anew, necessitating that the appellant establish standing.

The separate-courts theory views each federal court as an island unto itself, and that is its fatal flaw. The text and structure of Article III create a unified judicial department, not a disaggregated set of individual courts. And the separate-courts theory cannot be reconciled with longstanding Supreme Court practice concerning the retroactive effect of changes in law or the reopening of final judgments.

1. Separate Courts and the Text and Structure of Article III

The requirement of standing to sue derives from Article III, Section Two, of the Constitution, which limits the judicial power of the

173. See *id.* at 755, 761–62.

174. See *id.* at 761–63.

175. See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 95 (1998).

176. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992).

United States to particular categories of cases and controversies.¹⁷⁷ Those terms are hardly self-defining; at the Convention of 1787, James Madison described federal jurisdiction—almost tautologically—as “limited to cases of a Judiciary [n]ature.”¹⁷⁸ But the Court has endeavored to interpret that language in context as referring to disputes “historically viewed as capable of resolution through the judicial process.”¹⁷⁹ Reasoning that legal cases and controversies traditionally took the form of disputes between adverse parties concerning a concrete claim of injury, the Court has found the requirements of injury, traceability, and redressability implicit in the language of Article III.¹⁸⁰

It is plausible to extract from the historical understanding of cases and controversies a requirement of standing to commence an action in federal court.¹⁸¹ Likewise, it makes sense to require a showing of standing for appeals from *outside* the federal courts, like appeals from state courts or federal agencies.¹⁸² In both instances, a litigant seeks “for the first time to invoke the authority of the federal courts,”¹⁸³ and the constitutional power of federal courts is confined to cases and controversies.¹⁸⁴ The text

177. U.S. CONST. art. III, § 2; *see also* *Lujan*, 504 U.S. at 573–78 (recounting the Court’s history of, and rationale for, determining when a case is cognizable under Article III conceptions of standing).

178. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911).

179. *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *see also* *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (calling the history of *qui tam* actions “particularly relevant to the constitutional standing inquiry”); *Steel Co.*, 523 U.S. at 102 (explaining that Article III refers to “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process”); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (concluding that “[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies’”).

180. *See Lujan*, 504 U.S. at 560–61.

181. An enormous body of scholarship has responded to the Court’s historical claims about standing, and almost all of it is critical. *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1265–67 (1961); Sunstein, *supra* note 62, at 166–67; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1373–74 (1988). Some scholars have pushed back, however, defending standing requirements as consistent with historical practice. *See, e.g.*, Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1008 (1997); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 5 (2001); Woolhandler & Nelson, *supra* note 62, at 712–17.

182. *See supra* notes 72–73 and accompanying text (describing the extension of standing requirements to appeals from outside the Article III judiciary).

183. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612 (1989).

184. *See id.* at 617–18.

and structure of Article III, however, undercut the separate-courts theory as the basis for a requirement of standing to appeal *between* the federal courts.

First, Article III frames the case-or-controversy language as a limit on the judicial department, not as a limit on individual, disaggregated courts. Section 1 begins by vesting “[t]he judicial [p]ower of the United States” in the Supreme Court and any inferior courts created by Congress.¹⁸⁵ Section 2 then provides that “[t]he *judicial [p]ower*” shall extend to nine categories of cases and controversies.¹⁸⁶ The subject of the sentence containing the case-or-controversy language is “judicial power,” not the federal courts individually.¹⁸⁷ By point of contrast, five other provisions of the Constitution expressly refer to particular categories of “courts” or “tribunals” or to the federal courts generally.¹⁸⁸ Because standing limits derive from the case-or-controversy requirement, they operate as a limit on the judiciary as a whole rather than a barrier between different federal courts or different layers of appellate review.¹⁸⁹

Second, the Constitution grants Congress broad power to create and structure the relationships between federal courts. Article III, Section One, requires the creation of a Supreme Court but leaves the size, composition, and operational details entirely in the hands of Congress.¹⁹⁰ It also vests the judicial power in the Supreme Court and in “such inferior Courts as the Congress may from time to time ordain and establish,”¹⁹¹

185. U.S. CONST. art. III, § 1.

186. *Id.* § 2 (emphasis added).

187. *Cf.* *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (“The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked.”).

188. *See* U.S. CONST. art. I, § 8 (granting Congress power “[t]o constitute Tribunals inferior to the supreme Court”); *id.* art. II, § 2 (granting Congress the power to vest the appointment of inferior officers “in the Courts of Law”); *id.* (granting the President power to nominate “[j]udges of the supreme Court”); *id.* art. III, § 1 (imposing tenure and salary requirements for “[t]he [j]udges, both of the supreme and inferior Courts”); *id.* § 2 (specifying categories of cases in which the jurisdiction of the Supreme Court shall be original and appellate). For that reason, the use of the phrase “judicial power” in Article III, Section 2, should not be viewed merely as an effort to remain noncommittal about the identity of particular courts, since Article III, Section 1, leaves the creation of lower federal courts to the discretion of Congress. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 275 (6th ed. 2009) [hereinafter HART AND WECHSLER] (describing the Madisonian Compromise).

189. *Cf.* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1220 (2014) (urging an approach to standing “grounded in the federal judicial ‘Power’ and its deployment to address the evolving challenges posed by judicial review in a regime of separated powers”).

190. AKHIL REED AMAR, AMERICA’S CONSTITUTION 210, 212–13 (2005) (describing various “weapons” Congress could brandish against Supreme Court Justices).

191. U.S. CONST. art. III, § 1.

and Article I, Section Eight, reinforces that provision by granting Congress the power “[t]o constitute Tribunals inferior to the supreme Court.”¹⁹² Although Article III, Section Two, contains some language setting out types of cases within the Supreme Court’s original and appellate jurisdiction,¹⁹³ it leaves Congress free to structure the relationship between the Supreme Court and the inferior courts and between the inferior courts themselves.¹⁹⁴ It is difficult to reconcile the broad power of Congress to establish and constitute the inferior courts with standing rules that constrain the circumstances in which a case may be transferred, by appeal or otherwise, from one Article III court of Congress’s creation to another.

2. Separate Courts and Supreme Court Practice

The separate-courts theory is also incompatible with longstanding Supreme Court practice. The idea that every appeal marks the end of one case or controversy and the beginning of a new one conflicts with the Court’s actions in several contexts, including (1) the retroactive application of new rules announced during direct appeals and (2) the reopening of final judgments. In both of those areas, the law and practice presume that multiple courts within the judicial department adjudicate the same case or controversy.

First, the Court has developed an intricate body of rules governing the “retroactivity” of legal changes that occur during the pendency of an appeal. Since 1801, the Court has recognized that “if subsequent to the [trial court] judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed” and the trial court judgment “set aside.”¹⁹⁵ The issue has taken on special importance in criminal cases, where federal courts of appeals frequently must decide the effect of Supreme Court decisions announced after proceedings in district court but before the appeal is resolved. In *Griffith v. Kentucky*,¹⁹⁶ the Court held that new rules announced by the Supreme Court are “to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.”¹⁹⁷ That requirement,

192. *Id.* art. I, § 8.

193. *See id.* art. III, § 2.

194. *See* AMAR, *supra* note 190, at 226 (noting that “[t]he Constitution gave Congress broad power to allocate cases within the federal judicial system,” including power to shift cases from the Supreme Court to the inferior courts).

195. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

196. 479 U.S. 314 (1987).

197. *Id.* at 328.

the Court explained, is implicit in the language of Article III and essential to the “nature” and “integrity” of judicial review.¹⁹⁸ By contrast, in *Teague v. Lane*,¹⁹⁹ the Court held that new rules generally do not apply to cases on collateral review, i.e., those that become final before the new rule is announced.²⁰⁰ The Court defines finality, for purposes of that distinction, by reference to the process of direct appellate review within the judicial department.²⁰¹

These retroactivity rules are incompatible with the idea that every appeal marks the end of one case or controversy and the beginning of another. Legal changes that intervene during the pendency of an appeal must be honored precisely because the judicial department has not yet resolved the case, and the courts collectively have an obligation to apply the law as they best understand it. Legal changes may be disregarded for cases on collateral review only because the judicial department has finally resolved the case, making any relief from the judgment a matter of remedial discretion. The separate-courts theory would disrupt that structure, calling into question the power of federal courts on direct appeal to set aside final judgments in settled controversies based on new law.

Second, in holding that Congress lacks power to reopen final judgments, the Court has stressed Article III’s creation of a “judicial department” and Congress’s role in structuring that department.²⁰² In *Plaut v. Spendthrift Farm, Inc.*,²⁰³ Congress, by statute, changed the limitation period for certain securities fraud actions and also purported to “reinstate[]” any actions previously dismissed by the courts as untimely.²⁰⁴ The Court held that Congress is free to change the limitation period for cases still pending on appeal, but not to reopen final judgments: the Constitution “gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them.”²⁰⁵ The Court acknowledged that the line separating judgments that are “pending” from those that are “final” is defined by Congress, which (for example) sets time limits in which to file an appeal:

198. *Id.* at 322–23.

199. 489 U.S. 288 (1989).

200. *See id.* at 310.

201. *See* Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965) (“By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the new rule was announced] . . .”).

202. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

203. 514 U.S. 211 (1995).

204. *Id.* at 213–14, 240.

205. *Id.* at 217–19.

But a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of “inferior Courts” and “one supreme Court.” Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.²⁰⁶

That reasoning explicitly describes the judicial department, for separation-of-powers purposes, as an integrated whole. The Court’s distinction in *Plaut* between final judgments and judgments that remain pending on appeal is inconsistent with a theory that treats each court as initiating and finally resolving a separate case or controversy.

These longstanding practices confirm what the text, structure, and history of Article III describe. A constitutional requirement of standing to appeal cannot be justified on the theory that each proceeding before a separate Article III court represents a different case or controversy requiring a fresh claim of injury.

C. *The Mootness Theory of Standing to Appeal*

A third potential theory to explain standing to appeal links the requirement to the law of mootness. Mootness refers to the constitutional requirement that an Article III case or controversy “must exist not only [when] ‘the complaint is filed,’ but through ‘all stages’ of the litigation.”²⁰⁷ Because it centers not on the initial state of the controversy, but on its persistence as the litigation progresses, the Court has sometimes described mootness as “standing set in a time frame.”²⁰⁸ Contrary to the separate-courts theory, the law of mootness recognizes that an appeal transfers a single continuing case or controversy from one court to another. Yet a showing of standing to appeal remains necessary, on this account, to confirm that the controversy remains “live.”²⁰⁹ The idea is that when all losing parties whose injuries sustain the controversy elect

206. *Id.* at 227.

207. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)).

208. *See, e.g.*, *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

209. *Already, LLC*, 568 U.S. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).

not to appeal, and instead accept the adverse judgment, the case becomes moot and any further appeals must be dismissed.²¹⁰

The mootness theory is intuitively attractive. In similar contexts, such as the voluntary withdrawal of a claim by the plaintiff or a voluntary settlement by the parties, the Court has held that a case or controversy becomes moot.²¹¹ On closer inspection, however, describing the controversy as “moot” when an appellant lacks standing to appeal is imprecise, perhaps even misleading. In addition, the law of mootness is more flexible and subject to judge-made exceptions than the law of standing, making it less plausible as the source of a strict constitutional requirement of standing to appeal.

Standing requires that a plaintiff demonstrate a personal injury, traceable to the defendant and redressable through a favorable judgment.²¹² Mootness requires the dismissal of a case whenever intervening circumstances eliminate any of those essential elements of a case or controversy.²¹³ If, at any point at the trial level, the plaintiff’s injury is cured or can no longer be redressed, the district court ordinarily must dismiss the case for lack of jurisdiction.²¹⁴ Similarly, if intervening events cause the case to become moot during the pendency of an appeal, the appellate court must dismiss the case for lack of jurisdiction.²¹⁵

For two reasons, the mootness theory is an intuitively attractive explanation for the requirement of standing to appeal. First, the law of mootness recognizes that an appeal represents the continuation of a single case or controversy, not the initiation of a new one. That is clear from the Supreme Court’s approach to vacatur for cases that become moot while pending on appeal. Its “established practice” is not merely to dismiss the appeal, but also to vacate the judgment below and to remand with instructions to dismiss the case as moot.²¹⁶ That makes sense only on the

210. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

211. See *infra* notes 218–19 and accompanying text.

212. See *supra* notes 56–57 and accompanying text.

213. See Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1678 (1970).

214. See Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 610–11 (1992).

215. See Note, *supra* note 213, at 1678.

216. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see *Duke Power Co. v. Greenwood Cty.*, 299 U.S. 259, 267 (1936) (“Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss.”). Vacatur of lower-court opinions is not automatic, however, when the parties themselves cause the case to become moot while an appeal is pending. See *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994) (“It is petitioner’s burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate

understanding that the case on appeal was the same as the case in the district court. Because the judicial department was not able to finally resolve the controversy before it became moot, the appeal should be dismissed and all previous lower court judgments as well. The mootness theory, happily, does not suffer from the defects of the separate-courts theory.²¹⁷

Second, the law of mootness recognizes that the parties' own actions can render a controversy moot. Well-settled examples include: the plaintiff's voluntary withdrawal of the complaint;²¹⁸ the parties' settlement of the entire dispute;²¹⁹ the plaintiff's acceptance of an offer to pay the full amount in controversy;²²⁰ and, at least in some circumstances, the defendant's promise to discontinue its challenged conduct.²²¹ Those kinds of action render a case moot, the Court has explained, because "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."²²²

These holdings provide plausible support for the mootness theory. In the Court's decisions dismissing an appeal because the appellant lacked standing, the losing party elected to accept the adverse judgment of the district court rather than extend the controversy by filing an appeal.²²³ That is analogous to the plaintiff's withdrawal of a complaint or to the parties' voluntary acceptance of settlement terms. In those situations, the actions of the parties effectively extinguish the controversy, making further proceedings pointless.

It is not quite accurate, however, to characterize a case as moot when the time to appeal has expired, confirming the losing party's decision to accept the judgment. At that point, the controversy is not moot; it has ended. Mootness refers to the *premature* death of a case, before the judicial department has rendered a final judgment. The losing party's acceptance of a final judgment, by contrast, marks the death of the case

not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur.").

217. See *supra* Section II.B.

218. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 513 (1989).

219. See *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120, 120 (1985) (per curiam).

220. See *Alderson v. Weinstein*, 117 N.E.3d 401, 405 (Ill. App. Ct. 2018); see also *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 671–72 (2016) (holding that an *unaccepted* offer to satisfy a claim does not moot a dispute).

221. See *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91–96 (2013) (describing and applying the mootness exception to a defendant's "voluntary cessation" of challenged conduct).

222. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980)).

223. See *supra* notes 75–78 and accompanying text.

by natural causes. For that reason, the Court has held that the parties' actions before judgment, such as settlement or withdrawal of an action, render the case constitutionally moot. The parties' actions after judgment, on the other hand, do not moot the underlying case or controversy. Instead, federal courts have developed a body of equitable rules and exceptions for determining whether the vacatur of a judgment is warranted.²²⁴ Some courts of appeals have held that, when circumstances beyond the parties' control render further proceedings pointless before the thirty-day appeal window has elapsed, any further *appeal* would be moot.²²⁵ Characterizing the controversy as moot therefore adds nothing, except perhaps needless complexity.

Accordingly, although the Court's recent standing-to-appeal decisions have quoted language from mootness cases,²²⁶ they have never directly characterized a case as "moot" because of the appellant's lack of standing. Indeed, the Court has once explicitly disavowed that label. In *Karcher v. May*,²²⁷ the appellants argued that, if the Court concluded that they lacked standing to appeal, the judgments of the lower courts should be vacated on mootness grounds.²²⁸ The Court rejected that request, explaining that the controversy "did not become moot"; their lack of standing merely deprived the appellate court of jurisdiction to consider their appeal.²²⁹

Finally, mootness doctrine features a degree of flexibility that standing doctrine does not.²³⁰ The Supreme Court has announced two exceptions to mootness, each driven by practical concerns. Under one exception, the defendant's "voluntary cessation" of challenged conduct does not moot the case absent a strong showing that the conduct cannot "reasonably be expected to recur."²³¹ Without such an exception,

224. See WRIGHT ET AL., *supra* note 67, § 3533.10.1 (collecting cases).

225. See, e.g., *Hall v. Louisiana*, 884 F.3d 546, 548, 554 (5th Cir. 2018) (explaining that, because of the repeal of the challenged law before a notice of appeal was filed, the losing party "lost the opportunity to appeal"). But see *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 115–16 (4th Cir. 2000) (agreeing that the repeal of the challenged law after judgment, but while motions for reconsideration were pending, rendered the case moot and required dismissal of the complaint, despite separately considering whether equitable principles required vacatur of the judgment).

226. See *supra* notes 122–23 and accompanying text.

227. 484 U.S. 72 (1987).

228. See *id.* at 82.

229. *Id.* at 83.

230. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 190–91 (2000) (explaining that, in light of the "long-recognized exceptions to mootness . . . the description of mootness as 'standing set in a time frame' is not comprehensive" (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997))).

231. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 89, 90–91 (2013).

defendants could exploit mootness rules to obtain dismissal of an action, then quickly return to their old ways.²³² Under another exception, cases “capable of repetition, yet evading review,” may be entertained despite becoming moot, provided the plaintiff stands a reasonable chance of being injured in the same way again.²³³ Otherwise a recurring live controversy might never be fully resolved, and only because the federal courts are too slow to reach a final judgment before the controversy naturally dissipates.²³⁴ The fact that the Court treats the requirement of standing to appeal as an absolute bar, not amenable to such practical or equitable exceptions, suggests that the basis for the requirement is something other than mootness.

III. FINALITY AND STANDING TO APPEAL

None of the theories described above offers a persuasive account of why the Constitution requires standing to appeal within the federal judiciary, but a fourth theory does. According to the finality theory, an appellant must establish standing to appeal because, without it, the constitutional case or controversy has ended and the judicial department has issued a final judgment. The finality theory offers a coherent constitutional explanation of the requirement and is consistent with the outcomes in the Court’s standing-to-appeal cases.

The finality theory, however, does not leave Congress powerless to provide for appellate review at the suggestion of non-injured parties. That is because Congress plays a crucial role in determining the conditions under which a judgment becomes final. In fact, Congress already has authorized a form of appellate review that does not require an “appeal” by an injured party: a 200-year-old procedure that allows the courts of appeals to certify questions to the Supreme Court, which in turn can take up the entire case.²³⁵

The upshot is that Congress has the power to authorize appellate review at the suggestion of nonparties who have not suffered a personal injury. Existing statutes and court rules, properly read, do not provide that

232. See *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

233. *Friends of the Earth*, 528 U.S. at 190–91 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 109 (1998)).

234. Classic examples involve disputes concerning annual events and pregnancies. It almost always takes more than a year to take a constitutional challenge to trial, through an appeal of right, and through the certiorari process in the Supreme Court. See, e.g., Sudhin Thanawala, *Wheels of Justice Slow at Overloaded Federal Courts*, AP (Sept. 27, 2015), <https://apnews.com/54175de3d735409ab99a2f10e872d58e/wheels-justice-slow-overloaded-federal-courts> [https://perma.cc/L35X-QPJS].

235. See SUP. CT. R. 19.

kind of authorization. But two mechanisms for appellate review should pass constitutional muster: *automatic* transfer, in which decisions enjoining the enforcement of state law are subject to mandatory appellate review by operation of statute; and *judge-initiated* transfer, in which courts of appeals are given discretion to trigger an appeal themselves, either on their own motion or at the suggestion of the district court or a party.

A. *The Finality Theory of Standing to Appeal*

The finality theory proposes that standing to appeal is required because, once the time to appeal has expired for parties who remain injured, the judicial department has issued a final judgment and the constitutional case or controversy is over. As Justice Marshall argued in his concurrence in *Bender*, as soon as the district court entered its judgment and the injured defendants elected not to appeal, “[t]hat controversy ended.”²³⁶ Only by establishing standing to appeal can an intervenor-defendant prove that the controversy has not in fact concluded. Standing to appeal means that a personal injury, traceable to the judgment below, remains unredressed.

That explanation works. Like the mootness theory, the finality theory recognizes that an appeal represents the continuation of the same constitutional case or controversy, rather than the initiation of a new one.²³⁷ It also explains why the Court’s decisions so often describe standing to appeal as satisfied under either of two conditions: (1) when the appellant has authorization to appeal on behalf of the state; or (2) when the judgment below has inflicted an independent constitutional injury on the appellant.²³⁸ In the first situation, the judgment has not become final because the state defendants in fact have filed a timely

236. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 549 (1986) (Marshall, J., concurring); see *supra* notes 87–88 and accompanying text.

237. Alternatively, an intervenor-defendant could be viewed as initiating a new case or controversy, and the requirement of standing to appeal viewed as a direct parallel to the requirement of standing to sue. See *Bender*, 475 U.S. at 549 (Marshall, J., concurring) (“This lawsuit on appeal was *not* ‘the same dispute between the same parties’ as the one conducted in the District Court.” (citation omitted)). But federal law requires that new cases be initiated in district court, not in a court of appeals. See, e.g., 28 U.S.C. § 1331 (2018) (granting district courts “original jurisdiction” over civil actions arising under federal law); FED. R. CIV. P. 3 (“A civil action is commenced by filing a complaint with the [district] court.”). And the Constitution prohibits the U.S. Supreme Court from exercising original jurisdiction in federal-question cases. See U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–75 (1803).

238. See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–56 (2019); *Hollingsworth v. Perry*, 570 U.S. 693, 705–11 (2013).

appeal. In the second situation, the constitutional case or controversy involves multiple losing parties, and the judgment has not become final because at least one of them filed a timely appeal.

On this account, recurring doubts about standing to appeal arise because of a gap—albeit a contested gap—between the standards for intervention as a party, on one hand, and the requirements of Article III standing, on the other. Under Rule 24(a) of the Federal Rules of Civil Procedure, district courts *must* permit any party to intervene when it claims “an interest relating to the property or transaction” that may otherwise be impaired.²³⁹ Under Rule 24(b), they *may* permit anyone to intervene who “has a claim or defense that shares with the main action a common question of law or fact.”²⁴⁰ Federal courts of appeals have long disagreed about whether intervention under those provisions also requires a showing of Article III standing.²⁴¹ The Supreme Court, showing remarkable resilience, has left that conflict undisturbed for decades.²⁴²

At least under Rule 24(b) for permissive intervention, the better view is that an intervening party need not establish Article III standing. By its terms, the Court has recognized, the permissive-intervention rule “plainly dispenses with any requirement” of a “direct personal or pecuniary interest in the subject of the litigation.”²⁴³ As a constitutional matter, the original parties afford the district court the power to adjudicate the case or controversy. The participation of an additional defendant who may lack a personal stake in the outcome does not offend the Constitution any more than the participation of a superfluous plaintiff who may lack standing.²⁴⁴

That reading also carries important advantages. When state officials acquiesce in a constitutional challenge to state law, federal courts often welcome the participation of intervenor-defendants precisely because the original defendants cannot perform an essential role in the adversary

239. FED. R. CIV. P. 24(a)(2).

240. *Id.* 24(b)(1)(B).

241. See Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 GA. L. REV. 411, 427 (2005) (surveying the case law and concluding that two circuits require standing to intervene, while four do not, and the rest have equivocated or never reached the question).

242. See *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651–52 (2017) (holding that an intervenor requires standing when it seeks relief distinct from that requested by the original parties, but declining to address whether standing is required in other circumstances).

243. *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940).

244. See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (applying the well-settled rule that “the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement”); Steinman, *supra* note 241, at 433–34.

process.²⁴⁵ Thus, the Court in *Virginia House of Delegates* recognized that the intervenors carried the “laboring oar” in defending the law,²⁴⁶ in *Windsor*, the Court would have dismissed the appeal but for the “substantial argument” and “sharp adversarial presentation of the issues” by the intervenor,²⁴⁷ and in *Perry*, the intervenors defended state law at a ten-day trial, with the district court noting their “vigorous” advocacy.²⁴⁸ Without the participation of intervenor-defendants, the district courts in all three cases would be left in the uncomfortable position of adjudicating a “friendly, non-adversary, proceeding” at the behest of “a party beaten in the legislature,” contrary to the Supreme Court’s longstanding admonitions.²⁴⁹

The finality theory, to its credit, readily accommodates the gap between the standards for Article III standing and permissive intervention. Permissive intervention, on this view, allows a non-injured party to participate in the litigation in some capacity, but it does not make them party to the case or controversy within the meaning of Article III.²⁵⁰ Intervenors by permission may play a role, even a valuable one, but they remain constitutionally peripheral. By statute, Congress has imposed a thirty-day time limit to file a notice of appeal in district court,²⁵¹ and a ninety-day limit to file a petition for certiorari in the Supreme Court.²⁵² If those time limits elapse and no appeal has been filed by a party with standing, the constitutional case or controversy is over. To demonstrate that the point of finality has not arrived, an intervenor-appellant must establish standing.

B. Congress and Finality

The finality theory explains the constitutional requirement of standing to appeal. That does not mean, however, that Congress is powerless to

245. See *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002) (affirming intervention under Federal Rule of Civil Procedure 24(b) because “the government declined to defend fully from the outset” and “the presence of intervenors would assist the court in its orderly procedures leading to the resolution of this case, which impacted large and varied interests”), *abrogated by* *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

246. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019).

247. *United States v. Windsor*, 570 U.S. 744, 761 (2013).

248. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010).

249. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

250. See U.S. CONST. art. III, § 2 (providing that the judicial power shall extend to “[c]ontroversies between” various types of parties, including those “to which the United States shall be a [p]arty” and granting the Supreme Court jurisdiction over cases “in which a State shall be [a] [p]arty”).

251. See 28 U.S.C. § 2107(a) (2018); FED. R. APP. P. 4(a)(1)(A).

252. See 28 U.S.C. § 2101(c); SUP. CT. R. 13.1.

authorize alternative forms of appellate review at the suggestion of non-injured parties. Congress, after all, bears primary responsibility for determining when and under what conditions a judgment becomes final. Beyond time limits, Congress has created a wide range of devices that postpone the finality of judgments. The most striking is a little-known 200-year-old procedure that allows the courts of appeals to certify questions to the Supreme Court, not at the behest of an injured litigant, but at their own initiative.

1. How Congress Extends the Life of Cases

Under the finality theory, the requirement of standing to appeal derives from the constitution's "case"-or-"controversy" requirement. Once the federal judicial department finally resolves a case, Congress cannot direct the federal courts to reopen or revise the judgment.²⁵³ Yet, as the Court has recognized, the "[f]inality of a legal judgment is determined by statute."²⁵⁴ Congress plays a primary role in the life and death of every case by defining, through statutes, the conditions under which a case or controversy reaches the point of finality.

Most obviously, Congress can deem some federal court judgments not appealable and therefore immediately final.²⁵⁵ By electing to permit an appeal, Congress extends the life of the case. In doing so, it may set a time limit in which to appeal; if that period expires without any appeal, the judgment becomes final.²⁵⁶ The basic understanding that a judgment becomes final when the last direct appeal has concluded, or when the time to appeal has expired, appears explicitly in Congress's definition of finality for purposes of postconviction relief in criminal cases.²⁵⁷

253. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220–23 (1995).

254. *Id.* at 227.

255. U.S. CONST. art. III, § 2 (granting to the Supreme Court appellate jurisdiction over a wide swath of cases, "with such [e]xceptions, and under such [r]egulations as the Congress shall make"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513–14 (1868). In criminal cases, for example, Congress did not extend a general right of appeal to defendants until 1891. *See* Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827–28.

256. *Plaut*, 514 U.S. at 227 (rejecting the argument that because "the line that separates lower court judgments that are pending on appeal (or may still be appealed), from lower court judgments that are final, is determined by statute, and so cannot possibly be a constitutional line" (citation omitted)).

257. *See* 28 U.S.C. § 2244(d)(1)(A) (imposing a one-year limitation period for habeas petitions brought by persons in state custody, running from (*inter alia*) "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"); *id.* § 2255(f) (imposing the same limitation period for petitions for postconviction relief by persons in federal custody, running from (*inter alia*) "the date on which the judgment of conviction becomes final"); *Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches

But that is not all. Since the birth of the federal courts, Congress has controlled the finality of judgments by defining the *who*, *what*, *where*, *when*, and *why* of appeals within the judicial department. The Judiciary Act of 1789²⁵⁸ provided various avenues of appeal to the original federal circuit courts and to the U.S. Supreme Court, but only by parties who provided adequate security (§ 22),²⁵⁹ only for judgments in which the amount in controversy exceeded particular amounts (§§ 21–22),²⁶⁰ only to courts in specified geographic areas (§ 21),²⁶¹ only if filed within a (surprisingly generous) five-year limitation period (§ 22),²⁶² and only on specified legal grounds for reversal (§ 25).²⁶³ All of those provisions affect the finality of legal judgments. Some of them extend the life of a case by authorizing further review within the judicial department. Others hasten the death of a case by setting conditions that, unless satisfied, foreclose further review.

Congress has the power to prolong the life of cases and controversies in less obvious ways as well. At the trial level, court rules permit parties to move the court to grant a new trial,²⁶⁴ to amend its judgment,²⁶⁵ or to issue judgment notwithstanding the verdict.²⁶⁶ Each of those motions, which must be filed within time limits of their own, delays the finality of the judgment, both by extending the proceedings in the district court and by postponing the start of the time to appeal.²⁶⁷ At the appellate level,

when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.”).

258. Ch. 20, 1 Stat. 73.

259. *See id.* § 22, 1 Stat. at 84–85 (mandating that judges “shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect”).

260. *See id.* § 21, 1 Stat. at 83–84 (requiring an amount in controversy of \$300 to appeal in admiralty and maritime cases); § 22, 1 Stat. at 84–85 (requiring an amount in controversy of \$50 to appeal from a district court to a circuit court and an amount in controversy of \$2,000 to appeal from a circuit court to the U.S. Supreme Court).

261. *See id.* § 21, 1 Stat. at 83–84 (providing for appeals to “the next circuit court[] to be held in such district,” except that appeals from the district court of Maine shall be made to the circuit court in Massachusetts).

262. *See id.* § 22, 1 Stat. at 84–85 (providing that writs of error to the federal circuit courts or the U.S. Supreme Court “shall not be brought but within five years after rendering or passing the judgment or decree complained of”); *id.* § 25, 1 Stat. at 85–87 (providing for appeals from state courts to the U.S. Supreme Court “under the same regulations”).

263. *See id.* § 25, 1 Stat. at 85–87 (authorizing for appeals to the U.S. Supreme Court when a state court rejected a federal-law claim or defense, “[b]ut no other error shall be assigned or regarded as a ground of reversal”).

264. *See* FED. R. CIV. P. 59(a); FED. R. CRIM. P. 33(a).

265. *See* FED. R. CIV. P. 52(b).

266. *See id.* 50(b).

267. *See* *Leishman v. Associated Wholesale Elec. Co.*, 318 U.S. 203, 205–06 (1943).

rules authorizing petitions for panel rehearing perform the same function.²⁶⁸

Most of the mechanisms that delay the finality of a case depend on some action by the parties. Three longstanding practices, however, make clear that Congress has the power to postpone the finality of a case without any request by an injured litigant. Two, center on district courts, which in some types of cases may withhold approval of settlements and dismissals notwithstanding an agreement between the parties. The third centers on courts of appeals, which may review panel decisions en banc by their own initiative.

First, as noted above, the voluntary withdrawal of a complaint or the complete settlement of the dispute by the parties ordinarily renders further adjudication moot.²⁶⁹ Congress, however, has taken steps to delay or even prevent that from occurring in several contexts. In class actions, neither the voluntary dismissal of claims nor a settlement agreement between the parties takes immediate effect. Instead, each requires court approval following a hearing to determine whether the disposition is “fair, reasonable, and adequate.”²⁷⁰ Likewise, a shareholder derivative action on behalf of a corporation may not be “settled, voluntarily dismissed, or compromised” by the parties, except upon the approval of the court.²⁷¹ Both of those requirements reflect Congress’s concern that the parties’ willingness to end the case might be self-serving or the product of collusion. Court approval ensures that the dismissal or settlement takes into account the interests of absent class members, other shareholders, and the public.²⁷²

Second, in federal criminal cases, the United States does not have an absolute right to voluntarily dismiss criminal charges (to enter a *nolle prosequi*). Instead, Congress has provided that prosecutors may dismiss a criminal indictment or information only “with leave of court.”²⁷³ Although such leave is rarely withheld out of deference to executive discretion, federal courts retain the power to block the dismissal of a criminal indictment when that disposition is “clearly contrary to the

268. See FED. R. APP. P. 40(a).

269. See *supra* notes 218–21 and accompanying text.

270. FED. R. CIV. P. 23(e)(2).

271. *Id.* 23.1(c).

272. See Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts’ Injunctive Power, and the Class Action Fairness Act of 2005*, 29 HAMLINE L. REV. 217, 219, 224–25 (2006).

273. FED. R. CRIM. P. 48(a).

manifest public interest.”²⁷⁴ Nor can the parties privately settle a criminal case through a plea agreement. Federal rules place detailed conditions on the acceptance of a guilty plea, most of which protect defendants by ensuring that the plea is knowing, voluntary, and intelligent.²⁷⁵ But Congress also has granted federal district courts discretion to accept or reject plea agreements²⁷⁶ on the grounds, for example, that they are “too lenient, or otherwise not in the public interest.”²⁷⁷

Third, in the federal courts of appeals, cases must be “heard and determined” by three-judge panels, unless a majority of judges in the court orders a hearing or rehearing before the full court en banc.²⁷⁸ By rule, the parties may petition the court for en banc rehearing of a panel decision.²⁷⁹ But a request from a dissatisfied litigant is not required. Congress permits courts of appeals to order en banc rehearing on their own initiative, based (for example) on their view that “the proceeding involves a question of exceptional importance.”²⁸⁰ Several federal courts of appeals have adopted local rules or procedures by which judges may request a “poll” of their colleagues to determine whether to grant rehearing en banc, even if no party has requested it.²⁸¹

274. *Rinaldi v. United States*, 434 U.S. 22, 29 n.15, 30 (1977) (per curiam) (quoting *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975)) (noting that the rule “obviously vest[s] some discretion in the court,” but taking no position on “the circumstances in which that discretion may properly be exercised”); see *United States v. Smith*, 55 F.3d 157, 159 (4th Cir. 1995) (offering “the prosecutor’s acceptance of a bribe” and “personal dislike of the victim” as examples of bad faith contrary to the public interest); *United States v. Freedberg*, 724 F. Supp. 851, 853–54 & n.4 (D. Utah 1989) (denying a motion to dismiss the indictment because the defendant would retain most of the “ill-gotten gains” of his lucrative criminal enterprise).

275. See FED. R. CRIM. P. 11(b).

276. See *id.* 11(c)(3)–(5) (discussing procedures for a court accepting or rejecting plea agreements); *id.* 11 advisory committee’s note to 1974 amendment (explaining that the rule “does not attempt to define criteria for the acceptance or rejection of a plea agreement,” but leaves the decision “to the discretion of the individual trial judge”).

277. *United States v. Miller*, 722 F.2d 562, 563 (9th Cir. 1983); accord *Ellis v. U.S. Dist. Court*, 356 F.3d 1198, 1209 (9th Cir. 2004) (en banc); *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985); *United States v. Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981); *United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977). But see *Price v. U.S. Dep’t of Justice Attorney Office*, 865 F.3d 676, 690–91 (D.C. Cir. 2017) (Brown, J., dissenting) (noting that Rule 11 “requires courts to ‘consider . . . the public interest’ before accepting *nolo contendere* pleas—not guilty pleas” and “sensibl[y] refus[es] to impose the same, case-by-case, ‘public interest’ analysis” for guilty pleas (quoting FED. R. CRIM. P. 11)).

278. 28 U.S.C. § 46(c) (2018).

279. FED. R. APP. P. 35(b)–(c).

280. *Id.* 35(a)(2).

281. See 4TH CIR. R. 35(b) (providing that a poll may be requested “with or without a petition”); 5TH CIR. I.O.P. 35 (providing that “[a]ny active member of the court” may request a poll, “whether or not a party filed a petition for rehearing en banc”); 6TH CIR. I.O.P. 35(c) (“[A]ny

As then-Judge Gorsuch has explained, the power to initiate en banc rehearing *sua sponte* is valuable because it prevents erroneous panel decisions from becoming binding precedent “only because of the fortuity that the parties who could seek review happen to lack sufficient incentive to do so (say because of a settlement or extralegal considerations).”²⁸²

In each of those settings, Congress has created procedural mechanisms that prolong the life of a case or controversy that otherwise would end. Each mechanism operates without any request by an injured party; indeed, each sometimes postpones the point of finality *contrary to the wishes* of the parties. And in each instance, Congress was motivated in part by concern that the parties’ willingness to terminate the dispute might be self-serving, contrary to the public interest, or the product of “extralegal considerations.”

2. Certification and the Transfer of Cases Without an Appeal

The longstanding procedural devices described above have the effect of extending the life of an Article III case or controversy while it remains pending before a particular federal court. The strongest example of Congress’s power over the finality of judgments, however, has the effect of extending the life of a case by transferring it from one federal court to another without any appeal by an injured litigant. Since the earliest days of the republic, judges of the inferior federal courts have enjoyed the power to “certify” questions to the U.S. Supreme Court for review.²⁸³ That device was designed not to redress an injury to an appealing party, but to resolve conflicts among circuit court judges or to provide clarity in the law. Although rarely used today, the certification option remains on the books,²⁸⁴ and its long track record suggests an alternative path by which Congress could constitutionally authorize appellate review.

In 1802, Congress created the first procedures for certifying questions from one Article III court to another.²⁸⁵ The legislation provided that whenever the judges of the circuit courts were divided on a legal issue,

member of the en banc court may *sua sponte* request a poll for hearing or rehearing en banc.”); 11TH CIR. I.O.P. 35(5) (providing that any active service member of the court may request a poll “whether or not a petition for rehearing en banc has been filed by a party”). Other courts of appeals follow the same practice, although they have not adopted court rules that make the process so transparent. *See Planned Parenthood Ass’n of Utah v. Herbert*, 839 F.3d 1301, 1302 (10th Cir. 2016).

282. *Planned Parenthood*, 839 F.3d at 1308 n.1 (Gorsuch, J., dissenting).

283. *See* 17 WRIGHT ET AL., *supra* note 67, § 4038.

284. *See* 28 U.S.C. § 1254(2) (2018).

285. *See* Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

the point of disagreement could be “certified under the seal of the court, to the supreme court,” which shall “finally decide[]” the issue.²⁸⁶ In the Judiciary Act of 1891²⁸⁷ (known as the Evarts Act), Congress transferred that power to the newly created circuit courts of appeals,²⁸⁸ where it remains:

Cases in the courts of appeals may be reviewed by the Supreme Court . . . (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.²⁸⁹

Three features of the certification process authorized in the Evarts Act bear special emphasis.

First, the Evarts Act confers on the courts of appeals a broad discretion to certify questions. The statute authorizes certification not only when the judges’ opinions are divided, but on any “question[s] or proposition[s] of law” as to which the court “seeks instruction.”²⁹⁰ Since the 1940s the certification procedure has fallen into disuse, but in its heyday certification accounted for a substantial portion of the Supreme Court’s docket.²⁹¹ In the two centuries since Congress created the certification procedure, the Supreme Court has decided hundreds of certified questions at the request of judges of the circuit courts and courts of appeals.²⁹² The Evarts Act also imposes no constraints on the timeframe for certified questions, making clear that certification may occur “at any time” a case is in a court of appeals.²⁹³ Typically courts of appeals have certified questions before entering judgment, but the Supreme Court also has

286. *Id.* § 6, 2 Stat. at 159.

287. Ch. 517, 26 Stat. 826.

288. *Id.* § 6, 26 Stat. at 828.

289. 28 U.S.C. § 1254.

290. SUP. CT. R. 19; *see* 28 U.S.C. § 1254.

291. 17 WRIGHT ET AL., *supra* note 67, § 4038 (chronicling the evolution of certification “from functionally vigorous foundations into de facto discretion and then virtual discard” of the procedure); Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 603 (1972) (describing certification as “virtually obsolete”); *see also* Wisniewski v. United States, 353 U.S. 901, 902 (1957) (*per curiam*) (describing certification as appropriate only in “exceptional” cases).

292. *See* Aaron Nielson, Essay, *The Death of the Supreme Court’s Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 486–87 (2010).

293. 17 WRIGHT ET AL., *supra* note 67, § 4038.

answered questions certified after the judgment but before it reaches the point of finality, for example, while rehearing proceedings were pending.²⁹⁴

Second, the certification procedure does not limit the Supreme Court's review to the questions certified, but permits the Court to transfer the case or controversy out of the court of appeals. The statute gives the Supreme Court the option, in response to a certified question, either to provide an answer (to "give binding instructions") or to take up jurisdiction over the entire case (to "require the entire record to be sent up for decision of the entire matter in controversy").²⁹⁵ The Court has exercised that option in dozens of cases, particularly in the early days of the Evarts Act between 1896 and 1931.²⁹⁶

Third, and of special relevance here, certified questions generally are initiated by judges themselves, not by an aggrieved litigant seeking

294. See *Gableman v. Peoria, Decatur, & Evansville Ry. Co.*, 179 U.S. 335, 338 (1900) (noting that the court of appeals had rendered final judgment, but subsequently granted rehearing and certified questions to the Supreme Court of the United States); see also *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 622 (1974) (per curiam) (same); *Wall v. Cox*, 181 U.S. 244, 246 (1901) (same).

295. 28 U.S.C. § 1254(2); see also *Cincinnati, Hamilton & Dayton R.R. Co. v. McKeen*, 149 U.S. 259, 261 (1893) ("It is for us, when questions or propositions are certified . . . to determine whether we will answer them as propounded or direct the whole record to be placed before us in order to decide the matter in controversy in the same manner as if the case had been brought up by writ of error or appeal."); Kevin G. Crennan, Note, *The Viability of Certification in Federal Appellate Procedure*, 52 WM. & MARY L. REV. 2025, 2029–30 (2011) (describing the establishment of permanent circuit courts of appeals "to act as intermediate appellate courts" between district courts and the Supreme Court, and Congress's retaining certification, authorizing the Supreme Court to "decide the whole matter in controversy"). Before 1891, sending up the entire case from the circuit court to the Supreme Court was usually impossible because it would require the Supreme Court to exercise original jurisdiction rather than appellate jurisdiction. See *White v. Turk*, 37 U.S. (12 Pet.) 238, 239 (1838). With the creation of the federal circuit courts of appeals, it became possible to "send up" the entire case from one Article III appellate court to another. See 28 U.S.C. § 1254(2).

296. See, e.g., *Alison v. United States*, 344 U.S. 167, 169 (1952); *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 735–36 (1931); *Goodell v. Koch*, 282 U.S. 118, 120 (1930); *Poe v. Seaborn*, 282 U.S. 101, 109 (1930); *Sinclair v. United States*, 279 U.S. 263, 284 (1929), *overruled by* *United States v. Gaudin*, 515 U.S. 506 (1995); *Stipcich v. Metro. Life Ins.*, 277 U.S. 311, 315 (1928); *Donnelley v. United States*, 276 U.S. 505, 510–11 (1928); *Grosfield v. United States*, 276 U.S. 494, 495 (1928); *United States v. Midwest Oil Co.*, 236 U.S. 459, 468 (1915); *Loewe v. Lawlor*, 208 U.S. 274, 284 (1908); *Humbird v. Avery*, 195 U.S. 480, 481 (1904); *United States v. N. Pac. R.R.*, 193 U.S. 1, 1–2 (1904); *Brunswick Terminal Co. v. Nat'l Bank of Balt.*, 192 U.S. 386, 389 (1904); *Sigafus v. Porter*, 179 U.S. 116, 121 (1900); *N. Am. Commercial Co. v. United States*, 171 U.S. 110, 111 (1898); *The Kate*, 164 U.S. 458, 459 (1896); *N. Pac. R.R. v. Walker*, 148 U.S. 391, 392 (1893).

redress of an injury.²⁹⁷ The statute assigns the court of appeals sole discretion to certify questions,²⁹⁸ and it is the court—not the parties—that prepares and signs the certificate filed with the Supreme Court.²⁹⁹ No request or motion for certification by the parties is necessary.³⁰⁰ Indeed, several courts of appeals have held that it is presumptive and improper for parties to move for certification.³⁰¹ Excluding litigants from the certification process was seen as one of the procedure’s advantages.³⁰² Although the parties can try to influence certification decisions in various ways,³⁰³ the Supreme Court has not hesitated to answer certified questions raised *sua sponte* by the courts of appeals, even over the

297. The original version of the statute required a motion by the one of the parties, *see* Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159–61 (providing for certification “upon the request of either party, or their counsel”), but Congress soon eliminated that requirement for civil cases, *see* *United States v. Rider*, 163 U.S. 132, 136–37 & n.1 (1896) (describing the evolution of certification procedures before the Evarts Act), and the Evarts Act expressly assigned the responsibility for certification to judges, *see supra* note 295 and accompanying text.

298. *See* 28 U.S.C. § 1254(2) (authorizing the Supreme Court to review cases “[b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired”); SUP. CT. R. 19 (providing that “[a] United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case”). Senator Evarts defended the creation of the circuit courts of appeals in 1891, in part, on the ground that certification procedures allowed “the court itself” whenever “it deems it necessary or useful to be advised by the Supreme Court” to “send up these questions.” 21 CONG. REC. 10,222 (1890) (statement of Sen. Evarts).

299. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 9.2 (11th ed. 2019) (noting that “[w]hether questions should be certified is entirely for the lower court to determine” and that “[t]he court, not counsel, prepares the certificate, which is signed by that court’s clerk”).

300. *See* SUP. CT. R. 19.

301. *See Dickinson v. United States*, 174 F. 808, 809 (1st Cir. 1909) (calling it “impertinent and unlawful” to certify questions at the behest of a litigant because “the matter is not a matter at all within the control of the parties to the proceeding” and certification is unauthorized “unless the court itself desires instructions”); *Louisville, N.A. & C. Ry. v. Pope*, 74 F. 1, 10 (7th Cir. 1896) (holding that certification “is not a discretion the exercise of which may be invoked by a party as of right” and that although the court “may perhaps properly indulge the suggestion of counsel of the desirability of the advice and instruction of the supreme court . . . this formal motion is not conformable to correct practice”); *see also Kronberg v. Hale*, 181 F.2d 767, 767 (9th Cir. 1950) (*per curiam*); *Cella v. Brown*, 144 F. 742, 765 (8th Cir. 1906).

302. 17 WRIGHT ET AL., *supra* note 67, § 4038 (noting that “[l]itigants would be spared the burden of framing an initial petition and response”).

303. *See Lowden v. Nw. Nat’l Bank & Tr. Co.*, 298 U.S. 160, 165–66 (1936) (finding it significant, in refusing to answer certified questions, that the parties themselves deemed the questions posed by the court of appeals defective); *Indian Motorcycle Co. v. United States*, 282 U.S. 797, 797 (1930) (mem.) (granting party’s motion to amend a certificate); *United States v. Md. Cas. Co.*, 278 U.S. 663 (1928) (mem.) (dismissing certified questions on motion of a party); *Lederer v. McGarvey*, 271 U.S. 342, 344 (1926) (same); *Derobert v. Stranahan*, 199 U.S. 614, 614 (1905) (mem.) (dismissing certified questions for want of prosecution).

objection of the party that would benefit from its review.³⁰⁴ The Court also has stressed its exclusive discretion under the statute to order the entire case “sent up” from the court of appeals.³⁰⁵ Congress’s decision to place judges in control reveals that the purpose of certification was not to redress any injury to the parties. Congress saw it, instead, as a useful way to resolve conflicts of opinion among circuit judges and to provide clarity and guidance by expediting review in the Supreme Court.³⁰⁶

As an illustration, consider the course of the proceedings on certified questions in *Alison v. United States*,³⁰⁷ a tax case decided by the Supreme Court in 1952. In separate cases, two federal district courts in Pennsylvania reached conflicting conclusions as to whether a taxpayer could take a deduction for funds embezzled in previous tax years.³⁰⁸ The losing party in each case appealed to the U.S. Court of Appeals for the Third Circuit.³⁰⁹ After hearing argument, ordering rehearing and reargument en banc, and still finding itself deadlocked on the legal question, the judges of the court of appeals decided—apparently of their own initiative—to certify the question to the Supreme Court.³¹⁰ Neither the taxpayers nor the government requested Supreme Court review. Nonetheless, citing its authority under the certification statute, the Court ordered that the entire record be sent up to “decide the entire matter in controversy.”³¹¹ The Court then resolved the appeal on the merits,

304. See *Am. Land Co. v. Zeiss*, 219 U.S. 47, 58–59 (1911). In *American Land Co.*, the court of appeals apparently *sua sponte* raised a Fourteenth Amendment issue and certified it to the Supreme Court. See *id.* at 59. The appellant in the Ninth Circuit, which would have benefited from a conclusion that the law in question was unconstitutional, nonetheless argued that the certification was improper and that the Court lacked jurisdiction. See *id.* at 58–59. The Court found “possible support” for the party’s argument but proceeded to decide the constitutional question anyway. *Id.* at 59.

305. *Dillon v. Strathearn S.S. Co.*, 248 U.S. 182, 184 (1918) (“This court alone has authority to have [the case] sent up.”).

306. See James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 12–13 (1949). When Congress transferred the certification power from the circuit courts to the newly created courts of appeals in 1891, sponsors described certification as a “guard against the occurring diversity of judgments or of there being a careless or inadvertent disposition of important litigation by these courts.” 21 CONG. REC. 10,222 (1890) (statement of Sen. Evarts).

307. 344 U.S. 167 (1952).

308. See *id.* at 168.

309. See *id.* at 169.

310. Brief for the United States at 5, 7, *Alison*, 344 U.S. 167 (Nos. 79, 80), 1952 WL 82578; Brief for Martha L. Alison at 8, *Alison*, 344 U.S. 167 (No. 79), 1952 WL 82456.

311. *Alison v. United States*, 72 S. Ct. 1077 (1952) (mem.).

holding that both taxpayers were entitled to the deductions they had requested.³¹²

In more than two centuries of practice, the Court has never doubted the constitutionality of judge-initiated appellate review through certified questions. To the contrary, it has routinely offered binding answers to those questions or ordered that the entire case be sent up for its review, even as it has taken care to conform the practice to the dictates of Article III. Under the original version of the procedure, the Supreme Court has refused certified questions from circuit courts when they were acting as trial courts and had not yet reached a judgment, on the ground that the Supreme Court would then be exercising original rather than appellate jurisdiction.³¹³ For the same reason, it has expressed doubt about its power to take up a whole case by certification when the court of appeals is exercising original jurisdiction.³¹⁴ The Court also has refused certification on the ground that the questions were “too imperfectly stated” or too abstract to answer,³¹⁵ a rationale consonant with its decisions on ripeness and advisory opinions. But it has never seen any constitutional difficulty in the fact that courts themselves, rather than injured parties, have the power to transfer a case from one federal court to another for appellate review.

Certification fits comfortably with the finality theory of standing to appeal. Congress enjoys broad discretion in structuring the relationship among the inferior courts and between the inferior courts and the Supreme Court. Statutes determine when a judgment becomes final and under what circumstances it remains pending. Notwithstanding the transfer of particular questions, or even the entire record, between federal courts, there remains a single case or controversy. The long history of certification thus suggests an alternative method by which Congress might permit the transfer of cases between Article III courts without any appeal by a litigant.

C. Congress and Standing to Appeal

The Supreme Court has made clear that Congress lacks power to grant a right of appeal to any party without Article III standing, i.e., a personal injury that could be redressed through appellate review. Because the requirement of standing to appeal depends on the finality of the judgment,

312. *Alison*, 344 U.S. at 170.

313. *White v. Turk*, 37 U.S. (12 Pet.) 238, 239 (1838).

314. *United States v. Rice*, 327 U.S. 742, 747 (1946) (noting that the only question on appeal was whether the court of appeals original application for mandamus in the court of appeals).

315. *See, e.g., Perkins v. Hart*, 24 U.S. (11 Wheat.) 237, 257 (1826).

however, Congress could accomplish something similar through alternative means. This Article proposes two methods of circumventing standing to appeal: (1) automatic transfer, by which district court judgments that satisfy particular criteria undergo mandatory review by a court of appeals; and (2) judge-initiated transfer of judgments that satisfy particular criteria to the court of appeals, either on the appellate court's own motion or at the suggestion of the district court or a party.

Before fleshing out each option, a few preliminary points bear emphasis. In principle, these devices could be applied to any class of appeals within the federal courts. As described here, however, each would operate only in the narrow category of cases in which standing to appeal most frequently raises concerns.³¹⁶ They would apply: only to cases in which the defendants are state officials³¹⁷; only to cases seeking to enjoin the enforcement of state law, or to declare state law invalid, on federal constitutional grounds³¹⁸; only when those state officials have acquiesced in the adverse judgment³¹⁹; and only when no other defendant has standing to appeal. Both options, then, are offered as a way to address the specific problems presented by the risk of personal or partisan influence on litigation decisions by state executive officials.

Some commentators, it must be acknowledged, would resist the premise that Congress should do more to facilitate appellate review when a federal district court enjoins the enforcement of state law. As a matter of federalism, current law gives states the power to decide for themselves who has standing to appeal by designating who is authorized to represent the State and its officials in federal court. Automatic and judge-initiated transfer would replace those judgments with that of Congress, or of the federal judiciary. As a matter of the separation of powers, these vehicles for appeal might be seen as a special burden on executive officials, who historically have enjoyed the same prerogatives to appeal as other litigants.

Those concerns are normative, and formidable, but they are beyond the scope of this Article. The central claim here is a modest one:

316. See *supra* notes 97–107 and accompanying text.

317. The proposals focus on state officials, rather than federal officials, because of separation-of-powers concerns about Congress or the federal courts interfering in executive action concerning the enforcement and defense of federal law.

318. “Federal constitutional grounds,” as used here, would include challenges to state law on the ground that it conflicts with federal law and is therefore preempted under the Supremacy Clause. See U.S. CONST. art. VI.

319. “Acquiesced,” as used here, refers broadly to state officials’ cooperation in a constitutional challenge to state law. Examples of acquiescence would include refusing to defend state law, offering only a nominal defense of state law (for example, by allowing an intervenor-defendant to carry the “laboring oar”), or declining to appeal from an adverse judgment.

circumventing standing to appeal is *possible*, notwithstanding the fact that the requirement is grounded in the Constitution. Because it has the power to determine when a case becomes final, Congress also has the power to take questions of standing to appeal off the table. These examples offer a glimpse at the form such a circumvention might take.

Automatic Transfer. The bluntest mechanism would provide for automatic, mandatory court of appeals review of any federal district court judgment that enjoins state officials from enforcing state law. No showing of standing to appeal would be required because no party would initiate an appeal; the judgment would not become final but would transfer immediately, by operation of a statute, to the court of appeals for review. Although Congress has not previously provided for automatic transfer of this kind, two comparable procedural mechanisms suggest that it is feasible and constitutional.

First, most states that allow capital punishment also provide for some form of automatic appeal. Recognizing the enormous stakes in capital cases, many state legislatures have insist upon a compulsory appeal from any sentence of death.³²⁰ The same is true in many other nations that permit capital punishment.³²¹ The appeal under those statutes is mandatory, even if the defendant does not wish to file any appeal or postconviction challenge,³²² and even if no other person would have Article III standing to appeal.³²³ State courts have upheld those automatic appeal requirements against constitutional challenge.³²⁴

320. *Pulley v. Harris*, 465 U.S. 37, 44 (1984) (describing extensive revisions to capital sentencing schemes in two-thirds of states, and noting that “[a]ll of the new statutes provide for automatic appeal of death sentences”); Tim Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 507 & n.117 (1983) (collecting statutes).

321. See SAFEGUARDS GUARANTEEING PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY, Safeguard 6 (approved by the U.N. General Assembly by resolution 39/118, adopted Dec. 14, 1984) (“Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.”). For example, the Iraqi court of appeals (Court of Cassation) must exercise automatic appellate review in all criminal cases where a sentence of death or life imprisonment is imposed, “even if an appeal has not been lodged” by anyone. Iraq Crim. Proc. Code, art. 254(A), available at <http://hrlibrary.umn.edu/research/Egypt/Criminal%20Procedures.pdf> [<https://perma.cc/K9M7-LF5Q>].

322. See *Lonchar v. Thomas*, 517 U.S. 314, 317 (1996) (noting that a mandatory appeal proceeded in state court over the objection of the defendant, who “said he wanted to die and refused to cooperate with his lawyer or to attend his trial”).

323. See *Whitmore v. Arkansas*, 495 U.S. 149, 161–63 (1990) (holding that a third party lacked standing to challenge a death sentence as “next friend” to the defendant, who had voluntarily waived the right to appeal or “in any way” challenge his sentence).

324. See, e.g., *People v. Stanworth*, 80 Cal. Rptr. 49, 59 (Cal. 1969).

Second, for most of the twentieth century, Congress put in place a procedural device analogous to automatic appellate review. Beginning in 1911, out of concern about the power of a single federal judge to paralyze state regulatory schemes,³²⁵ Congress required that all challenges seeking to enjoin the enforcement of state law on federal constitutional grounds must be heard by a district court of three judges,³²⁶ the same number of judges that sit on panels of the courts of appeals. That requirement remained in effect until 1976.³²⁷ Although three-judge district courts exercised original jurisdiction over cases, rather than reviewing injunctions already issued, the idea that every injunction against the enforcement of state law should be reviewed by at least three federal judges has some historical precedent.

Judge-Initiated Transfer. Another device for circumventing the requirement of standing to appeal would permit federal courts of appeals, in their discretion, to initiate the transfer of a case following a district court judgment. Judge-initiated transfer might occur in several ways: (1) by the court of appeals *sua sponte*, acting on its own motion, in the same manner that federal courts of appeals already initiate *en banc* review of panel decisions; (2) at the suggestion of the district court, by certifying the judgment for consideration, in the same manner that courts of appeals may certify questions to the Supreme Court for possible transfer; or (3) at the invitation of any party, which could file a notice with the court of appeals to suggest (but not require) that it take up the case. No showing of standing to appeal would be required because no party would file an appeal; the judgment would not become final until a fixed period of time passes during which the court of appeals could choose to take cognizance of the case.³²⁸

In exercising that discretion, courts of appeals might draw upon a statutory standard adopted for federal habeas litigation, where a

325. HART AND WECHSLER, *supra* note 188, at 1041 (describing the “storm of controversy” that followed the Supreme Court’s decision in *Ex parte Young*, 209 U.S. 123 (1908)).

326. Act of Mar. 3, 1911, 36 Stat. 1162, later codified as 28 U.S.C. § 2281.

327. See Act of Aug. 12, 1976, 90 Stat. 1119.

328. It might be argued that when a “judge-initiated” transfer occurs at the suggestion of a party, it is in essence the party that initiates the transfer, necessitating a showing of Article III standing. That would be true if a timely appeal were essential to the continuation of the case, as under current law. See 28 U.S.C. § 1291; FED. R. APP. P. 3(a). Under the proposed form of judge-initiated review, however, the request of a party would never be a *prerequisite* for a court of appeals’ decision to initiate review. If the court of appeals has the power to take up cognizance of a case *sua sponte*, on its own motion, it should make no difference whether the judges first get the idea from a party, from an amicus curiae, by reading the district court opinion themselves, or by reading the newspaper or checking their Twitter feed.

petitioner's right to appeal is conditioned on a "certificate of appealability" (COA) that may be issued only upon a "substantial showing of the denial of a constitutional right."³²⁹ The Supreme Court has construed that standard as satisfied when "jurists of reason could disagree with the district court's [judgment]," or could conclude that the issues presented "deserve encouragement to proceed further."³³⁰ The form of judge-initiated transfer proposed here differs from the COA process in obvious ways: it would expand avenues for appellate review, rather than restricting them, and it would not require an application by any party. Nonetheless, courts of appeals might be persuaded to initiate appellate review, in the narrow class of cases in which that option would be available, when jurists of reason could disagree with a judgment striking down state law as unconstitutional.

Although federal courts currently do not engage in that kind of judge-initiated review, "own-motion review" is common in some state courts. The California Supreme Court, for example, is expressly authorized to review orders of the state court of appeals "on its own motion," even if no petition for review is filed by the parties.³³¹ The Texas Court of Criminal Appeals has the same power, expressly conferred by the state constitution.³³² Some state supreme courts have the power to initiate their own review in disciplinary proceedings for members of the state bar,³³³ and similar own-motion review is routine in some federal agencies.³³⁴

As a practical matter, automatic and judge-initiated transfer would require some alterations to appellate practice. Under each of those mechanisms, for example, no party would initiate an appeal, yet many court rules presuppose that one of the parties is the "appellant" and another the "appellee."³³⁵ Rules governing the forfeiture of arguments likewise presuppose that the parties will select the issues they wish to preserve for review.³³⁶ Appellate courts could easily adapt, however, by

329. 28 U.S.C. § 2253(c)(1)–(2).

330. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

331. Cal. R. Ct. 8.512(c)(1).

332. TEX. CONST. art. V, § 5(b).

333. *See, e.g.*, N.J. R. Ct. 1:20-16(b).

334. For example, as a means of ensuring accuracy and reviewing the work of Administrative Law Judges, the Social Security Administration's Appeals Council may hear appeals either upon a "request for review" by a party or by "own-motion review," in which the Appeals Council elects to review a random selection of cases *sua sponte*. *See* Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 243 (1990).

335. *See* FED. R. APP. P. 28(a)–(b).

336. *See, e.g.*, *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146–47

designating one party as the appellant³³⁷ or by specifying any additional issues that they wish the parties to address.³³⁸

Those concerns are offset, moreover, by an important practical advantage of circumventing standing to appeal. Standing sometimes turns on disputed factual questions. In the district court, the plaintiff bears the burden of supporting the elements of standing to sue at each stage of the litigation through pleadings, summary judgment, or even at trial.³³⁹ In principle, standing to appeal must be proven in the same way, with the court of appeals called upon to resolve disputed questions of fact in the first instance. That is an awkward task: courts of appeals are designed to review factual findings by a district court, not to build their own factual record from scratch.³⁴⁰ Circumventing standing to appeal renders that inquiry unnecessary.

CONCLUSION

In this age of acquiescence, state officials increasingly have refused to defend state law against constitutional attack. Escalating political polarization and scrutiny of officials' litigation choices have heightened the risk that decisions not to defend, and not to appeal from adverse judgments, may be tainted by personal or partisan considerations. In that context, the requirement of standing to appeal can have unfortunate consequences, making it easier for state officials to "lock in" erroneous judgments against state law for self-serving reasons.

This Article has sketched out two procedural mechanisms, automatic transfer and judge-initiated transfer, designed to alleviate those concerns. In doing so, it has sought to clarify the constitutional basis for the requirement of standing to appeal, describing it as a product of the finality of the judgment of the judicial department, and the conclusion of the Article III "case" or "controversy." Because of Congress's primary role in defining when judgments become final, Congress has the power to

(3d Cir. 2017) (describing and explaining the longstanding rule among courts of appeals that "an appellant's opening brief must set forth and address each argument that the appellant wishes to pursue in an appeal").

337. *Cf.* S. Ct. R. 12.6 (providing that, in cases before the U.S. Supreme Court by writ of certiorari, "[a]ll parties" to the judgment under review "are deemed parties entitled to file documents in this Court," and "[a]ll parties other than the petitioner are considered respondents").

338. *Cf.* *United States v. Windsor*, 133 S. Ct. 786, 787 (2012) (Mem.) (ordering that "[i]n addition to the question presented by the petition, the parties are directed to brief and argue" two other questions).

339. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

340. *See* Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 960 (2010) (examining the challenges faced by appellate courts when evaluating standing in cases appealed directly from federal agencies).

circumvent the requirement of standing to appeal if it wishes. Whatever one's views on whether and how to deploy that option, the possibility of circumvention marks an important difference between *standing to sue* and *standing to appeal*. Congress is powerless to remove the conditions necessary for a case or controversy to begin, but it can add to the conditions necessary for a case or controversy to end.