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Fractional Standing

Daniel E. Rauch[†]

Generations of commentators have examined (and critiqued) standing doctrine. The fiercest clash has turned on the question of “injury”—specifically, what type of grievance is sufficient to merit court consideration. Defining “injury” is no easy task, and in recent years, substantial inquiry has focused on just what harms should qualify an individual as “injured.” Subjective fear? Lost aesthetic enjoyment? Increased risk of death? And so on.

Surely, these debates are of great importance. Yet up to this point, judges and scholars have almost all assumed an “injury binary”: either an individual has received a hurt sufficient to qualify for standing, or she has not.

This Note rejects this binary, and instead argues for a third path: “fractional injury.” A fractional injury is one that, if manifest in a lone individual, would be insufficient to grant standing. Should multiple individuals experience this injury and band together as a group to demand relief, however, then their collective grievance would be sufficient to merit standing. The upshot of this approach would be a class of injuries for which “fractional standing”—the standing of the united fractions—would be recognized.

*This Note offers the first systematic exploration—and defense—of fractional standing. After briefly reviewing existing standing doctrine, the Note proceeds to illuminate the current “standing binary” and identify courts and commentators who have already gestured toward a notion of “fractional standing.” Here, I highlight several real-world cases, such as the D.C. Circuit’s prominent ruling in *Natural Resources Defense Council (NRDC) v. E.P.A* and the Supreme Court’s decision in *Clapper v. Amnesty International*.*

Ultimately, though, my aim is less descriptive than normative, and so the balance of the Note argues that, irrespective of their current status, fractional injuries should be recognized going forward. Specifically, I argue that fractional standing would vindicate the core purposes of standing doctrine’s injury require-

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ment—ensuring effective legal advocacy, dispensing constitutional justice, marshaling scarce resources, and preserving the constitutional separation powers. I also assess and respond to several important objections.

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Standing—the question of “who” may access courts and “when” they may do so¹—is an inquiry academic commentators deem “immensely powerful.”² Few questions are as central to standing as the issue of “injury,” the determination of whose grievances are sufficient to merit court consideration. Defining “injury” is no easy task³ and, in recent years, substantial inquiry has focused on just what harms should qualify an individual as “injured.” Subjective fear?⁴ Lost aesthetic enjoyment?⁵ Increased risk of death?⁶

Surely, these factors are of great importance. Yet, to this point, judges and scholars have almost all assumed a standing binary: *either* an individual has received a hurt sufficient to qualify for standing, *or* she has not.

At times, though, courts and commentators have hinted at a possible third option: “fractional injury.” A fractional injury is one that, if manifest in a lone individual, would be insufficient to grant standing. Should multiple individuals experience this injury and band together as a group to demand relief, however, then their collective grievance would be sufficient to merit standing. The upshot of this approach would be a class of injuries for which “fractional standing”—the standing of the united fractions—would be recognized.

1. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1363 (1973).

2. Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEMPHIS L. REV. 727, 727 (2009).

3. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (noting that the concept is “not susceptible of precise definition”).

4. See Brian Calabrese, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445 (2011).

5. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing that “aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society,” and thus diminishment of these interests would generally be sufficient to grant standing).

6. Susan W. Schillaci, *Increased Risk of Future Harm As Injury in Fact: Expanding or Eroding Standing?*, 10 QUINNIPIAC HEALTH L.J. 1 (2006).

This Note offers the first systematic exploration—and defense—of fractional standing.⁷ In Part I, I offer an overview of existing standing doctrine. I first provide a brief look at standing doctrine as it operates in the United States. In doing so, I highlight four structural aims that current standing doctrine prioritizes: ensuring effective legal advocacy, marshaling scarce judicial resources, preserving the separation of powers, and dispensing justice to litigants. I conclude Part I by highlighting the “injury binary”—the assumption that an individual litigant is *either* injured (and thus worthy of court access) *or* uninjured (and thus not).

Part II, however, introduces a different conception: the notion of “fractional injury.” Once again, fractional injuries are those that, if manifest in an individual, would be insufficient to warrant standing, but if manifest in a group of individuals, would be sufficient. Here I observe that even in systems that espouse the “injury binary,” courts have gestured toward a notion of “fractional standing” already in practice.

Ultimately, though, my aim is less descriptive than normative. In the balance of Part II, I argue that, irrespective of their current status, fractional injuries *should* be recognized going forward. Specifically, I argue that fractional standing would advance the core interests of the standing doctrine’s injury requirement: ensuring vigorous and efficacious legal advocacy, marshaling the judiciary’s limited resources, preserving the separation of powers, and ensuring that litigants receive justice. I also assess and respond to several important objections. Part III offers brief conclusions.

Before proceeding, a clarification is in order: this Note is not meant as a doctrinal argument that current precedent requires (or even permits) fractional standing. Instead, my claim is a normative and functional one: irrespective of current doctrine, recognizing “fractional standing” would better satisfy the aims of judicial inquiries into standing. Thus, while I believe modern standing doctrine plausibly supports my approach,⁸ this conclusion is unnecessary to my central argument.

I. Standing Today

Before beginning, we must survey existing standing doctrine. This Part offers a brief look at standing doctrine as it operates in the United States. In doing so, I highlight four structural aims that the injury requirement of contemporary standing doctrine is said to vindicate: effective advocacy of legal positions, ensuring judicious use of scarce court resources, maintaining the separation of pow-

7. As will be seen in Part II, while several scholars have noted the idea in passing, few have discussed it in any detail, and those who do generally reject it. See *infra* note 50.

8. See Jonathan Remy Nash, *Standing’s Expected Value*, 111 MICH. L. REV. 1283, 1320-21 (2013) (arguing that Article III’s “injury in fact” standing is broad enough to extend to “probabilistic harm”).

ers, and ensuring all litigants have access to justice. This Part closes by highlighting the “injury binary,” the assumption that an individual litigant is *either* injured (thus, worthy of court access) *or* uninjured (thus, not).

To have standing in American courts, a litigant must establish a genuine “case” or “controversy” under Article III of the Constitution. A “case” or “controversy,” in turn, includes three key elements: (1) a litigant has suffered an injury (commonly known as “injury in fact”), (2) that injury was caused by the defendant (that is, it is “fairly traceable”), and (3) it is within the courts ability to grant redress (“redressability”).⁹

While superficially simple, this structure has engendered fierce controversy.¹⁰ The bulk of the dispute regards the first prong of the test, which forms the central focus of this Note: the “injury in fact” requirement.¹¹ To wit, recent prominent cases decided by the Supreme Court have turned on whether fears of government spying are “injuries” (the Court said no),¹² whether expenditures made to protect organic seeds from a risk of genetic contamination are “injuries” (the Court said yes),¹³ and whether the predicted harms of climate change are “injuries” (the Court gave a qualified yes).¹⁴

Yet to fully understand the injury requirement, we must turn from how to why. What are the purposes the injury requirement of standing doctrine aims to achieve? Why not allow any person, at any time, to challenge legal wrongs?¹⁵ While the question is contentious, courts and commentators have repeatedly emphasized four priorities. First, the injury requirement is said to improve the quality of legal advocacy, leading to superior results. In part, this is based on the

9. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Of course, even if all three elements are present, courts may still deny standing for “prudential” reasons, such as the need for judicial efficiency. Bradford Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L.J. 1, 28 (2005). That said, prudential reasons—unlike the tripartite constitutional test—are less formidable restrictions, and may be overridden by congressional action. Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 952 (2008). Such limits are not explored in detail in this Note.

10. See, e.g., Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061-62 (2015); Joseph O. Oluwole & Preston C. Green, III, *Hein v. Freedom from Religion Foundation and Taxpayer Standing*, 54 WAYNE L. REV. 1203, 1205 (2008); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614 (2004); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 885 (2008).

11. Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1668 (2007) (calling injury the “central, and most controversial, component of Article III standing”). Because of injury’s central importance, the other two prongs of the test for constitutional standing—traceability and redressability—will not be explored in detail in this work.

12. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013).

13. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2755 (2010).

14. *Massachusetts*, 549 U.S. at 523.

15. Notably, this is the case in democracies like South Africa and Israel that feature *actio popularis*: the ability of any citizen, at any time, to lodge a constitutional complaint. See S. AFR. CONST., 1996, art. 38 (stating that “anyone acting in the public interest” may “approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened.”); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 190-94 (2006) (noting the wide latitude for such actions that has been developed in Israel).

assumption that a party who has received an injury will advocate more vigorously than one whose interest is merely intellectual or theoretical.¹⁶ In part, this also stems from the belief that, when a controversy has manifested itself in the real world, this allows judges to make more accurate and informed decisions than they would with a purely hypothetical problem.¹⁷

A second rationale for the injury requirement is the preservation of scarce judicial resources. Because courts and judges have limited time, the injury requirement creates an order of priority, ensuring that jurists spend their time on those disputes in which real people have something tangible on the line.¹⁸

A third rationale for the injury requirement is the principle of separation of powers. The separation of powers argument begins from the premise that judges—particularly unelected judges—are less democratically accountable than other government organs such as legislatures.¹⁹ Recognizing this fact, it is seen as important that courts use their power to overturn democratic decisions as judiciously and sparingly as possible.²⁰ The injury requirement, in this view, usefully restricts courts' power to certain legal disputes. Absent this check, critics fear courts would have an unlimited jurisdictional range and, as a result, a vast and inappropriate amount of power. Relatedly, some also suggest that, without the constraints of standing, courts would gain disproportionate power over the national executive, since they could use judicial fiat to mandate how the executive spends scarce "enforcement" resources.²¹

Finally, commentators have noted that the first three goals of injury standing doctrine must be balanced against a fourth: ensuring that harms can be effectively redressed, and that justice is done.²² Thus, even as they aim to screen out

16. Nash, *supra* note 8, at 1328-29.

17. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting that the "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"). For a classic exposition of this view, see Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

18. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000); Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3 (2010).

19. John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CALIF. L. REV. 1367, 1372 (2007).

20. See, e.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 43 (1984).

21. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 101 (2007).

22. See, e.g., Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 REV. LITIG. 97, 98-99 (2002); Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 ENVTL. LAW. 321, 377 (2001); Justin R. Pidot, *The Invisibility of Jurisdictional Procedure and Its Consequences*, 64 FLA. L. REV. 1405, 1406 (2012); Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 122 (2011).

frivolous or irrelevant petitions, injury requirements should also be tailored to ensure that those who have been harmed receive their day in court.

Of course, whether or not the injury requirement actually satisfies these (sometimes competing) goals is deeply controversial. For every scholar who claims that a personally-experienced injury is required to generate sharp advocacy,²³ there is one who argues that pure intellectual interest would be more than adequate to meet this end.²⁴ For every scholar who claims the injury requirement is a vital check on judicial overreach,²⁵ there is one who sees the “separation of powers” argument as a red herring.²⁶ Yet in principle, each of these four goals is “eminently reasonable,”²⁷ and to the extent that our concept of injury does achieve them, it is to be respected.

Up to this point, I have highlighted features of standing doctrine’s injury requirement that have been the focus of substantial academic exploration. Yet there is one feature of the injury requirement that is seldom explicated: the injury binary. Simply put, today’s standing doctrine creates two starkly separate categories. On one hand, those victim to a recognized “injury”—however slight—are granted court access. Thus, under the “identifiable trifle” principle,²⁸ one who is defrauded of even one cent is entitled to court access.²⁹ On the other hand, those who fall victim to an unrecognized injury are categorically barred from the court. For instance, one may be intellectually disgusted at racial segregation, but intellectual disgust has not been recognized as an “injury.” Absent some other sort of harm, this challenge to segregation will never be heard.³⁰

As even this brief discussion suggests, the question of where the boundary line between injury and non-injury should rest remains uncertain.³¹ Moreover, given the broad nature of determining precisely what “injury” means, many charge that the current doctrine permits judges to act arbitrarily to correct harms they deem legitimate.³² Yet, although these debates are crucial, they have failed for the most part to challenge the underlying binary. At day’s end, either an individual has full standing, or she does not.

23. E.g., F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 65 (2012).

24. E.g., Siegel, *supra* note 21, at 88-89.

25. E.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983).

26. E.g., Murphy, *supra* note 9, at 974.

27. Staudt, *supra* note 10, at 613.

28. Hessick, *supra* note 23, at 72.

29. Of course, given litigation costs, the chances that an individual litigant would pursue such a suit are quite low. However, with aggregation devices like class action suits, such “trifles” can add up quite quickly. See generally WILLIAM B. RUBENSTEIN, 1 NEWBERG ON CLASS ACTIONS (5th ed. 2011).

30. E.g., *O’Shea v. Littleton*, 414 U.S. 488 (1974) (denying standing to two white litigants who, on the basis of ideological disgust, challenged segregation in Cairo, Illinois).

31. For a brief sampling of this debate, see Calabrese, *supra* note 4; William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277 (2013); Miles L. Galbraith, Comment, *Identity Crisis: Seeking a Unified Approach to Plaintiff Standing for Data Security Breaches of Sensitive Personal Information*, 62 AM. U. L. REV. 1365 (2013).

32. Harrison, *supra* note 19, at 1368.

II. Toward Fractional Standing

Up to this point, I have outlined the modern structure of standing doctrine. I have also outlined the notion of the “injury binary”: discrete individuals are either injured, or they are not. In this Part, however, I suggest that in some instances, courts and commentators have gestured toward a third option: recognizing *fractional injury*.

This Part first aims to highlight how courts and commentators have already hinted at this possibility. After offering this descriptive material, I advance a normative case for why, irrespective of current doctrine, courts ought to recognize fractional standing. Specifically, I argue that fractional standing serves the aforementioned core interests of the injury requirement of standing doctrine, and I assess and respond to several important objections to adopting fractional standing.

A. Hints of Fractional Injury

To date, the injury binary has been a largely unquestioned and unchallenged assumption. Yet, beneath this veneer, several courts and commentators have already suggested the possibility of fractional standing.

The first and most obvious example of currently existing fractional standing comes in the doctrine of associational standing. Under American law, associations, such as voter rights groups, may be granted standing under one of two circumstances. First, and less important for our purposes, an association has standing to challenge attacks on its structure as an organization. For example, if Congress passed a law banning Muslim groups from incorporating as non-profits, an incorporated association of imams would have standing to challenge the legislation as unconstitutional.³³ Second, and more important for our purposes, an association can sometimes bring suit on behalf of its individual members. Courts grant such associational standing whenever:

- (1) [an] association member would have standing to sue individually;
- (2) the interests asserted are germane to the organization’s purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of individual members.³⁴

As this scheme suggests, “representational” standing is ostensibly granted only when at least one individual association member herself has standing, meaning that individual has already been “injured.” Accordingly, associational standing seems at first to be merely another form of the injury binary.

33. See Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1225 (2014) (describing associational standing doctrine).

34. John C. Yang, *Standing . . . in the Doorway of Justice*, 59 GEO. WASH. L. REV. 1356, 1362 (1991).

As applied, however, the doctrine of associational standing has sometimes operated in ways that seem quite similar to fractional standing. The most striking example of this came in the D.C. Circuit Court of Appeals' (well publicized) flirtation with probabilistic standing in *National Resources Defense Council (NRDC) v. EPA*.³⁵ In this case, the NRDC (a large environmental rights organization) brought suit on behalf of its members to challenge a new EPA ozone standard. As is required for all associational standing complaints, the NRDC alleged that its individual members had been harmed by the policy (e.g., by an increased risk of cancer). Rather than identify any particular harmed individuals, however, the organization instead looked to the "law of large numbers." Specifically, the NRDC argued that, since it had roughly 490,000 members,³⁶ and the increased risk of cancer from the ozone policy was roughly one in 100,000,³⁷ the policy could be expected to eventually cause cancer in at least several group members.³⁸ Accordingly, the association reasoned, via statistics, that it had satisfied the standing requirement.

Initially, the D.C. Circuit rejected this claim, holding, among other things, that the NRDC had failed to identify any particular member who had been injured and so warranted standing.³⁹ On rehearing, however, the court reversed course, specifically noting that:

The lifetime risk that an individual will develop nonfatal skin cancer as a result of EPA's rule is about 1 in 200,000 by the intervenor's lights. Even if a quantitative approach is appropriate—an issue on which we express no opinion—this risk is sufficient to support standing. One may infer from the statistical analysis that two to four of NRDC's nearly half a million members will develop cancer as a result of the rule.⁴⁰

There is much about this decision that is striking.⁴¹ Yet one of the most interesting implications, as Professor Heather Elliott has suggested, is that the D.C. Circuit's ruling effectively supported fractional standing by signaling that large organizations can aggregate fractional risks to establish standing, even if an individual or small association would be unable to meet this threshold in the same scenario.⁴² Put differently, the one-in-100,000 increased risk of cancer inflicted on each NRDC member might not have been sufficient to grant any individual

35. *Nat. Res. Def. Council v. EPA*, 440 F.3d 476, *withdrawn*, 464 F.3d 1 (D.C. Cir. 2006) [hereinafter *NRDC I*].

36. *Id.* at 482.

37. *Nat. Res. Def. Council v. EPA*, 464 F.3d 1, 7 (D.C. Cir. 2006) [hereinafter *NRDC II*].

38. *Id.*

39. *NRDC I*, 440 F.3d at 484.

40. *NRDC II*, 464 F.3d at 7.

41. For commentary on the ruling, see Elliott, *supra* note 20, at 504-05; and Robin Kundis Craig, *Removing "The Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 *CARDOZO L. REV.* 149, 201 (2007).

42. Elliott, *supra* note 20, at 506.

member standing, but collectively the “two to four” cancer cases were enough to open the courthouse door.⁴³

To be sure, the D.C. Circuit’s cumulative approach is far from universal, with different circuit courts adopting different views of such “probabilistic standing.”⁴⁴ Moreover, at least some commentators suggest that the Supreme Court subsequently rejected the *NRDC* approach.⁴⁵ Nevertheless, as *NRDC* shows, rulings that sound in the realm of fractional standing are already upon us. And in any case, even the classic concept of associational standing evinces shades of fractional standing. After all, the larger an organization is, the greater its odds are of having at least one member in the “right place at the right time” to qualify as personally injured. This suggests that, even in the status quo, an organization’s access to the courts can turn significantly on the size of its membership.

Moreover, beyond associational standing, and even when harms are not so neatly quantified, courts often talk in ways that suggest an intuitive form of “fractionalization” is at work. In *Clapper v. Amnesty International USA*,⁴⁶ for example, the Supreme Court considered whether a group of journalists and human rights lawyers who had jointly sued to challenge government surveillance policy should be granted standing. The majority rejected their plea. In a dissenting opinion, however, Justice Breyer noted that, among the group of journalists, there was a high chance that the government was “intercepting *at least some* of their private, foreign, telephone, or e-mail conversations.”⁴⁷ Such framing readily suggests a “fractional”-type approach. As the pool of journalists and lawyers grows, the pool from which “some” communications might be captured would appear to grow as well. By contrast, had only a single journalist alleged spying, it seems unlikely that the minority would have been so receptive to the plaintiffs’ claims. Thus, even in cases where harms are not easily quantified, the sheer amount of plaintiffs seems to exert an intuitive—if subtle—pull.

As I have noted, the mine run of academic commentary has overlooked these suggestions, instead viewing these cases from a binary stance. Commentators like Amanda Leiter, for example, argue that in cases like *NRDC* there should be no minimum level of risk that an individual must experience to gain standing.⁴⁸ Under this view, the *NRDC* should have been granted standing not because

43. *Id.* at 505 n.222 (“[I]t seems unlikely that the D.C. Circuit, in the *NRDC* case, would have reached the same conclusion had the case been brought by a much smaller organization. For example, an environmental group with 10,000 members could show only that it had one-twentieth of a member who would likely die from the methyl bromide rule, arguably insufficient for standing.”).

44. Interesting examples of this phenomenon are detailed in Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 *ECOLOGY L.Q.* 665, 668-69 (2009).

45. *E.g.*, Michelle Fon Anne Lee, *Surviving Summers*, 37 *ECOLOGY L.Q.* 381 (2010). *But see* Nash, *supra* note 8, at 1295-97 (arguing that probabilistic standing possibilities have survived recent Court rulings).

46. 133 S. Ct. 1138 (2013).

47. *Id.* at 1155 (Breyer, J., dissenting) (emphasis added).

48. Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 *Geo. L.J.* 391 (2009).

of aggregate probability, but rather because each and every one of its members had received an “identifiable trifle” of risk sufficient to justify standing.⁴⁹ Such critiques are important, but they remain within the binary framework. Another path, however, is possible.⁵⁰

B. The Case for Fractional Standing

To this point, we have surveyed the field of “fractional standing” as it appears to manifest today. At times, as in *NRDC*, fractional injury seems explicitly embraced, with courts granting standing precisely because so many members alleged an injury at the same time. At other times, as in *Clapper*, the suggestion is subtler and more qualitative: as more people join the pool, there seems more reason to grant court access. Yet even if fractional standing has yet to gain centrality—indeed, even if current precedent did not evince this concept—it is an idea that deserves a more serious assessment than critics have provided. This Section first sketches what a fractional standing regime might look like; it then makes the case for fractional standing.

1. An Approximate Model of Fractional Standing

What would a “fractional standing” jurisprudence look like? At the outset, it is important to note that not all injuries need be broken into fractions. Indeed, for the bulk of traditional legal actions, our current categories of “fully injured” and “no injury” would retain great utility. Thus, even if fractional standing were embraced, courts would still be free to grant standing to anyone who has been physically assaulted (however slightly), while denying standing to anyone who is merely ideologically concerned (however sad they are).

Between these poles, however, would exist a new category: fractional injuries. What would these injuries be? Here we may begin from the current concept of injury. In a “rough and ready” way, the current decision calculus regarding when an “injury” occurs seems to turn on two variables: (1) the probability of the harm and (2) the severity of the harm. On the first count, courts show greater leeway in granting standing for more certain events than less certain ones, with all courts holding that, unless some minimum degree of likelihood is satisfied, standing cannot be granted.⁵¹ On the second count, even if an event is not certain to occur, courts have suggested that, when threatened harm is severe (such as

49. *Id.* at 406.

50. Those few commentators who have more directly addressed the prospect of something like fractional standing have apparently condemned it. For her part, Heather Elliott bemoaned the “curious aspect” that rulings like *NRDC* might reach different conclusions about standing depending on the size of the suing organization. Elliott, *supra* note 20, at 505 n.222. Bradford Mank echoes Elliott’s approach (and cites her work), describing the *NRDC* court’s fractional approach as a “problem.” Mank, *supra* note 44, at 722-23.

51. *E.g.*, *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013).

death or dismemberment), even a relatively uncertain chance might be sufficient to constitute injury.⁵²

Building on this simple calculus, one might imagine fractional standing to operate along two distinct dimensions of cases: (1) cases where low probabilities could be combined into sufficiently high chances of harm, and (2) cases where low severities could be combined into sufficiently serious harms.

The first possibility, that probabilities might be summed, seems more intuitive. Indeed, such an approach would be highly similar to that of the D.C. Circuit in *NRDC*: individuals with slight personal risks of harm could band together, and once the aggregate risk reaches a key threshold,⁵³ the claim would be granted standing. Examples of such “low probability” harms abound, but the most salient appear in areas like health policy,⁵⁴ safety regulation,⁵⁵ and climate change.⁵⁶ It is in precisely these areas where one might imagine an individual has not suffered enough harm to be counted as injured, but a population might.⁵⁷

The second possibility, of course, would be for courts to combine the sums of intensities. For example, one might argue that the harm of knowing the National Security Agency could be illegitimately spying on you is comparatively low (when compared with, say, cancer). Yet, should a sufficiently large group of individuals experience this harm, and should their experiences be aggregated, the harm would eventually obtain the status of a standing-worthy injury.

Whichever route is pursued, the court’s analysis would be comparable: first, a group or class of individuals would come forward citing a common harm. This group could be an association, such as the NRDC. More ambitiously, the group might be an ad hoc association of individuals banding together solely for litigation purposes, in what would amount to a sort of “class action standing.”⁵⁸ While

52. *E.g.*, *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) (“Because the evaluation of risk is qualitative, the probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm.”). *See generally* Nash, *supra* note 8.

53. Of course, the question of where such a threshold should be set would, itself, be challenging. For one possibility, see Mank, *supra* note 44, at 665, which proposes a one in –a million threshold for treating risk of death as an injury.

54. Craig, *supra* note 41.

55. Leiter, *supra* note 48.

56. David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. LAND USE & ENVTL. L. 451 (2000).

57. *See, e.g.*, Mary D. Fan, Comment, *Risk Magnified: Standing Under the Statist Lens*, 112 YALE L.J. 1633 (2003).

58. While beyond the scope of this work, a full comparison between the proposed concept of “class standing” and the current device of “class action” appears to be of considerable interest. Intuitively, the two devices appear to have many important similarities. Structurally, both aim at aggregating harms that, if pursued individually, would be non-viable: in the “class standing” context, harms that could not *legally* be recognized on an individual basis would be able to receive court redress. Similarly, in the traditional “class action” context, harms that could not *practically* be pursued on an individual basis (usually because the individual damages are only a few dollars) are able to receive court redress. RUBENSTEIN, *supra* note 29, at 21. Likewise, as discussed in greater detail in Part II.B.3.d, both devices would require systems to effectively ensure that one lawyer can adequately “represent” each of the hundreds or thousands of litigants united before the court. *See* MARTIN H. REDISH, *WHOLESALE JUSTICE*

this concept initially seems novel, at least some “associations” that have been granted standing in the past were formed for the sole purpose of a particular lawsuit, which suggests that such a route is already viable.⁵⁹

In any case, once the fractional group has launched its challenge, the judge would aggregate the individual “fractional” harms to determine if, when combined, the sum total justified standing. This is not to say that such an action would be a “mechanical” multiplication exercise; indeed, given the amorphous nature of concepts like “injury,” such quantifiable rigor could seldom be expected.⁶⁰ Yet, just as precepts like the “Hand Rule” employ the language of mathematics to set a rough heuristic in tort law (even if in practice it is seldom applied with full mathematical rigor), fractional standing would provide a qualitative lens for jurists to approach complex problems of court access.⁶¹

When will aggregated injuries be substantial enough to justify review? What would this “calculus” look like in practice? The simplest approach would be to set a quantitative bar based on how many “whole” injuries have been experienced. That is, if four persons have each suffered a harm equal to “one-fourth” of a standing-worthy claim, then once their harms are combined, standing would be justified.⁶²

(2009). Perhaps a more resonant similarity, however, is that both class action and class standing have thus far been products not of intentional legislative design but of ad hoc, judge-led innovations. See RUBENSTEIN, *supra* note 29, at 32-35 (discussing the gradual development of class actions from the English common law courts of equity to the American court system). In the case of traditional class action, in time these judge-created devices were recognized and incorporated into formal rules of procedure, see Fed. R. Civ. P. 23, a fate “class standing” may someday share. This shared origin is largely unsurprising, since both devices reflect the need to adjust our “adversarial” legal system, which was built to address discrete, person-on-person injuries, to meet the more complex demands of modern industrial society (where a single entity can simultaneously injure millions). That said, despite these similarities, there are also important differences. In particular, traditional class action still emphatically requires that the “class representative” have received an actual “injury in fact,” that is, that the injury binary is satisfied. RUBENSTEIN, *supra* note 29, at 58-59 (noting that the class representative must at all times maintain individual injury standing under the standards set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). As a result, “class standing” would represent an important evolution from the current device of class action.

59. In the classic example, the Supreme Court granted standing to Students Challenging Regulatory Agency Procedures (SCRAP), an “unincorporated association formed by five law students to enhance the quality of the environment,” which had apparently formed exclusively to launch legal challenges against various railroad regulations. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 670 (1973).

60. Fletcher, *supra* note 31, at 280 (“‘Injury in fact’ may appear to be a neutral factual concept. But it is not. It is a normative concept. If we put people who lie to one side, it is apparent that anyone who feels himself or herself to be injured is, in fact, injured. We may not ourselves feel injured in the same situation. We may not choose to recognize someone’s injury as entitling that person to protection or compensation.”).

61. Of course, unlike the “Hand Rule,” where judges must perform a rough cost-benefit analysis to determine the outcome, the heuristic here would turn on some combination of the probability of the harm and the severity of the harm.

62. And, of course, if a ratio of one-to-one is seen as setting the bar “too low,” a more stringent ratio could be employed instead. For example, courts might, for prudential reasons, decline to grant fractional standing unless the equivalent of two (or ten) standing-worthy injuries had been experienced.

Notably, this “quantitative” approach need not be limited solely to fields we generally associate with mathematical precision, such as environmental regulations.⁶³ Consider, for instance, two prominent constitutional rulings on police practices. In *City of Los Angeles v. Lyons*,⁶⁴ the Supreme Court held a litigant who had suffered a police chokehold lacked standing to sue for injunctive relief. The Court reached this conclusion because Lyons, the victim, could not establish, with sufficient certainty, that he would personally face a police chokehold again.⁶⁵ By contrast, in *Floyd v. City of New York*⁶⁶ (litigation challenging New York’s stop-and-frisk police search policy), the court took a different turn. Specifically, the presiding judge distinguished *Lyons* on the grounds that the probability that each individual plaintiff would, once again, be stopped-and-frisked was substantially greater than the probabilities at issue in *Lyons*.⁶⁷ On these grounds, she recognized the plaintiffs’ standing. In these sorts of cases, fractional standing would essentially function to convert a *Lyons*-type claim into a *Floyd*-type claim: that is, had multiple plaintiffs in Lyons’s position banded together, at a certain point the probability that *at least one of them* would, at some point, face a chokehold, would reach the critical probability identified in cases like *Floyd*, such that standing would be appropriate.

Of course, even such a loose approach to “quantitative” methodology might prove unwieldy in certain cases, such as for harms like the invasion of privacy—harms that do not lend themselves to ready quantification. Here, though, other approaches are possible. For example, courts might base their reasoning on whether a substantial portion of a relevant population has been impacted. Thus, in a case like *Clapper*, a court might ask if the parties alleging the harm of surveillance comprise a substantial portion of the pool of citizens that engage in communications with foreigners suspected of terrorist activities. The answer to this inquiry, in turn, could shape the extent to which the grievance could merit access to legal redress. As yet another alternative, courts might look to the diversity and distribution of the plaintiffs assembled: to the extent that a given “fractional injury” is experienced by individuals in different parts of the country or in varied contexts, a grant of standing might become more appropriate.

This basic outline, to be sure, leaves much unresolved, such as which precise harms should be “fractional,” which harms should be “full injuries,” and which harms do not merit standing at all. Yet for now, this sketch is sufficient to see some of the advantages that fractional standing might offer.

63. As were at issue in *NRDC v. EPA*. See *supra* notes 35–43 and accompanying text.

64. 461 U.S. 95 (1983).

65. *Id.* at 105–06.

66. 283 F.R.D. 153 (S.D.N.Y. 2012).

67. See *id.* at 170 (distinguishing *Lyons* on the grounds that, *inter alia*, the frequency of alleged injuries inflicted by the practices at issue here creates a likelihood of future injury sufficient to address any standing concerns).

2. Fractional Standing and the Judicial Role

With this background in mind, we may turn to consider how fractional standing would interact with the core purposes of the injury standing doctrine's injury requirement: ensuring efficacious legal advocacy, allocating scarce judicial resources, defending the separation of powers, and ensuring justice for litigants. On each count, fractional standing emerges as superior to the current binary regime.

a. Effective Legal Advocacy

The first functional justification for the injury requirement is the desire for high-quality litigation to determine legal questions. Specifically, two mechanisms have been suggested: (1) that actually injured parties offer more vigorous and skilled arguments,⁶⁸ and (2) that judges decide more competently when assessing harms that are manifest in the real world, as opposed to completing hypothetical exercises.⁶⁹ Under either theory, fractional standing would offer constructive benefits.

The first premise of the "legal advocacy" argument is the belief that parties who are themselves injured are more apt to vigorously contest a legal question, and thus to bring courts the highest quality arguments to assess. Of course, this correlation is far from perfect. After all, even without any injured members, a sincerely concerned legal interest group would almost surely offer sufficiently "sharp" legal advocacy.⁷⁰ Conversely, actually injured victims may be wholly unprepared to argue a complex legal question. Nevertheless, this principle continues to capture an important intuition that animates standing doctrine: all else equal, it is in a court's interest to have a motivated and focused presentation of the issues.

Fractional standing enhances these values. First, by favoring large groups of plaintiffs over small groups of plaintiffs, it ensures that those litigants who do reach court are more likely to be the group or groups most aggrieved by the harm at issue. Indirectly, it also promotes a higher quality of advocacy, since organizations that are able to coordinate large groups of stakeholders are also more likely to have the resources to litigate effectively.

The second premise of the "legal advocacy" argument is the assumption that judges are more competent at resolving disputes once they have manifested

68. See *supra* note 16 and accompanying text.

69. See *supra* note 17 and accompanying text.

70. Siegel, *supra* note 21, at 88-89 ("[I]t is hard to doubt that the Sierra Club or Americans United for Separation of Church and State would have sufficiently illuminated the merits of issues presented in the landmark cases in which they were held to lack standing."). Perhaps recognizing this fact, the United Kingdom has recently authorized organizations with no actually injured members to have standing in environmental suits, provided they are sufficiently ideologically committed to the litigation. See Owens, *supra* note 22, at 343-47.

in the real world. In fairness, judges around the world have engaged in abstract review for decades, casting this claim into doubt. Yet even if this is viewed as an important concern, there does not seem to be any analytical reason to believe that fractional injuries are not “real,” or that judges cannot analyze their impact on the world (as when real ozone depletion is causing a real aggregation of cancer risk).

Thus, insofar as providing high-quality advocacy is concerned, fractional standing appears to offer no drawback to the status quo—instead, it suggests several benefits.

b. Marshaling Scarce Judicial Resources

The second key justification for the injury requirement is that it ensures that scarce judicial resources are allocated to the most pressing problems. Under this theory, limiting court access to the truly “injured” is essential, since otherwise courts would face “floodgates” of litigation that would swamp them and reduce decision quality.⁷¹

Fractional standing would serve a key role in helping to allocate judicial resources. First, by maintaining the status quo “binary” in the many contexts where it works well,⁷² courts could ensure that fractional disputes only reach them once they have achieved a certain degree of seriousness. Moreover, aggregation would serve as a powerful source of information for courts, as it would indicate when a “low probability” or “low intensity” harm had achieved legally cognizable dimensions. Finally, the rise of class standing might give plaintiffs with “borderline” claims an incentive to consolidate their focus into one action, rather than each bring myriad separate legal claims, netting a potentially important savings of legal resources.

c. Preserving the Separation of Powers

Perhaps the most serious challenge to fractional standing stems from the ideal of separation of powers. As noted above, proponents of the separation of powers argue that, because the judiciary is less democratically accountable than other branches of government, its powers must be carefully constrained. Standing, on this account, serves the vital role of ensuring that a court does not become a roving “Council of Revisions”⁷³ with the discretion to review any law at will,

71. Robert Terenzi Jr., Note, *When Cows Fly: Expanding Cognizable Injury-in-Fact and Interest Group Litigation*, 78 *FORDHAM L. REV.* 1559, 1597 (2009). For a critical view of the “floodgates” argument, see Marin K. Levy, *Judging the Flood of Litigation*, 80 *U. CHI. L. REV.* 1007 (2013).

72. See *supra* Part II.B.1.

73. Notably, Originalists contend that the Founders’ rejection of a council of revisions approach is yet another justification for adopting a constrained concept of standing. See, e.g., Kontorovich, *supra* note 11, at 1674.

but rather is limited to addressing a (relatively) small set of legally recognized grievances.

Initially, the separation of powers perspective seems quite hostile to the fractional standing approach. After all, if a court is empowered to recognize new forms of “fractional harm,” this would seem to increase its influence and ambit at the expense of the other branches of government.

More subtly, as fractional standing will involve large classes of plaintiffs, it runs into a familiar argument: if there is, indeed, a broadly shared sense of grievance, the proper venue to express this hurt is the legislature, not the courts. Under this argument, the very fact that a large fractional class has aggregated would count against it.

Even if one accepts the separation of powers framework, however, fractional standing actually enhances this balance by addressing a fundamental pathology of democracy. By their nature, fractional harms are often of the sort that ordinary democratic processes fail to redress. After all, a classic vice of modern democracy is that a small but motivated minority can prevail over a large but only indirectly affected majority.⁷⁴ Regulation that increases cancer risks is a good example of this: industry groups might spend millions to lobby the government for a lower ozone standard, while citizens who suffer a one-in-a-million increased chance of cancer are unlikely to march on Capitol Hill. While such dynamics are a recurring feature of democracies, they are particularly likely to present concurrently with fractional harm: low intensity or low probability harms spread out across the population. Thus, the addition of fractional standing could play a key role in helping our system’s separation of powers to function more effectively.

Of course, there remains the argument that, if misused, fractional standing could abet judicial abuses of power. For example, one might imagine a capricious judge who uses the concept of fractional harm to permit standing for plaintiffs based solely on the judge’s biases. To wit, a pro-environmental judge might consider ecological concern fractional in order to create a “back door” to court access for otherwise meritless claims.

There is no doubt that, if abused, fractional standing precepts could allow inappropriate judicial actions. Yet the same could be said about any number of judicial practices, most notably, the current standing doctrine itself.⁷⁵ Indeed, should a judge desire to subvert standing doctrine, the doctrine’s current malleability and indeterminacy would seem to permit it.⁷⁶

74. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1-18 (1963) (discussing the advantages small groups facing concentrated harms from a given change have in political conflicts with large groups where the individual benefit to each from that change is small); see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 35-44 (1991).

75. Fletcher, *supra* note 31, at 280.

76. Staudt, *supra* note 10, at 615-16.

Accordingly, the question is not whether fractional standing might be used inappropriately, but whether it has a greater risk of inappropriate use than the status quo. And through this lens, it is unclear why the concept of fractional harm would be any more susceptible to judicial manipulation than current standing doctrine.

d. Dispensing Justice

Finally, at the same time as our standing doctrine aims to satisfy the three criteria outlined above, it also seeks to ensure that those who have been truly injured have a path to redress. Over the past forty years, the priority this value has been given has waxed and waned, with broad standing rules embraced in the Warren Court era,⁷⁷ and narrower rules prevailing in later years.⁷⁸ Yet as recent rulings like *Massachusetts v. EPA* attest, standing doctrine does constantly seek to recognize and redress injustice, even if it requires evolution and recognition of new harms.⁷⁹

Fractional standing would allow courts to far better fulfill their role in redressing legal wrongs. First, and most obviously, fractional standing would permit many injured individuals to, for the first time, receive justice. If one believes that an increased risk of cancer or the chilling effect of government surveillance are harms, then it is a good thing that these harms can be redressed.

Moreover, by acknowledging the existence of harms that do not individually rise to the status of injury, courts could more accurately represent the nature of harm and wrong. Society has always recognized classes of activity that are harmful precisely because they are repeated across multiple instances. Thus certain crimes, like the offense of stalking, are criminal solely because they form repeated patterns.⁸⁰ Likewise, certain indignities, such as being exposed to trace cigarette smoke, are generally deemed harmless individually, but can become violations of legal norms if such exposure becomes a pattern.⁸¹ Current standing jurisprudence, however, does not adequately recognize this longstanding principle. Fractional standing would thus serve as a powerful tool for recognizing that there are, indeed, phenomena which are greater than the sum of their parts, in which individually innocuous components of a harm—such as carbon dioxide

77. See Stearns, *supra* note 10, at 875 (noting that the Warren Court worked to “broaden standing”).

78. Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 304 (1996) (collecting cases to conclude that “[s]ince the mid-1970s . . . the Court’s attitude toward the standing doctrine has been increasingly restrictive”).

79. Such as, in the case of *Massachusetts v. EPA*, the distinctive harms caused by worldwide climate change. 549 U.S. 497, 521–23 (2007).

80. E.g., S.D. Codified Laws § 22-19A-1(1) (2006) (defining the crime of stalking as when persons “[w]illfully, maliciously, and repeatedly follow or harass another person”) (emphasis added).

81. See Irene Scharf, *Breathe Deeply: The Tort of Smokers’ Battery*, 32 HOUS. L. REV. 615 (1995).

emission⁸² or the positioning of a particular security camera⁸³—can add up to a legally cognizable and justiciable wrong.

Finally, introducing the concept of fractional harms would provide judges with the flexibility to take tentative steps toward addressing novel and evolving phenomena: rather than simply declaring a given event “injurious” or “not injurious,” courts could take the more cautious, middle path of granting fractional standing. This option, in turn, would allow courts to better refine and develop their doctrines around new and changing events.

In sum, fractional standing would allow new and more refined paths to justice by recognizing previously unaddressed harms, by candidly embracing the cumulative nature of some harms, and by giving judges a key tool to explore and develop new doctrines of injury.

3. Objections Considered

As the above analysis indicates, fractional standing would go a long way toward accomplishing the core aims of standing doctrine’s injury requirement. Yet, before concluding that courts should recognize fractional injury, several important objections must be weighed and considered.

a. Judicial Competence

One argument against the recognition of fractional standing stems from questions of court competence. To date, many have noted that courts can struggle with assessing low probability harms because complex mathematics are beyond the ken of typical jurists.⁸⁴ Relatedly, given the potential complexities of “probability pleadings,”⁸⁵ one might fear higher administrative costs and challenges as courts struggle to sift through such complex, “polycentric” calculations.⁸⁶

As an initial response, the methodology proposed in this Note would often be relatively simple to apply. In the case of fractional risks of harm, for example, it would be as simple as basic multiplication. Indeed, courts are already trusted to engage in such probabilistic thinking in a variety of contexts. As Jonathan

82. *E.g., Massachusetts*, 549 U.S. at 517; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

83. Not coincidentally, such a perspective is linked to the emerging notion of a “mosaic theory” of government tracking, in which individually appropriate devices (such as government cameras), may, through sheer aggregation, transform into an unconstitutional degree of constant citizen monitoring, even if each individual camera was appropriate. *See* David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381 (2013).

84. *See* Lee, *supra* note 45, at 416-17 (highlighting the technical challenges facing judges who attempt to address harms based on small probabilities).

85. My thanks to Mark Jia for suggesting this argument.

86. For the classic argument that courts are ill-equipped to engage in such complex, “polycentric” problem solving, see Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

Remy Nash notes, courts already make probabilistic judgments in areas including determining when to grant bail and at what level (accounting for the probability of recidivism or escape), deciding whether to grant a preliminary injunction (accounting for the probability of threatened future harm), and discerning when an election has an “intolerable” probability of being infected with bias.⁸⁷ Additionally, courts like the D.C. Circuit Court of Appeals often have extensive experience with probabilistic harms in technical fields like health, environmental and industrial regulation.⁸⁸

The more fundamental point, however, is that, despite its name, fractional standing refers as much to a general frame of mind as to a particular mathematical calculation. Judges today are already entrusted to weigh when an indignity becomes an “injury,” a task that involves far more philosophy than mathematics. In the same way, fractional injury would often be used less as a precise numerical ratio and more as a general, qualitative precept: that the number of those harmed should matter in deciding whether court access is merited. Weighing the application of such a qualitative heuristic will not always be easy, but it is the sort of task that is well within what we already demand of the judiciary.

b. Bias Toward Large Organizations

A second objection stems from the possibility that a fractional standing system would unduly advantage large and established organizations. Such an argument could take one of two forms. First, and most obviously, a large organization would simply be more likely to have the numbers to obtain standing. To return to the NRDC example, if the rate of cancer were truly one in a million, and if one set the “injury” bar at a single projected cancer, then there would only be a few organizations whose membership could clear this bar.⁸⁹ Second, a more nuanced critique would suggest that in complex, “probabilistic” cases, establishing fractional standing might demand the services of experts like statisticians, public health specialists, and others who could establish the “fraction” of harm imposed on each person, a burden smaller groups might find difficult to bear.⁹⁰

Fortunately, such concerns are less severe than they might seem. First, it is important to remember that in the status quo, large organizations already enjoy immense advantages in securing standing, since they are far more likely to have

87. See Nash, *supra* note 8, at 1316-17.

88. See generally Patricia M. Wald, *Making “Informed” Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135 (1981) (noting that, for the D.C. Circuit, “[t]he staples of our diet are the legal sides of the most complicated scientific, economic, social, and even political issues of our day; issues that affect the quality of our nation’s life—the air we breathe; the water we drink; the price we pay for fuel, medicine, telephone calls, and political campaigns”).

89. A fact at least some commentators have recognized. See, e.g., Mank, *supra* note 44, at 722-23.

90. E.g., Leiter, *supra* note 48, at 415 (noting that, in a related context, establishing probability “may necessitate conducting extensive interviews, preparing myriad affidavits, hiring statistical experts, and perhaps even developing new statistical models”).

a member who has been “injured.” Thus, any marginal change that would follow from the rise of fractional standing seems minimal.

Second, even as fractional standing opens the door for large associations, it also explicitly recognizes a way for individuals to circumvent organizations entirely through “class standing.” As suggested earlier, a court that embraced fractional injury would be more willing to accept ad hoc groups of litigants whose only connective bond is the harm they allege. The creation of such a class would allow for aggrieved individuals to potentially circumvent asserting claims through organizations altogether, thus weakening the power and influence of established groups.

Finally, even if one believes that large organizations would be advantaged by a fractional standing system, this may well be a positive outcome. As noted above, one of the main goals of the injury requirement of standing doctrine is to ensure that legal issues are argued as well and comprehensively as possible. Indeed, at least one scholar has suggested that a core concern of modern standing doctrine is (and should be) “relative standing”—that is, the selection of the relatively superior plaintiff to advance a given cause.⁹¹ Seen in this light, a system that makes it more likely that large and established organizations will advocate for legal positions is a “feature, not a bug,” as it helps ensure high-quality advocacy.⁹²

c. Problems of Representation

A final potential objection to fractional standing stems from problems presented by representation. As in other group litigation contexts, such as the class action setting, there is the possibility that an aggregated group might deny individuals their due, particularly if the strategy chosen by the group (or its leaders) differs from the members’ individual preferences. For example, an individual who has experienced a cancer risk and who has joined in a fractional litigation might personally prefer a strategy of total attack against an agency. Yet, once standing is granted, it is possible that the class as a whole (via their lawyer and/or class representative) will instead argue for a more conciliatory settlement. Thus, true representation is denied.

There is no doubt that such problems of representation are serious. Yet, just as courts were able to fashion checks for other aggregate litigation, such as class actions,⁹³ there is no reason why similar checks would not arise here over time.

Perhaps most importantly, it is vital to remember that cases brought via fractional standing are those, which, in the status quo, could not be brought at

91. Re, *supra* note 33, at 1195-96.

92. This has been recognized by democracies like the United Kingdom in their relatively broad grant of standing to well-established advocacy organizations as opposed to less experienced groups. See *supra* note 70.

93. Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT’L & COMP. L.J. 217, 220 (1992).

all. Accordingly, while the representation that fractional standing offers to aggrieved individuals may sometimes be imperfect, it seems clearly superior to the alternative of receiving no hearing at all.

III. Conclusion

Evolution is never easy, but as we choose how to allocate court access, it is vital that our system match the realities of our courts' current role and further our aspirations regarding the role they ought to have. Binary standing is a deeply intuitive concept. It is precisely because it is intuitive that it has remained unchallenged for so long. Yet the core purposes of standing doctrine—and the true nature of harm and injury—each suggest a change is in order. Against this backdrop, the recognition of fractional standing would allow courts to better fulfill their role within our democracy.

