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Standing for Democracy: Is Democracy a Procedural Right in Vacuo? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing

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Standing for Democracy: Is Democracy a Procedural Right *in Vacuo*? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing

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ABSTRACT

Many commentators express concern that democracy in the United States is under threat, whether from the pressure of concentrated wealth and structural racism, government secrecy and authoritarian tendencies, an outdated constitutional structure and old-fashioned corruption, or perhaps a combination of them all. Against this background, this Article argues that the Supreme Court's treatment of

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procedural rights for determining standing—the key that opens the door to federal court—is an overlooked factor in contributing to democratic erosion. According to the Court, violation of a congressionally conferred procedural right that does not safeguard some separate, non-procedural, concrete interest of plaintiff—a “procedural right in vacuo,” the Court calls it—does not constitute Article III injury, and so the right holder is barred from seeking redress in a federal court. This is true, the Court says, even in cases in which the “procedural right” at issue is a statutory right to participate in public decision-making. Conceding for present purposes that standing requires a showing of a particular and concrete injury, this Article argues that a congressionally conferred right to participate in the processes of self-governance has value in and of itself, and its infringement should be treated as Article III injury even if the alleged violation does not cause financial loss or damage to some other, non-procedural interest of the right holder. The Court’s devaluation of congressionally conferred procedural rights in its standing doctrine not only has diminished opportunities for democratic practice, but also has destabilized political institutions that support democratic values. Overall, the Article seeks to reorient standing doctrine in ways that support participatory norms as well as intrinsic process values that serve as guardrails of democracy.

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INTRODUCTION

Is democracy in crisis?¹ With increasing frequency commentators raise concerns that democracy in the United States is under threat, whether from the pressure of concentrated wealth and structural racism, government secrecy and authoritarian tendencies, an outdated constitutional structure and old-fashioned corruption, or perhaps a combination of them all.² These are all hot button

1. See, e.g., *At the Capitol on Jan. 6, a Day of Remembrance and Division*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/live/2022/01/06/us/jan-6-capitol-riot>.

2. See Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 215 (2020) (“With the election of President Donald Trump and challenges to democracy observed worldwide, there has been a not-so-small explosion of books and articles diagnosing and decrying the possible demise of democracy.”). As examples of this trend, see generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); Aziq Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018); Ewan McGaughey, *Fascism-Lite in America (Or the Social Ideal of Donald Trump)*, 7 BRIT. J. AM. LEGAL STUD. 291 (2018).

issues that dominate public discussion,³ and all the more so after a violent assault on the Capitol sought to undo the results of the 2020 presidential election.⁴ Against this background, we argue that the Supreme Court's devaluation of procedural rights in its standing jurisprudence—and the Court's consequent refusal to allow judicial enforcement of such rights—has contributed to the erosion of democratic practices in the United States. As the Court sees it, invasion of a procedural right that is not designed to safeguard some independent, non-procedural, concrete interest of plaintiff—a “procedural right *in vacuo*” as dubbed by the Court—does not constitute Article III injury, and so the right holder is barred from federal court, even when Congress has enacted the “procedural right” in order to facilitate citizen participation in public decision-making. In our view, a congressionally conferred right to participate in the processes of self-governance should be accorded constitutional value in and of itself, and its infringement should be treated as Article III injury even if plaintiff suffers no financial loss or harm to some other non-procedural interest. The Court's devaluation of these procedural rights—which instantiate intrinsic process values of dignity, respect, and equality—not only has diminished opportunities for democratic self-governance, but also has destabilized political institutions that support democratic practice.

This claim may seem overheated, beside the point, or so narrow as to be insignificant given concerns about democracy's survival.⁵ Other than in rarified legal circles,

3. See, e.g., Thomas Homer-Dixon, *The American Polity is Cracked, and Might Collapse. Canada Must Prepare*, GLOBE & MAIL (Dec. 31, 2021), <https://www.theglobeandmail.com/opinion/article-the-american-polity-is-cracked-and-might-collapse-canada-must-prepare/>; Paul Krugman, *How Democracy Dies, American-Style*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/2019/09/09/opinion/trump-democracy.html>.

4. See, e.g., MARK BOWDEN & MATTHEW TEAGUE, *THE STEAL: THE ATTEMPT TO OVERTURN THE 2020 ELECTION AND THE PEOPLE WHO STOPPED IT* (2022).

5. Cf. Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for “Process Values,”* 60 CORNELL L. REV. 1, 39 (1974) (remarking on “how

“standing” and “procedure” generally do not figure into public explanations of America’s democratic crisis. And even within those circles, scholars have tended to see standing doctrine as “opaque”⁶ and “amorphous,”⁷ with procedure compounding a sense of technical esoterica.⁸ But hear us out. The argument starts from the premise that democracy— notwithstanding differences in how democracy is defined⁹— builds on a principle of self-governance that recognizes the right of each member of the community to participate in forming and safeguarding the policies by which they are governed. This principle of self-governance is constituted and carried out through procedures that enable individuals to participate on fair and equal terms. As Justice Felix Frankfurter famously wrote, “Legal process is an essential part of the democratic process.”¹⁰ In particular, the right to participate in democratic governance has been called the “right of rights”¹¹—a view that articulates a philosophical

often laymen seem ready to dismiss procedural rules as ‘mere technicalities’ even though these are the very rules which must secure most process values”).

6. Gene R. Nichol, *The Roberts Court and Access to Justice*, 59 CASE W. RESV. L. REV. 821, 833 (2009) (calling standing doctrine “an opaque labeling exercise”).

7. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Other criticisms of standing decisions have been even less generous. *See, e.g.*, JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE IN PUBLIC LAW* 1 (1978) (Vinnig states that the Court’s standing decisions generally suggest “a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate.”); *see also* *Am. Bottom Conservancy v. U.S. Army Corps of Eng’rs*, 650 F.3d 652, 655–56 (7th Cir. 2011) (Posner, J.) (stating that the Court’s standing decisions rest on “tenuous” grounds and have been criticized by “reputable scholars”).

8. Or, as a sitting federal judge has said of the cognate doctrine of the political question, “If you don’t understand that you’re not alone.” Jed S. Rakoff, *Don’t Count on the Courts*, N.Y. REV. BOOKS, Apr. 5, 2018, at 46, 47.

9. *See infra* Part I.

10. *See* *United States v. United Mine Workers of Am.*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring).

11. JEREMY WALDRON, *LAW AND DISAGREEMENT* 254 (1999); *see also* Robert A. Dahl, *ON DEMOCRACY* 98 (2d ed. 2015) (discussing “the fundamental right of citizens to participate effectively in governing” as a feature of democratic society). *But see* Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1047 (1980) (stating that

ideal but serves only as a catchy slogan unless it is constituted by procedure.

Procedural rights enable self-governance by creating pathways for participation that form the institutional infrastructure through which democratic decisions are made and effectuated. In this sense, procedure provides the architectonic building blocks of democratic practice. While playing this structural role, procedure also allocates power to the holder of the right, conferring authority to engage in forms of self-governance that both justify and provide the basis for democratic practice. Within this democratic structure, to borrow from Roderick M. Hills, Jr., procedural rights afford individuals the right to “equal participation in the definition of our rights.”¹²

Procedural rights of self-governance are individual rights, but they also facilitate social relations that are essential for collective action, political mobilization, and the formation and operation of civil society in general.¹³ Moreover, procedure provides the mechanism for resolving the core tension of democracy—disagreements that result when a decision is made by a group rather than by an

“it is far from established that participation is the preeminent constitutional value,” and asserting that “a significant body of constitutional scholarship values substantive goals above participation”).

12. Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 902 (2006); cf. Michael J. Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 FORDHAM L. REV. 1, 3 (1997) (contrasting procedural liberalism, which “insists that the Constitution must defend a framework of rights that is neutral among ends,” with the “more demanding notion of citizenship and freedom,” which emphasizes “self-rule, to participate in shaping the forces that govern the collective destiny”).

13. Cf. Steven Klein, *Democracy Requires Organized Collective Power*, 30 J. POL. PHIL. 26, 26–27 (2022) (discussing how procedures affect the organization of power in democratic society); see also Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 853 (2021) (“Social movements can sometimes accomplish more by establishing institutional structures that provide them (or their allies) with increased representation and influence within the regulatory process than they can with one-off policy victories.”).

individual—whether by mediating conflict, encouraging compliance, tie-breaking, generating trust, or some other process.¹⁴ Procedure serves this purpose whether it is constrained by substantive rights that limit group decision-making or by institutional designs meant to counter-balance group conflicts, or through hybrid mechanisms that draw from both.¹⁵

But procedure is more than instrumental to democratic life.¹⁶ Procedure also has intrinsic value for each individual member of the polity who holds a right to participate, because it confers dignity upon the right holder, instantiates that member's equal status under law, and accords respect separate and apart from the end result of exercising the procedural right. As Laurence Tribe has written in an analogous context, “In most areas of human endeavor—from performing a symphony to orchestrating a society—the processes and rules that constitute the enterprise and define the roles played by its participants matter quite apart from any ‘end state’ that is ultimately produced.”¹⁷

14. See, e.g., Keith E. Whittington, *An “Indispensable Feature”? Constitutionalism and Judicial Review*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 21, 23 (2002) (“Rather than having substantive theories of justice, we must also consider the forms of politics and how politics ought to be conducted in a world in which people continue to disagree about basic questions of justice.”).

15. See Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1102 (2005) (reviewing RICHARD H. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003)) (discussing the rights-structure debate of the law of democracy); cf. Samuel Issacharoff & Richard H. Pildes, *Not by “Election Law” Alone*, 32 LOY. L.A. L. REV. 1173, 1173 (1999) (discussing “the distinct ways in which rights and political structures, as well as courts and legislatures, come together in the complex legal construction of the institutions and laws governing the political process”).

16. See Paul MacMahon, *Proceduralism, Civil Justice, and American Legal Thought*, 34 U. PA. J. INT'L L. 545, 560 (2013) (“Procedure may matter to a proceduralist because of its instrumental effects, or because procedure is valuable in its own right.”).

17. Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 631 (1973); see also Becca Rothfeld, *The Fate of the Self in the Age of Clicks*, N.Y. TIMES (Aug. 24, 2021), <https://www.nytimes.com/2021/08/24/books/review/the-fate-of-the-self-in-the-age-of-clicks.html> (stating that “most people enjoy games because they value

The Supreme Court has acknowledged the importance of democracy to its standing jurisprudence. Indeed, the Court repeatedly has recited that the Article III requirement reflects “concern about the proper—and properly limited—role of the courts in a democratic society.”¹⁸ Significantly, however, the Court’s focus on the democratic demand for a limited judiciary seems to have crowded out other democratic concerns that ought to be relevant to the standing inquiry.¹⁹ Putting to the side whether the Court takes seriously its rhetoric of a limited role,²⁰ the Court has never sufficiently explained what “democratic society” means as it relates to Article III standing or why it requires excluding from its definition of Article III injury the violation of congressionally conferred procedural rights. On some occasions, the Court seems to equate democratic society with “our kind of

the process, not just the outcome, of playing,” and that “[i]n this respect, games resemble most of our cherished ventures”).

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

19. The emphasis on a limited judiciary is aligned with the familiar academic “obsession” with whether judicial review is a democratic practice. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 *YALE L.J.* 153, 155 (2002). The Court’s countermajoritarian role, and the need for judicial restraint, threads through a great deal of legal commentary that is critical of the Court’s enforcement of equality rights, supported by arguments that rest on considerations that include the asserted lack of neutral justification for the enforcement of such rights, *see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 34–35 (1959); the lack of institutional capacity to declare or enforce equality rights, *see* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); and the indeterminacy of rights overall, *see* generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

20. *See* Stefanie A. Lindquist, Joseph L. Smith & Frank B. Cross, *The Rhetoric of Restraint and the Ideology of Activism*, 24 *CONST. COMMENT.* 103, 105 (2007) (presenting results of an empirical study of Supreme Court decisions from 1986 to 2004, and concluding that “restraint was contingent on the source of the law at issue” and reflected “a conservatism that is particularly critical of congressional power”).

government,”²¹ or “our system of government”;²² on other occasions, democratic society disappears and is displaced by “the idea of separation of powers.”²³ These phrases, resonant with Legal Process norms,²⁴ neither support nor justify the Court’s approach to standing and procedural rights.²⁵ The Constitution draws no distinction between statutorily created procedural rights and those considered substantive,²⁶ and it is not obvious why a legislative commitment to the procedural means for forming and effectuating policies deserves less constitutional or judicial respect than the substantive ends achieved by those procedures. Conceding reasonable disagreements about the procedural rights that democracy requires,²⁷ once procedural

21. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178–79 (Bork, J., concurring) (“All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”)).

22. *Id.* at 750 (“The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government.”).

23. *Id.* at 752 (stating that “the law of Art. III standing is built on a single basic idea—the idea of separation of powers”).

24. See generally Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994) (discussing Legal Process norms and dominant approaches to justiciability doctrine).

25. For a criticism of the Court’s reliance on separation of powers as a rationale for narrowing standing doctrine (without discussing procedural standing), see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1508 (1988) (arguing that standing doctrine, by eliminating opportunities for participation, constitutes “an affirmation of authoritarianism in the guise of democracy; it is a denial of self-governance”).

26. Cf. Robert J. Condlin, “A Formstone of Our Federalism”: *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIA. L. REV. 475, 533 (2005) (Condlin explains that, in the context of federal choice-of-law rules, “the Constitution only permits the substance/procedure obligation to be imposed; it does not require it. The obligation itself comes from federal statutes.”).

27. See *infra* Part I. This is not to deny that questions about democratic procedure are “sufficiently different” from questions about democratic substance as to warrant a distinct analysis. See Frederick Schauer, *Judicial Review of the*

rights are created through a valid democratic process, those procedural rights are rights on a par with others; the Court is flatly wrong in claiming authority to erase those rights from the category of rights that can be enforced through the Article III courts, and it acts undemocratically in doing so.

The voluminous literature on standing so far has not fully explored the democratic significance of the Court's treatment of "procedural rights *in vacuo*."²⁸ Rather, most commentators either have criticized the requirements that the Court has devised for procedural standing,²⁹ or focused

Devices of Democracy, 94 COLUM. L. REV. 1326, 1328 (1994) (stating that "it is worthwhile to think of the constitutional theory relating to textually undetermined questions of democratic procedure as somewhat distinct from the constitutional theory relating to textually undetermined substantive rights such as the right to privacy and the right to travel" (footnotes omitted)).

28. Scholars in various fields have criticized perceived democratic deficits in aspects of the Court's constitutional doctrine. See, e.g., David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259, 260 (2016) (stating that the Court's election-law jurisprudence has "failed to appreciate the plethora of democratic values embedded within its decisions"); Burt Neuborne, *Response to Professor Gardner: Is There a Theory in This Class?*, 35 CONN. L. REV. 1519, 1520 (2003) (stating that the Court's election-law decisions lack any "thoughtful normative conception of democracy," and arguing that it is instead a "rootless muddle"); see also Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525, 1528 (2003) (stating that the Court's decisions adhere to constitutional formalism without regard to "the point and aims of democracy"). Brief mention is made of Article III standing and democracy in Robert C. Hughes, *Judicial Democracy*, 51 LOY. U. CHI. L.J. 19, 63 (2019) ("To the extent that the standing doctrine is open to interpretation, courts should consider citizens' individual and collective interest in having a public response to reasoned *arguments* for interpreting the law (including the Constitution) in one way rather than another."), and Jonathan R. Siegel, *What If the Universal Injury-in-Fact Test Already Is Normative?*, 65 ALA. L. REV. 403, 413–14 (2013) (discussing the irony of the Court's refusing, "in the name of democracy," to enforce statutes because the alleged violation does "not fall differentially upon particular individuals"). The relation of legislature and legislator standing to democratic life is beyond the scope of this Article. But see generally Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845 (2018).

29. See generally, e.g., Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169 (2012) (arguing that the Court's relaxation of imminence and redressability in procedural rights cases cannot be reconciled with current Article III doctrine, and calling for a "two-tier solution" that would accord standing when Congress has created a procedural

on how these requirements affect specific rights, such as the right to privacy.³⁰ Nor have scholars explored standing and its effect upon process values in and of themselves.³¹ And despite a large and emergent literature on democratic erosion, in which courts are cast variously as democratic stabilizers³² or as democratic “wrecking balls,”³³ analysts likewise have not considered Article III standing doctrine as it relates to congressionally conferred procedural rights that, in our view, can serve to maintain and sustain democratic norms and practices.³⁴

This Article seeks to fill this gap. Let us be clear: We accept for purposes of the argument the Court’s current view that Article III requires a showing of injury to meet standing requirements and that the injury must be particularized and

right and plaintiff falls within the zone of interests of the statute); Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221 (2008) (treating procedural rights standing cases as public actions not subject to the conventional Article III inquiry).

30. See, e.g., Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 439 (2017) (“Article III standing has emerged as a major barrier to federal court litigation for plaintiffs who assert a violation of their privacy rights.”).

31. See, e.g., Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187, 2187, 2215–16 (2018) (discussing the Court’s treatment of representational harm as a generalized grievance, and not injury sufficient to support standing to challenge state partisan gerrymandering); see also Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2277 (1998) (arguing that “any coherent standing doctrine must necessarily be derived from a more robust substantive theory of the permissible role of race in politics than anything the Supreme Court has offered”).

32. See generally, e.g., Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1 (2019).

33. See, e.g., David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1375 (2020).

34. See, e.g., Tom Ginsburg, *The Jurisprudence of Anti-Erosion*, 66 DRAKE L. REV. 823, 853 (2018) (acknowledging that “threats to democracy can arise outside the traditional scope of electoral contestation” and can involve “the partisan capture of bureaucratic machinery,” but not discussing U.S. standing doctrine or its treatment of process values as facets of such capture).

concrete.³⁵ However, our argument challenges the Court's refusal to recognize violations of congressionally conferred procedural rights—largely but not exclusively rights involving public access to and participation in administrative agency policy making—as injuries sufficient to support Article III standing. Boiled down, we argue that the Court's approach to procedural injuries in its standing decisions threatens to demote democracy twice: first, by refusing to acknowledge that participation in self-governance is a particular and concrete interest, causing constitutionally cognizable injury when a right to participate is violated; and second, by overruling a considered congressional judgment to designate participation as such a right.

By impeding Congress's ability to authorize individual participation in administrative action, the denial of standing has removed an important check on bureaucratic decision-making, undermining the already slim democratic legitimacy of the administrative state.³⁶ And although the Court purports to apply its standing decisions in a neutral manner, in practice the doctrine has tended to accentuate the concentrated power of corporate groups, to narrow the influence of consumers and workers, and to exacerbate entrenched structural discrimination against Black, Brown, and poor persons.³⁷ Some might argue that the standing

35. In this sense, to borrow from now-Chief Justice Roberts' famous article on Article III standing, we are granting the Court its "*donnée*"—"our criticism is applied only to what [the Court has made] of it." See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1219 (1993) (quoting Henry James, *The Art of Fiction*, in THE PORTABLE HENRY JAMES 387, 402–03 (Morton D. Zabel ed., 1968)).

36. See generally Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

37. See, e.g., Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (arguing that the standing rulings of the prior three decades show that the doctrine "not only [was] unstable and inconsistent, but . . . also systematically favor[ed] the powerful over the powerless"); see also Raj Shah, Comment, *An Article III Divided Against Itself Cannot Stand: A Critical Race Perspective on the U.S. Supreme Court's Standing Jurisprudence*, 61 UCLA L. REV. 196, 198 (2013) (questioning whether the Court

decisions we discuss pose little threat to democracy, because the other branches of government have been or will be able to compensate for any harms that flow from the Court's approach. But there's the rub. The Court purports to ground its standing decisions in Article III of the Constitution, and, as such, indirectly limits Congress's power to enact legislation under both Article I and Section 5 of the Fourteenth Amendment that can be judicially enforceable.³⁸ These decisions thus make it more difficult for Congress to mitigate the detrimental effects of the Court's standing doctrine,³⁹ for in many situations Congress no longer can enact substitute legislation—there is no “constitutional workaround.”⁴⁰ The question addressed in this Article thus clearly has democratic significance beyond the technical details of federal jurisdiction and the abstruse doctrine of standing.

Part I sets out the background assumptions about democracy, procedure, and democratic procedure as they relate to the argument. Although some would argue that democracy embraces no more than periodic elections and a rule of majoritarianism, we assume that democracy in America comprises and demands a more robust set of practices—not only the right to vote, but also rights to participate in the formation and effectuation of the policies,

has applied its procedural standing doctrine equally to white litigants and people of color).

38. See *infra* Part II.

39. For a discussion of congressional evasion of constitutional limits in the context of administrative lawmaking, see, for example, *Bowsher v. Synar*, 478 U.S. 714, 755 (1986) (Stevens, J., concurring) (footnote omitted) (quoting *INS v. Chadha*, 462 U.S. 919, 959 (1983)) (stating that the danger of “congressional action that evades constitutional restraints . . . is not present when Congress delegates lawmaking power to the executive or to an independent agency”); see also Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2103 (2002) (discussing statutes that “may appear to evade the formal lawmaking requirements” of Article I).

40. The phrase comes from Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

practices, and values that bind members of the polity.⁴¹ Moreover, even if democracy does not in all situations require these participatory and effectuation rights, once the polity through a valid process has agreed to establish such rights, they hold intrinsic value for the right holder without regard to their instrumental effects.

Part II turns to the Court's standing jurisprudence and focuses on the Court's approach to congressionally created procedural rights as a basis for showing the "injury in fact" needed to establish constitutional standing. The Court's decision in *Summers v. Earth Island Institute*⁴² marked a significant doctrinal shift—the moment the Court introduced the idea that rights of public participation in governance are mere procedural rights "*in vacuo*," of no Article III value even when Congress has devised such rights to promote democracy and, indeed, to counter power imbalances that threaten democratic values.⁴³ This Part surfaces the conceptual difficulties with the Court's reliance on a substantive-procedural distinction and its formal and reductionist equation of "substantive" with "concrete," and "procedural" with "abstract." Briefly tracing the post-New Deal evolution of standing doctrine to accommodate the assertion of legislatively created rights and interests, this Part shows how the Court's disregard of the intrinsic worth of process in terms of equality, dignity, and respect has blocked individuals from enforcing the participatory rights conferred upon them by Congress to enhance democratic practice.

Part III assesses the Court's procedural standing decisions using the markers of democratic decline identified by leading theorists of the topic. Those markers include

41. Cf. Amartya Kumar Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY, no. 3, July 1999, at 3, 9 (1998) ("Democracy is a demanding system, and not just a mechanical condition (like majority rule) taken in isolation.").

42. 555 U.S. 488 (2009).

43. *Id.* at 496–97.

reduced accountability, increased inequality, and narrowed avenues for participation. The Article then broadens the lens from Article III and shows that the Court's devaluation of intrinsic process values in its standing cases is not an isolated feature of its decision-making. Rather, the Court's approach to procedural standing forms a piece with what commentators have called a "counterrevolution" in the Court's protection of procedural rights that dates from the end of the Warren Court—a trend that has displaced public rules of procedure with private rules of contract, impeded efforts at collective action, and suppressed dignity interests in favor of the narrowly "efficient" result.⁴⁴ Moreover, although the Court defends its standing and other procedural decisions as consistent with, and indeed required by, a principle of neutrality, in practice these cases show a manifest political valence that has amplified the influence of corporations and the wealthy, while entrenching racial and gender inequities.

We briefly conclude. The threat posed by the Court's procedural standing decisions is not simply *Lochner* redux.⁴⁵ The problem is the Court's steady dismantlement of the procedures that constitute democratic institutions. By denying Congress the power to create procedural rights of democratic access, the Court not only has ignored the intrinsic value of process, but also has removed important guardrails of democracy, contributing to the nation's democratic decline in ways that are difficult to measure, but nevertheless are perilous and significant.

44. Use of the term "counterrevolution" to describe the Court's approach to process values seems to have first appeared in Richard S. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996).

45. Cf. Metzger, *supra* note 36, at 32.

I. DEMOCRACY, PROCEDURE, AND DEMOCRATIC PROCEDURE

This Part sets out the concepts that inform the argument: democracy, procedure, and democratic procedure. The literatures on these subjects, philosophical as well as legal and political, are large, in dialogue with each other, and often in disagreement. They reflect the fact that democracy is a notoriously contested concept.⁴⁶ Analysts discuss democracy from different perspectives, many of which have been criticized as idealized,⁴⁷ romanticized,⁴⁸ or essentialized and lacking any institutional—or social, economic, political, temporal, or cultural—context.⁴⁹ Procedure likewise is complicated by boundary problems;⁵⁰ the substance-procedure distinction has been called “notoriously problematic.”⁵¹ There is no consensus on which procedures are optimal for democratic life or the nature, scope, or design of democratic procedure.⁵² This Part can at

46. See W.B. Gallie, *Essentially Contested Concepts*, in 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 168–69 (1956) (referring to democracy as an example of an essentially contested concept, meaning, “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users”).

47. See Issacharoff, *supra* note 32, at 9–16 (distinguishing between “real” democracies and “idealized” democracies).

48. See Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 808 (2014).

49. See Paul Frymer, *Distinguishing Formal from Institutional Democracy*, 65 MD. L. REV. 125 (2006).

50. See generally, e.g., Edgar H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392 (1941) (collecting scholarly statements on the porous boundary between substance and procedure, and maintaining that the context for using the terms is significant).

51. See Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1022 (2010). Disagreement about civil procedure is especially dominant in the United States. See ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2001) (stating that “[c]ompared to other economically advanced democracies, American civil life is more deeply pervaded by conflict and controversy about legal processes”).

52. See WALDRON, *supra* note 11, at 300 (stating that people “have their own opinions about procedures”); see also Aileen Kavanagh, *Participation and*

best gesture at the complexity and depth of the writings and highlight the path marking ideas relevant to our basic claim: that the violation of a congressionally conferred participatory right injures the right holder in ways sufficient to meet Article III standing requirements even without a resulting injury to a non-procedural interest.

Notwithstanding the disagreements and contestation, few would dispute this basic definition: democracy is a political practice reflecting a commitment to be bound by the duly adopted decisions of a group of which the individual is a member. Joshua Cohen thus refers to democracy as an agreement “to exercise state power . . . from the collective decisions of the members of a society who are governed by that power.”⁵³ At this high level of generality, democracy depends on certain procedural arrangements, usually including the right to vote, which constitute the practice of self-governance and enable each and every member of the polity to participate in the formation of policies by which they will be governed. For the most part, American democracy depends not only on periodic elections in which members of the polity vote, but also on a principle of majoritarianism to resolve electoral outcomes when the vote is not unanimous.⁵⁴

Judicial Review: A Reply to Jeremy Waldron, 22 L. & PHIL. 451, 468 (2003) (stating that “people disagree about democratic procedures, just as much as democratic outcomes”); Jean L. Cohen, *Beyond Political Theology: Comment on Kalyvas on Carl Schmitt*, 21 CARDOZO L. REV. 1589, 1591 (2020) (“The choice is not substance or process, identity or talking, democracy or liberalism. We can never, in a democratic polity, get out of the spiral of procedure/substance/procedure. Rather, one must see that the heart of democracy is the possibility of shifting to the level of deliberation about substantive values, to procedures, and back again, within procedural forms.”).

53. Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 95, 95 (Seyla Benhabib ed., 1996); see also JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (1950) (defining democracy as “institutional arrangements for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”).

54. See John Gilbert Heinberg, *History of the Majority Principle*, 20 AM. POL. SCI. REV. 52, 53 (1926) (“The term majority principle denotes a device employed by groups for reaching decisions . . . whose members are considered equal for the

However, majoritarianism is not the exclusive procedure for regulating elections,⁵⁵ and it is not the exclusive procedural device in the United States—some states (admittedly only a few) require supermajorities for certain kinds of decisions.⁵⁶ But even accepting majoritarianism as the rule of decision, the rule is not self-defining. Some theorists treat majoritarianism as a counting device—as James Gardner puts it, “the impersonal operation of its aggregating mechanism”—while others, in the republican tradition, emphasize the importance of deliberative processes to inform and precede the act of voting.⁵⁷

purpose of voting, and where the opinion of the greater number is deemed expressive of the collective will.”).

55. See Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 B.U. L. REV. 1029, 1030 (2010) (stating that majoritarianism “is one among a variety of decision rules that may, but need not, advance the project of collective legitimate self-rule based on political equality”); see also Christopher L. Eisgruber, *Democracy and Disagreement: A Comment on Jeremy Waldron’s Law and Disagreement*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 35, 37 (2002) (describing majoritarianism as a “distinct conception” of the democratic ideal). For proposals on how to design an optimal democracy, see generally HANS GERSBACH, *DESIGNING DEMOCRACY: IDEAS FOR BETTER RULES* (2004).

56. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 888 (2021) (explaining that states largely have eliminated supermajority requirements, where “[t]oday, only four states have supermajority requirements”). Relatedly, jury decision-making illustrates the limits of applying the principle of majoritarianism to democratic procedure. Although some commentators endorse a rule of proportional representation for the selection of jurors, others endorse random selection as a way to secure either first-order or second-order diversity. Compare Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1178–79 (2005) (defending random selection as a way to support diversity understood as minority empowerment within otherwise majoritarian spaces), with Jeffrey Abramson, *Second-Order Diversity Revisited*, 55 WM. & MARY L. REV. 739, 772, 779 (2014) (defending random selection and the principle of cross-sectional jury selection based on a “democratic norm” requiring that “community members had a fair and equal opportunity to be recruited onto [the] jury,” and criticizing second-order diversity for “teaching majorities to regard jury verdicts as expressions of group conflict”). See also Anders Walker, *[Dis]integration: Second-Order Diversity and Schools*, 109 GEO. L.J. ONLINE 21, 23 (2020) (revisiting integrationist-motivated school assignment procedures in light of the democratic benefits of “majority-minority schools and minority spaces within majority schools” and in resistance to an assimilationist or melting pot framework).

57. See James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. &

Does the concept of democracy require procedures other than the right to vote? Some democratic theorists stop at the ballot box; as Corey Brettschneider observes, “There is debate over what else besides the right to vote counts as a procedural right.”⁵⁸ Without resolving this question, procedural minimalism does not describe the practice and tradition of democratic procedure in the United States, which by constitutional text, political custom, and judicial precedent afford participation rights beyond the ballot box and at different institutional entry points. Democracy in America assumes that members of the polity share in the creation and establishment of the policies and values by which they are governed, and these policies and values include the procedures used to reach many basic decisions. Indeed, as Allen Buchman more generally has asked, “[I]t is not clear why equality demands only that each citizen has an ‘equal say’ over ends, not over means, since the choice of means may not only be crucial for whether the ends are achieved but also can both express and have an impact on the most fundamental interests and values that persons can have.”⁵⁹ In addition to the vote,⁶⁰ the Constitution recognizes

MARY BILL RTS. J. 927, 934–36 (2011) (distinguishing between liberal/aggregative and republican/deliberative models of democracy); *see also* C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 VA. L. REV. 515, 520–21 (2011) (explaining that many theorists believe “that democratic processes are legitimate only if limited in various ways, especially by guarantees of individual rights that restrict the domain of popular decision making”); John J. Worley, *Deliberative Constitutionalism*, 2009 BYU L. REV. 431, 431–33 (stating that “[D]emocratic principles enjoy greater prestige today than perhaps at any time in the history of political ideas, yet democratic theorists still disagree about the meaning and justification of democratic ideals and about what legal, political, and social institutions those ideals require,” and distinguishing among “procedural democrats,” “deliberative democrats,” and “constitutional democrats”).

58. *See* Corey Brettschneider, *Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review*, 53 POL. STUD. 423, 439 n.1 (2005); *see also* Gardner, *supra* note 57, at 928 (stating that “Americans so often reductively equate democratic politics with voting”).

59. Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 711 (2002).

60. On the right to vote, *see* HELEN HERSHKOFF & STEPHEN LOFFREDO,

the right to petition (and the cognate rights of freedom of speech and press),⁶¹ the right to the writ of habeas corpus,⁶² the jury right in some criminal and civil cases,⁶³ and the right to due process before the government's taking of liberty or property.⁶⁴ Further, the Constitution authorizes the establishment of federal courts that enable disputants to participate in judicial proceedings.⁶⁵ Rules of procedure, enacted by Congress and by the Supreme Court with authority delegated by Congress, are said to distinguish judicial proceedings from those of autocratic decision-

GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME 849 (2019) ("The federal Constitution secures the right to vote on behalf of 'qualified voters . . . in conformity to the requirements of state law' subject to federal regulation." (citing *United States v. Classic*, 313 U.S. 299, 310, 314 (1941) (interpreting U.S. CONST. art. 1, § 2))).

61. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); see Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 155 (1986) ("The right of petition, so fundamental in colonial politics was included in the Bill of Rights. That the Framers meant to imply a corresponding governmental duty of a fair hearing seems clear given the history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances." (footnotes omitted)).

62. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

63. U.S. CONST. amends. VI, VII; see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995) (Amar states that "the jury's function in the federal constitutional scheme was not limited to the protection of individual litigants. Rather, the jury was an essential democratic institution because it was a means by which citizens could engage in self-government.").

64. U.S. CONST. amends. V, XIV.

65. See Richard Marcus, *A Common Law Perspective on the Supreme Court and Its Functions*, 81 STUDIA IURIDICA 15, 37 (2019) (observing that "the procedural authority of the US Supreme Court is too often overlooked, but it is a supreme authority that can only be changed by Congress, or by the rules process over which the Court has the final word"). Debate persists on the appropriate mix of legislative and judicial authority to make rules for court practice. See Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The View of Two Co-Authors*, 78 GEO. WASH. L. REV. 9, 25–29 (2009) (discussing some of these disputes, for example, with respect to the development of rules of evidence).

makers, faux legislators, or mere bureaucrats⁶⁶ and, some commentators argue, ensure that the courts function as democratic institutions.⁶⁷ Whether or not democracy demands each of these procedural rights, Congress has sufficient authority to confer rights of participation on individuals that go beyond ballot access.⁶⁸ This view of the Article I power follows, conceptually and logically, from the Constitution itself, which, as Cass Sunstein has posited, recognizes that “[s]elf-government is a good in itself.”⁶⁹ Congress’s power to create participatory rights extends not only to the courts, but also to legislative tribunals and to administrative agencies. Indeed, many would argue that the democratic bona fides of the administrative state depends upon procedures that enable individuals to receive information about government activity, to express views to government decision-makers, and to help shape the regulatory decisions that indirectly govern ordinary conduct.⁷⁰ These different modes of participation, at all levels

66. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (“[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”); Michael Bayles, *Principles for Legal Procedure*, 5 L. & PHIL. 33, 36 (1986) (stating that “[i]n considering principles for legal procedure, it is important to have a clear notion of adjudication as distinguished from legislation, negotiation, and so on”).

67. In this Article, we do not address the different conceptions of the relation between courts and democracy. See, e.g., Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 320 (1997) (arguing that “adjudicative lawmaking can, under certain conditions, claim democratic legitimacy by ensuring constructive participation through interest representation”).

68. As Justice Reed famously stated in his concurring opinion in *Erie Railroad Co. v. Tompkins*, “[N]o one doubts federal power over procedure.” 304 U.S. 64, 92 (1938).

69. See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 6 (2001).

70. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (associating the requirements of due process with judicial review of administrative decision-making). But see JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 179 (Cambridge Univ. Press 2018) (“I am

of government and in the states as well as the federal system, are a customary part of democratic life in the United States as it operates in lived experience. Political participation thus can and does “take many forms: financial contributions to candidates, political parties, and advocacy groups; petition signing; political speech and debate; communication with and lobbying of officials; attending public meetings; holding office; and any of a host of other obligations of citizenship.”⁷¹

Does democracy demand more than the procedures by which it is constituted? Some theorists place primary if not exclusive emphasis on democracy as pure process,⁷² viewing democratic procedure separately from democratic substance, or what Frank Michelman in a related context has called “proceduralism . . . all the way down.”⁷³ This position asserts that democracy requires no more than procedures that are open, fair, and equally available to all members of the polity—the principle of democratic legitimacy—leaving the

hard pressed to conclude that administrative lawmaking in the American national government is ‘undemocratic’ when the legal requirements for and practices of administrative policymaking are compared with realistic alternative modes of action.”).

71. Gardner, *supra* note 57, at 928; *see also* NANCY BERMEO, *ORDINARY PEOPLE IN EXTRAORDINARY TIMES: THE CITIZENRY AND THE BREAKDOWN OF DEMOCRACY* 4 (2003) (“Voting and taking collective action are essential elements of democratic citizenship. These activities are also essential to the fate and quality of democratic regimes because political and military leaders judge the risks of democracy by looking at how ordinary people use the freedoms that democracy affords.”).

72. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 136 (1st ed. 1971) (justifying the importance of “fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory.”).

73. *See* Frank I. Michelman, *Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture*, 86 CALIF. L. REV. 399, 405 (1998) (discussing Robert Post’s theory of responsive democracy and calling it “bottomlessly procedural, resting on no substantive foundation and implying no substantive presupposition”); *see also* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMM. 251, 264 (2011) (Baker says, a “procedural theory that asserts that democracy implies authority to decide any question by ‘majoritarian processes,’ whatever these processes are, . . . overtly question begging. Why accept a mere procedural theory? And how does one determine and why should one accept specific majoritarian processes?”).

substantive outputs resulting from these procedures to the participants themselves (the principle of democratic outcomes).⁷⁴

Whether democratic procedures are sufficient for democracy without regard to democratic outputs is a question separate from whether democratic procedure can be designed without regard to substantive values.⁷⁵ Intuitions suggest that voters in the United States would be loath to have an election decided by the roll of the dice (except, perhaps, to break a tie)⁷⁶ or by Shirley Jackson's lottery.⁷⁷ Relatedly, when a federal judge resolved a discovery dispute by ordering the participants to play "rock, paper, scissors" on the courthouse steps, a quiet sense of outrage was registered

74. See generally Thomas Christiano, *The Authority of Democracy*, 12 J. POL. PHIL. 266 (2004) (discussing the distinction between the "quality" of democratic outcomes and the "quality of the procedure" by which democratic decisions are made).

75. See Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 509 (2003) (calling pure process an "incomplete" account); see also Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) ("The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.").

76. See Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985, 998 (2001) ("Let us ask: What causes (so to speak), or grounds, the justice of letting the outcome of a crapshoot be decided by a true application of the rules of craps? It isn't, surely, the crystalline beauty or egalitarian perfection of those rules or of the game they constitute. It is, surely, the desire and free agreement of the players of the game to play that game. And agreement—consent—as a ground of justice surely is not a purely procedural notion. It is rather an intuition closely tied to some notion we have of human purposes or human flourishing—of human freedom, dignity, autonomy, responsibility." (footnotes omitted)). On the use of the roll of the dice to break a tie in an election, see, for example, Patricia D. Cafferata, *Occasionally Lady Luck Decides Elections in Nevada*, NEV. LAW., Sept. 2012, at 21, 23.

77. See Shirley Jackson, *The Lottery*, NEW YORKER (June 26, 1948), <https://www.newyorker.com/magazine/1948/06/26/the-lottery>; see also Zaid Ibrahim Ismael & Sabah Atallah Khalifa Ali, *Human Rights at Stake: Shirley Jackson's Social and Political Protest in "The Lottery,"* 7 INT'L J. APPLIED LINGUISTICS & ENG. LITERATURE, no. 6, Nov. 2018, at 28, 28.

even on practitioner blogs.⁷⁸

These simple examples suggest that maintaining democratic practice requires not only procedures, but also procedures that are informed by and take account of democratic values—values that often are identified as equality, dignity, and respect.⁷⁹ To borrow from Robert S. Summers,

Put in affirmative terms, a law-applying process that is procedurally rational, humane, and respectful of individual dignity and personal privacy is good in those respects *as a process*, quite apart from whether it is also an efficacious means to good results (just convictions, just acquittals, etc.). For procedural rationality, humanity, and regard for dignity and privacy are “process values.”⁸⁰

A procedural system that fails to attend to these process values can be thought of as a Potemkin Village—a façade of rule-formalism that is likely to burden participation, impede authentic expression, and magnify inequality, and so overall subvert rather than promote democratic life.⁸¹ James Allan offers the provocative example of a majoritarian voting process carried out by “people raising their hands in the presence of men with machine guns” and “voting by secret ballot but with the votes counted by unscrutinised henchmen.”⁸² As more typical examples, commentators have

78. *Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.*, No. 6:05-CV-1430-ORL-31JGG, 2006 U.S. Dist. LEXIS 38526, at *1 (M.D. Fla. June 6, 2006); see also “*Rock, Paper, Scissors*” . . . *Everyone Loses*, NEWMAN FERRARA LLP (June 16, 2006), <https://www.nyrealestatelawblog.com/manhattan-litigation-blog/2006/june/rock-paper-scissors-everyone-loses/>.

79. Cf. Corey Brettschneider, *The Value Theory of Democracy*, 5 POL. PHIL. & ECON. 259, 261 (2006) (seeking to demonstrate “that a core set of substantive values implicitly underlies pure procedural theories of democracy” identified as “equality of interests, political autonomy, and reciprocity” on the view that they “are central to the ideal of democracy because they support the notion of democratic citizens as free, equal, and reasonable rulers”).

80. Summers, *supra* note 5, at 3.

81. For a discussion of the establishment of procedure devoid of democratic process values, see generally, for example, Karl Loewenstein, *Law in the Third Reich*, 45 YALE L.J. 779 (1936).

82. James Allan, *Thin Beats Fat Yet Again: Conceptions of Democracy*, 25 L.

raised democratic concerns about procedures that require meetings to be open to the public, but allow them to be scheduled at times when community members are at work or engaged in family care;⁸³ initiative processes that allow only unpaid volunteers to solicit signatures;⁸⁴ and burdens of proof that depend on expert evidence that is priced out of reach for lesser-resourced litigants.⁸⁵ To ensure functional and not merely formal rights of participation,⁸⁶ the polity may choose to take what John Rawls has called “compensating steps”⁸⁷ and enact procedures that are designed intentionally to rectify power imbalances and other inequalities that threaten and could destabilize democratic governance.⁸⁸ These forms of procedure can be seen as a “small-p”⁸⁹ version of the representation-reinforcement theory that John Hart Ely drew from *Carolene Products*

& PHIL. 533, 552 (2006).

83. See Grant Glovin, *Power and Democracy in Local Public Participation Law*, 51 URB. LAW. 43, 61–62 (2021); see also ARIEL C. ARMONY, *THE DUBIOUS LINK: CIVIC ENGAGEMENT AND DEMOCRATIZATION* 4 (2004) (building on case studies of Weimar Germany, the antisegregation movement in the United States, and contemporary Argentina to argue that “[f]or civil society to develop its democratic potential, it must be firmly rooted in and backed by the Rule of Law” and ensure that participation not “work as a multiplier of inequalities”).

84. See Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 47 (2003).

85. See Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I*, 1973 DUKE L.J. 1153, 1163 (discussing the impact of the “costs of the legally optional, yet practically essential, equipage often needed for an effective presentation once the case is filed” in court).

86. Kavanagh, *supra* note 52, at 481 (discussing decisions made in “appreciation of the gap between formal and substantial equality”).

87. JOHN RAWLS, *A THEORY OF JUSTICE* 225 (1971), *quoted in* Kavanagh, *supra* note 52, at 481.

88. SABEEL RAHMAN, *DEMOCRATIC AGAINST DOMINATION* ch. 5 (Oxford Univ. Press 2017) (discussing how to design and structure “actual democratic institutions” to avoid economic domination and to “rebalance political power” (emphasis in original)).

89. See generally Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147 (2019) (using the term “small-p process” in a different context).

footnote four.⁹⁰ As legislatively conferred rights, such procedures would stand squarely within “the formalistic-positivist framework” justified by majoritarianism and warrant judicial respect.⁹¹

In tension with pure process theorists are those who ascribe only an instrumental value to procedure, emphasizing its role in effectuating democratic goals that are external to the procedure itself. This notion of procedure has been described as at best “incomplete,”⁹² a view that we share; among other things, it ignores the intrinsic democratic value of procedural rights—“the degree to which decisional processes preserve and enhance human dignity and self-respect.”⁹³ In any event, the instrumental defense of democratic procedure can co-exist with and certainly does not defeat the claim that procedures can be democratically valuable in and of themselves without having any impact on the outcome of a decision.⁹⁴ Consider, for example, why a

90. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101–02 (1980) (presenting a process-based theory that justifies the Court’s “policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent”); see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53, 153 n.4 (1938).

91. Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS: NOMOS XVIII* 126, 149–50 (J. Ronald Pennock & John W. Chapman eds., 1977). Likewise, the judicial power in a common law system entails authority to devise procedures to protect participatory and enforcement values. See generally *id.*

92. Bone, *supra* note 75, at 509.

93. Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981); see also Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 120–21 (1978) (defining the “inherent dignity” of process as “the sense of dignity that springs, not from the outcomes of governmental decisions and conduct, but from the interaction between individuals and their government that occurs as part of the decision-making process,” and explaining “it is inherent in the process by which decisions are reached and conduct is affected, yet it is independent of extrinsic, substantive outcomes”).

94. See Tribe, *supra* note 75, at 1070 (“If process is constitutionally valued, therefore, it must be valued not only as a means to some independent end, but for its intrinsic characteristics: being heard is part of what it means to be a

violation of the right to vote is recognized to produce an injury to the right holder, even when the casting of the individual vote would not affect the bottom-line electoral result:

Disenfranchisement in a general election carries with it a loss of political power so minute that cold calculation should convince us that our personal franchise is in practical, political terms valueless. Yet something—the affront to our self-image as citizens, the sense of unfairness from exclusion—has led some of us to pursue this “valueless” privilege to participate in political decisionmaking through every available court. Involvement in the process of political decisionmaking, via the exercise of a right to voter participation, seems to be valued for its own sake.⁹⁵

Samuel Issacharoff has called such an injury “noninstrumental”;⁹⁶ Richard Pildes has called it “expressive.”⁹⁷

person.”); see also Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *GETTING TO THE RULE OF LAW: NOMOS L*, at 3, 19 (James E. Fleming ed., 2011) (defending the view that procedure is valuable for its “dignitarian aspect: it conceives of the people who live under it as bearers of reason and intelligence”); Edward A. Dauer & Thomas K. Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116, 148–49 (1973) (describing the inherent dignitary value of process as “the value of autonomy, of controlling the events that affect you . . . and the respect and self-respect that come with it”).

95. Mashaw, *supra* note 93, at 888 (footnotes omitted); see also Peter N. Salib & Guha Krishnamurthi, *Post-Election Litigation and the Paradox of Voting*, U. CHI. L. REV. ONLINE (Mar. 10, 2021), <https://lawreviewblog.uchicago.edu/2021/03/10/salib-krishnamurthi-election/> (explaining that economists “will tell you that your vote does not matter,” and suggesting that a “strategy to explain the rationality of voting is to expand the benefits of voting beyond the decisional capacity and institutional impacts,” including affirming the satisfaction of participating).

96. Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 64–67 (1996); see also Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 Hous. L. REV. 289, 305–06 (1997).

97. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993). For discussion of the expressive values of judicial remedies, see Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1266–67 (2021) (“Beyond changing parties’ material circumstances, another important

Many rights of democratic procedure, instantiating the right holder's equality, respect, and dignity, share this feature of intrinsic value. We emphasize, however, that to say that process is valuable in and of itself is not to say that process is a substitute for substance.⁹⁸ Rather, it recognizes that rights of participation confer something of value upon the right holder that is separate from any immediate or anticipated payoff that might result from the exercise of the right; they accord the respect and dignity that any theory of self-governance worth having needs to acknowledge and protect. From this perspective, Ed Sparer famously explained the significance of the procedural right to a hearing before the termination of welfare assistance benefits. The procedural right was not a substitute for a substantive right to adequate benefits, nor was its only, or indeed primary, significance in securing payments that were due as a matter of statute (although, of course, otherwise the individual went hungry)—rather, “the particular legal right involved a recognition of the *fundamental human right* of the recipient to dissent and resist; . . . the legal right [also] was important to movement building, i.e., to the attempt to shift political forces so that basic social and economic reforms could be made.”⁹⁹ Although a violation of the right might not produce an immediate injury to the right holder's non-procedural interest, the violation would diminish the right holder's equality, dignity, and respect, and in that way cause injury.

Rights of democratic procedure share the general characteristic that commentators associate with the right to

role for federal judicial remedies is to express respect for parties that have suffered dignitary harm.”).

98. See, e.g., Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 26 (1997) (“Ironically, formal procedural rights may hurt rather than help poor people because they serve to mask substantive injustice.”).

99. Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 563 (1984).

vote, acknowledging that not every procedure instantiates the democratic values that we see as essential to self-governance. When a democratic decision is made to allow individuals to participate in the formation or enforcement of policy, the procedure is democratically valuable both for its instrumental and its intrinsic worth to the individual right holder. Violation of the right results in harm that is separate and independent of any possible injury to the person's other "concrete" stakes in the situation. Yet, as the next Part discusses, the Supreme Court apparently would assign zero weight to a violation of a congressionally conferred procedural right to participate, seeing no injury in the procedural denial unless the denial separately causes an injury to the right holder's financial or other non-procedural interests.

II. PROCEDURAL VIOLATIONS AS ARTICLE III INJURY

This Part provides the doctrinal basis for our claim that the Supreme Court's procedural standing decisions have contributed to an erosion of democratic values in the United States. We begin with an illustrative scenario. Suppose Congress were to create a public right to notice of proposed agency actions, and a concurrent right of citizens to voice their views on these proposals—views that the agency must then consider before acting. Suppose further that Congress were to authorize private lawsuits to enforce these statutory rights. If a federal agency denied an individual the congressionally conferred right of democratic participation and that person invoked the statutory right of action to challenge the denial, would the suit state an Article III case or controversy resolvable by a federal court? Not long ago, the framework for answering this question would have been clear: invasion of a congressionally conferred right aligned with the democratic values embodied by the Constitution surely would have been found to constitute Article III

“injury” sufficient to support standing.¹⁰⁰ But in 2009, a bare majority of the Supreme Court appeared to answer this question in the negative. In *Summers v. Earth Island Institute*, the Court held that members of an environmental group who invoked their statutory rights to notice of, and an opportunity to comment on, the disposition of federal lands by the U.S. Forest Service had no standing to contest the agency’s refusal to afford those rights. In the Court’s view, the statutory right of public participation was merely a procedural one, and the deprivation of a “procedural right,” absent some consequent harm to the person’s separate, substantive interest, was said to cause no “concrete injury.” Hence, plaintiffs could not seek redress in federal court for the agency’s denial of their statutory right to participate in the processes of self-government.¹⁰¹

In decisions following *Summers v. Earth Island Institute*, a divisive issue among the justices has been the near-metaphysical one of what counts as a “concrete injury” sufficient to give rise to Article III standing—with the Court increasingly questioning Congress’s constitutional power to create rights and authorize their enforcement by Article III courts. Significantly, the Court has narrowed the kinds of interests that Congress may choose to designate as “rights,” the violation of which may be redressed in federal court, and has tethered Congress’s rights-creating power to interests with close analogues in the common law and characterized by some Justices as “private” and not “public” rights.¹⁰²

100. See, e.g., *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 451 (1989) (finding standing to challenge the Department of Justice’s refusal to permit public interest groups to scrutinize the ABA Committee’s activities to the extent permitted under the Federal Advisory Committee Act).

101. 555 U.S. 488, 496, 500–01 (2009).

102. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (explaining that in determining whether a congressionally created right is judicially enforceable, the Court asks whether there is “a close historical or common-law analogue”); see also William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 230 (emphasizing the traditional distinction between private and public rights, and arguing that a private right “must have one of four specific

Consistent with this trend, the Court's recent cases also have drawn an increasingly strict doctrinal line around so-called "procedural rights"—indeed, one might fairly read those cases as approaching a categorical presumption that "procedural rights" are by definition not "concrete." As *Summers* amply illustrates, this indiscriminate demotion of "procedural rights" sweeps with it participatory processes aligned with democratic governance, reflecting a narrow conception of democratic values and the Court's disinclination to account for such values in interpreting the Constitution.

Some commentators have questioned whether the Court's approach is consistent with separation of powers and the deference that an unelected Court ought to afford majoritarian politics in "our kind of government."¹⁰³ Commentators also have raised federalism concerns about the Court's lack of respect for state-defined interests that traditionally have informed federal constitutional rights.¹⁰⁴ We do not disagree with these criticisms of the Court's doctrinal approach. Our argument, however, is somewhat different. As developed in Part I, we start from a baseline that treats self-governance as constitutive of democratic life and as dependent upon procedures to be carried into action.

forms," i.e., those related to property, contract, tort, and statutory privilege). For a critique of the early stages of this trend, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 187 (1992) ("[T]he idea that standing should be reserved principally to people with common law interests and denied to people without such interests . . . reflects a *Lochner*-like conception of public law. It defines modern public law by reference to common law principles that appear nowhere in the Constitution.").

103. See *supra* text accompanying note 21; see, e.g., Benjamin Douglas, *Antisocial Justice: Pathologies of the Standing Doctrine*, 15 CHARLESTON L. REV. 37, 90 (2020) (stating that the Court's standing doctrine has served "to undermine the legislature"); see also Siegel, note 28, at 413–14 (explaining that the Court's standing jurisprudence promotes Executive and Article III power at the expense of Congress).

104. See, e.g., Grayson Wells, Comment, *What's the Harm? Federalism, the Separation of Powers, and Standing in Data Breach Litigation*, 96 IND. L.J. 937, 940 (2021) (criticizing the Court's standing doctrine for failing to "look to state law when determining whether an injury is concrete").

Congressionally created procedural rights support self-governance by enabling individual participation in public life and, as appropriate, by allowing individuals to act collectively with others. These procedures also help to recalibrate power imbalances in existing political arrangements. But the procedures are not only instrumental; they also instantiate intangible process values—of respect, equality, and dignity—that are concrete interests particular to each individual, the violation of which ought to support standing. The Court takes a different view. In particular, in *Summers*, the Court cast democratic rights of participation, even when conferred by Congress, as merely procedural rights *in vacuo*—treating their violation as a generalized grievance that does not support the standing of any individual claimant and thereby renders the right unenforceable in federal court.

Outside of its Article III jurisprudence, the Court has made clear that what counts as procedure—as distinct from substance—varies upon legal doctrinal context.¹⁰⁵ Recognizing that the line between procedure and substance is not fixed,¹⁰⁶ commentators have emphasized the Court's attempts at defining what counts as procedure within specific doctrinal domains, as, for example, the conflict of

105. See, e.g., Ethan Isaac Jacobs, Note, *Is Ring Retroactive?*, 103 COLUM. L. REV. 1805, 1829 (2003) (stating that “[a]nalysis of the substance-procedure distinction shows that the boundary between substance and procedure varies according to the legal context in which it is employed”); see Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1369–70 (2000) (“[C]onstitutional doctrine—both substantive and procedural—is diverse and unruly. In crafting theories to explain either the nature of substantive rights or the structural mechanisms through which constitutional rights are vindicated, we should (to echo Aristotle) demand no more uniformity than the nature of the subject matter permits.”).

106. See, e.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (“Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible.”).

laws¹⁰⁷ and habeas corpus relief.¹⁰⁸ Yet when determining standing, the Court has carved out a category of statutory rights that it deems undeserving of judicial protection—procedural rights—without ever having defined what it means by “procedure” for purposes of Article III. The Court’s approach, to borrow from D. Michael Risinger, “is really an abdication of analysis, wilfully embraced.”¹⁰⁹ At no point has the Court seriously considered the relation of participation and effectuation rights to democratic practice, or to their role in sustaining “our kind of government” that the Court typically states is critical to its standing doctrine.

We provide a brief overview of standing doctrine, pausing on a few points of special relevance to our argument about the Court’s devaluation of democratic procedural rights. To that end, we examine the state of standing doctrine at the time *Summers* reached the Court and show that the Court’s holding in *Summers* was not justified by precedent. We then turn to *Summers* itself and raise questions about the conception of democracy that seems to have motivated the decision.

A. *Standing before Summers*

Article III, which limits the power of the federal courts to “Cases” and “Controversies,”¹¹⁰ does not refer to standing, and the word itself did not enter the Court’s lexicon until the

107. See generally Walter Wheeler Cook, “Substance” and “Procedure” in the *Conflict of Laws*, 42 *YALE L.J.* 333 (1933) (discussing the distinction).

108. See, e.g., Jacobs, *supra* note 105, at 1829 (discussing the procedural-substantive distinction for purposes of habeas corpus relief).

109. D. Michael Risinger, “Substance” and “Procedure” Revisited with Some *Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions,”* 30 *UCLA L. REV.* 189, 190 (1982); see also *id.* at 189 (“One of the most common concepts in the last century of legal exposition in both judicial opinions and scholarly analysis is the dichotomy between procedural law and substantive law. Indeed, the distinction has been adopted as the appropriate test to resolve a variety of points of controversy in various areas of the law.” (footnotes omitted)).

110. U.S. CONST. art. III, § 2.

middle of the twentieth century.¹¹¹ This is not to deny that the Court in earlier cases focused on threshold matters related to standing, such as the need for a proper party, adversarial presentation, and avoidance of collusion.¹¹² When a party sought to enforce a federal statute, the question of standing typically boiled down to whether Congress had afforded plaintiff a right of action; the Court phrased this requirement as whether plaintiff was asserting its own legal rights and interests, sometimes referred to as alleging an injury-at-law.¹¹³ But, as Chief Justice Warren emphasized in the 1968 decision *Flast v. Cohen*, standing did not, “by its own force, raise separation of powers problems.”¹¹⁴

In its 1970 decision *Association of Data Processing Service Organizations, Inc. v. Camp*, the Court seemed to revamp its approach by introducing a new test for determining a party’s standing, that of “injury in fact.”¹¹⁵ Now, a party could establish standing to sue by showing an

111. Thus, for example, the canonical pair of standing cases, *Massachusetts v. Mellon*, consolidated with *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923), nowhere used the term “standing,” emphasizing instead the need for proper parties, and holding that the state-plaintiff, seeking to challenge a federal tax and spending program, “present[ed] no justiciable controversy,” and the individual taxpayer suffered no “injury inflicted or threatened as will enable her to sue,” *id.* at 480.

112. Compare Sunstein, *supra* note 102, at 169 (“Without a cause of action, there was no case or controversy and hence no standing. This is an extremely important principle. Moreover, a handful of cases in the 1920s and 1930s relied on notions of ‘standing’ without mentioning the word.”), with Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (stating that “early American courts did not use the term ‘standing’ much,” but contending the constitutionalization of standing doctrine reflects “a settled historical consensus about the Constitution’s meaning” that recognizes a division between “some areas of litigation as being under public control and others as being under private control”).

113. Lee & Ellis, *supra* note 29, at 176–77 (“If ‘injury-in-fact’ sounds redundant to a layperson, it is only because the layperson does not appreciate that it replaced what amounted to an ‘injury-at-law’ test.”).

114. 392 U.S. 83, 100 (1968).

115. 397 U.S. 150, 152 (1970). The Court used that same phrase, “injury in fact,” in *Barlow v. Collins*, 397 U.S. 159, 163 (1970).

“injury in fact” that fell within the “zone of interests” protected by the statute the party sought to enforce, even if the statute did not create an explicit substantive right for that party or confer on that party a procedural right of enforcement.¹¹⁶ *Data Processing* did not propose any new restrictions on Congress’s power to authorize private suits against the government; to the contrary, the opinion embraced the Court’s practice of entertaining cases based on “an explicit provision in a regulatory statute conferring standing . . . commonly referred to [as] allowing suits by ‘private attorneys general’ . . .”¹¹⁷ As Justice Douglas explained, “Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved ‘persons’ is symptomatic of that trend.”¹¹⁸ Under the test set out in *Data Processing*, standing was a threshold matter, to be easily met, and distinct from the merits.¹¹⁹ Two years later, the Court confirmed in *Sierra Club v. Morton*¹²⁰ that the question of standing to assert a statutory right was “within the power of Congress to determine.”¹²¹ And in later decisions over the next decade, the Court repeatedly acknowledged that the “injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing,’”¹²²

116. *Data Processing*, 397 U.S. at 152–54.

117. *Id.* at 153 n.1 (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)).

118. *Id.* at 154.

119. *Id.* at 158 (stating that whether “anything” in the relevant statutes gave petitioners “a ‘legal interest’ that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits”); see Caleb Nelson, “*Standing*” and *Remedial Rights in Administrative Law*, 105 VA. L. REV. 703, 764 (2019) (emphasizing the distinction between standing as a threshold matter and the merits).

120. 405 U.S. 727 (1972).

121. *Id.* at 732 & 732 n.3.

122. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

leaving Congress with discretion to confer rights of public participation and to authorize their enforcement through private suits.¹²³

In the years that followed, the Court began to narrow its definition of “injury in fact”—restricting the category to injuries it deemed “concrete” (not “abstract”) and “particularized” (not “generalized”), and locating these requirements within Article III. But the Court made no claim that its “injury in fact” standard imposed any significant constraint on Congress’s power to confer judicially enforceable rights on individuals.¹²⁴ Indeed, the Court continued to emphasize Congress’s wide latitude to create interests that would give rise to standing, constrained only by the prohibition against “confer[ring] jurisdiction on Art. III federal courts to render advisory opinions, . . . or to entertain ‘friendly’ suits, . . . or to resolve ‘political questions.’”¹²⁵ Even in *United States v. Richardson*¹²⁶—the signal case on non-justiciability of “generalized grievances,” in which the Court denied a taxpayer standing to enforce the Constitution’s command that the government publish a regular statement of its expenditures—a majority of the Justices would have permitted plaintiff standing to litigate the universally-shared public grievance had Congress authorized such an action.¹²⁷ In particular, Justice Powell’s

123. See, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–10 (1972); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–75 (1982).

124. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 253 (1988) (noting, nearly two decades after *Data Processing*, that while “[t]he Court has often stated that the power of Congress to grant standing is limited by the Article III requirement that a plaintiff suffer ‘injury in fact’ . . . when the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself”).

125. *Sierra Club*, 405 U.S. at 732 n.3.

126. 418 U.S. 166 (1974).

127. The four dissenting Justices in *Richardson* would have found standing directly under the Constitution, with or without congressional authorization. *Id.* at 197 (Douglas, J., dissenting); *id.* at 202 (Stewart, J., joined by Marshall, J., dissenting); *id.* at 235 (Brennan, J., dissenting).

concurrence expressed the view that plaintiff-respondent Richardson would have had standing if Congress had conferred on taxpayers “a specific statutory grant of the right of review,” adding that the Court had “confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing.”¹²⁸

By contrast, the Court frequently denied standing in cases in which a party sought to challenge executive action but did not come armed with a specific, congressionally conferred right to sue. The pattern is illustrated not only by *Richardson*, but also by *Allen v. Wright*,¹²⁹ where the Court dismissed a lawsuit by parents of Black schoolchildren challenging a federal practice of granting tax exempt status to exclusively white private schools, a practice that was alleged to subsidize white flight from the public schools and thwart desegregation efforts.¹³⁰ The Court in *Allen*, without

128. *Id.* at 193, 194 (Powell, J., concurring); *see also id.* at 194 (stating that “the traditional requirement that . . . a plaintiff must allege some particularized injury that sets him apart from the man on the street” operates “*in the absence of a specific statutory grant of the right of review*” (emphasis added)). Justice Powell explicitly pointed to Congress’s primacy at the conclusion of his opinion, stating:

I believe we should limit the expansion of federal taxpayer and citizen standing *in the absence of specific statutory authorization* to an outer boundary drawn by the *results* in *Flast* and *Baker v. Carr*. I think we should face up to the fact that *all* such suits are an effort ‘to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System.’ The Court should reaffirm *the traditional prudential barriers* against such public actions.

Id. at 196 (citation omitted) (initial and final emphases added). By characterizing the barriers against litigation of “generalized grievances” as “prudential,” Justice Powell acknowledged that Congress possessed the power to authorize such suits.

129. 468 U.S. 737 (1984).

130. *See, e.g.*, Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973) (discussing the role of private schools in Southern resistance to racial integration); *see also* Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL’Y REV. 1, 6–8 (1992) (discussing the role of government aid to private schools in impeding racial integration of public schools).

even a nod to its prior assertions that standing “does not, by its own force, raise separation of powers problems,”¹³¹ now declared that “the law of Art. III standing is built on a single basic idea—the idea of separation of powers,” and held that separation of powers barred the parents’ suit to halt the racially discriminatory use of public tax benefits.¹³² But even *Allen* did not question the power of Congress to create new rights and interests that a proper party could ask the federal courts to enforce. Rather, *Allen* accepted that the ban on the adjudication of generalized grievances was a “judicially self-imposed,” “prudential component” of justiciability doctrine that Congress could displace by statute.¹³³

In time, the Court’s injury-in-fact test, initially adopted to liberalize standing, was repurposed to facilitate the opposite result—the restriction of standing and an aggressive assertion of judicial power relative to Congress. Some early commentators warned of this danger. In particular, William A. Fletcher cautioned that the Court could not apply injury in fact “in a non-normative way” and that its requirement as a condition of standing put the Court on a collision course with Congress.¹³⁴ By designating injury in fact as a requirement of Article III, the Court in *Data Processing* unintentionally created the conceptual basis for displacing Congress’s authority to define the rights and interests sufficient to support standing, and opened the way for a test that looked solely to constitutionalized and judicialized definitions that Congress could not override:

If such a requirement of injury is a constitutional minimum that Congress cannot remove by statute, the Court is either insisting on something that can have no meaning beyond a requirement that

131. *Flast v. Cohen*, 392 U. S. 83, 100 (1968); *Allen*, 468 U.S. at 767 (Brennan, J., dissenting).

132. *Allen*, 468 U.S. at 752, 766.

133. *Id.* at 751.

134. Fletcher, *supra* note 124, at 231 (“[R]equiring an allegation of ‘injury in fact’ is not to require a neutral, ‘factual’ showing, but rather to impose standards of injury derived from some external normative source.”).

plaintiff be truthful about the injury she is claiming to suffer, or the Court is *sub silentio* inserting into its ostensibly factual requirement of injury a normative structure of what constitutes judicially cognizable injury that Congress is forbidden to change.¹³⁵

The decisive turn in the Court's standing jurisprudence occurred with Justice Scalia's 1992 opinion in *Lujan v. Defenders of Wildlife*,¹³⁶ which, we now know, initiated a sustained and far-reaching judicial campaign of curtailing Congress's power to create statutory rights enforceable in the federal courts.¹³⁷ Plaintiffs in *Lujan* were organizations with members that included scientists and environmentalists. They sued the Department of the Interior alleging violation of a provision of the Endangered Species Act (ESA) that required the Department to consult with any federal agency considering an action that might adversely affect animals the Department had identified as endangered. Plaintiffs argued that the government's failure to abide by the ESA's consultation requirement placed certain endangered species at heightened risk, thereby threatening to curtail their members' ability to carry out professional and other study of these species.¹³⁸ The Court acknowledged that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing," but found that the injuries alleged by the scientists and environmentalists were not sufficiently

135. *Id.* at 233.

136. 504 U.S. 555 (1992).

137. See Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit of Legislative Power*, 42 DUKE L.J. 1170, 1170 (1993) (explaining that *Lujan* seemed to be the first step in an agenda of "reducing the permissible role of Congress in government policymaking"); see also James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEGAL STUD. 85, 87 (2017) (stating that Justice Scalia, who authored *Lujan*, was "only too ready to invalidate generous federal legislative grants of standing on the ground that they violated judge-made limits on the right of individuals to sue").

138. *Lujan*, 504 U.S. at 562.

“imminent” to support standing.¹³⁹ More to the point, the Court held that the “citizen suit” provision of the ESA—which authorized suits by “any person” to enjoin violations of the act by the government or any other entity¹⁴⁰—was unconstitutional, because it allowed parties with no Article III injury in fact to maintain an action in federal court.¹⁴¹ Commentators emphasize the importance of *Lujan* as marking the first time that the Court had ever invalidated a congressionally conferred right to sue for exceeding the judicially constructed “injury-in-fact” limitation of Article III.¹⁴²

Lujan advanced two principles in support of its holding, neither of which had firm roots in the Article III case law up to that point. Most prominently, the Court held that the “injury in fact” requirement for standing acts as a restriction on Congress’s Article I power to authorize *judicial review*, at least in private lawsuits against the government.¹⁴³ The extent of that limit on legislative power depended in turn on the scope of Congress’s authority to create statutory *rights*, the invasion of which would supply the required “concrete

139. *Id.* at 562–67.

140. The Endangered Species Act provided in relevant part that “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.” 16 U.S.C. § 1540(g) (2002); *see also Lujan*, 504 U.S. at 571–72.

141. *See Lujan*, 504 U.S. at 571–78.

142. Pierce, *supra* note 137 **Error! Bookmark not defined.**, at 1178 (Professor Pierce explains that until *Lujan*, “[t]he Court had never before held unconstitutional a statutory provision that authorized judicial review of an agency action at the behest of members of a statutorily specified class. Indeed, the Court had consistently respected indications of congressional intent to confer standing on individuals with particular interests in the outcome of agency proceedings.”). Earlier, in *Muskraat v. United States*, 219 U.S. 346 (1911), the Court invalidated a statute conferring a right of action on designated members of the Cherokee Nation to sue the United States in the Court of Claims to validate various statutory restrictions on property allotments to tribal members. *See* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 97–98 (7th ed. 2015) (calling *Muskraat* a “puzzling case”).

143. *Lujan*, 504 U.S. at 560, 576–78.

injury.” On that second question, *Lujan*’s statement of constitutional principle likewise moved beyond existing precedent. While acknowledging the long-settled doctrine that Congress could “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,” the Court held, for the first time, that Congress could not elevate a “generally available grievance about government” to the status of a legally cognizable injury.¹⁴⁴ This ruling broke important new ground. Before *Lujan*, the Court had consistently categorized the rule barring adjudication of “generalized grievances” as a non-constitutional, “prudential” limitation subject to legislative override. *Lujan* converted that prudential limitation into a constitutional prohibition—an element of Article III’s “hard floor,” unalterable by Congress.¹⁴⁵ Although the *Lujan* decision invoked separation-of-powers principles in its standing inquiry, that justification no longer operated as a Bickelian restraint on an unelected judiciary, but rather as an arrogation of judicial power to negate value and policy judgments made by the peoples’ representatives in Congress.¹⁴⁶

Lujan was consequential in another way as well—namely, its treatment of “procedural rights.” The court of appeals had held that the ESA afforded plaintiffs a “procedural right” to have the Department of the Interior comply with the interagency consultation procedures

144. *Id.* at 573–74, 578.

145. Justice Scalia relied upon *United States v. Richardson*, 418 U.S. 166 (1974), for his claim that the ban on generalized grievances was a constitutional limitation grounded in Article III, and therefore beyond congressional alteration. *Lujan*, 504 U.S. at 575–76. However, the fifth vote necessary to achieve the majority in *Richardson*, that of Justice Powell, characterized the generalized grievance restriction as a “prudential barrier[]” that would bar standing only “in the absence of specific statutory authorization” of the right of review. *Richardson*, 418 U.S. at 196 (Powell, J., concurring); see *supra* text accompanying notes 126–28.

146. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

mandated by the Act, and that the Department's failure to do so had caused plaintiffs to suffer a "procedural injury" for which Congress had authorized a cause of action to seek redress.¹⁴⁷ In reversing the appellate court, the *Lujan* majority invoked executive prerogative: "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" would unconstitutionally "transfer from the President to the courts the . . . duty, to 'take Care that the Laws be faithfully executed.'"¹⁴⁸ Moreover, the Court held, the ESA's citizen-suit provision, by authorizing suits to enforce a bare "right" of citizens to government compliance with the law—whether that "right" might be described as procedural or otherwise—fell squarely within the Court's newly constitutionalized prohibition on "generalized grievances."¹⁴⁹

Notably, *Lujan*'s reference to procedural rights arose solely as a response to, and rejection of, the lower court's suggestion that procedural rights deserved *favored* treatment: that a congressionally designated "procedural injury" might support standing even if the "injury" plaintiff sought to redress amounted to no more than a non-concrete, abstract, generalized grievance (as the Court characterized plaintiffs' challenge to the Department's failure to engage in inter-agency consultation). The characterization of plaintiffs' right as "procedural," however, otherwise did no work in the Court's analysis. Put another way, *Lujan* found the ESA citizen-suit provision unconstitutional because it authorized litigation of a "generalized grievance," not because it

147. *Lujan*, 504 U.S. at 571–72.

148. *Id.* at 577–78 (quoting U.S. CONST. art. II, § 3).

149. *Id.* at 576–77 ("The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.").

authorized litigation of a “purely procedural right.”¹⁵⁰

Lujan did not ask, did not resolve, and certainly did not explain, whether the “concrete interest” required for Article III standing could inhere in a procedural right that Congress conferred upon individuals—or whether, in the Court’s view, procedure categorically lacks any intrinsic value for purposes of determining Article III injury. Justice Blackmun’s dissent focused on this specific gap in the majority’s analysis, stating that “[w]hatever the Court might mean . . . it cannot be saying that ‘procedural injuries’ *as a class* are necessarily insufficient for purposes of Article III standing,” and warning that the majority was “seek[ing] to impose fresh limitations on the constitutional authority of Congress to allow citizen suits in the federal courts for injuries deemed ‘procedural’ in nature.”¹⁵¹ This analytic gap in the decision is noteworthy for another reason: the majority in *Lujan* neither discussed nor questioned the reasoning in *Public Citizen v. U.S. Department of Justice*,¹⁵² decided just three years earlier, which held that a non-profit advocacy group suffered a concrete injury sufficient for Article III standing when it was denied procedural rights conferred on the public by the Federal Advisory Committee Act. The Act required any “advisory committee” to file a charter, provide notice of its meetings, open those meetings to the public, and make other records publicly available. As the Court in *Public Citizen* explained, the exclusion from meetings and denial of

150. *Id.* at 573–74 (“We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”).

151. *Id.* at 589–90, 601 (Blackmun, J., joined by O’Connor, J., dissenting). Some language in the majority opinion might be read as warranting Justice Blackmun’s concern. *See id.* at 573 n.8 (rejecting the idea that “the Government’s violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)”).

152. 491 U.S. 440 (1989).

information were “sufficiently concrete” for standing where plaintiffs sought “to monitor [the] workings [of an advisory committee] and participate more effectively in the judicial selection process.”¹⁵³

B. *Summers and Procedural Standing*

To say, as *Lujan* held, that a plaintiff asserting a procedural right is not excused from demonstrating a “concrete injury” for Article III standing is entirely different from saying that violation of a pure “procedural right” can never in itself count as such an injury. To be sure, a “procedural” right does not hand the right holder a free pass through the Article III gatehouse, but neither should an allegation of a pure procedural violation pose an impenetrable barrier. We acknowledge that not all procedural rights are equal—but some have inherent value, beyond any instrumental function, so that abridgement of the right in and of itself inflicts concrete harm. Nothing in *Lujan* held otherwise. Its ruling that Congress may not convert the courts into forums for the airing of “generalized grievances” does not compel the conclusion that “procedural rights” as a class confer no concrete interests and therefore are not judicially enforceable.

Nevertheless, in *Summers v. Earth Island Institute*,¹⁵⁴ a five-member majority took the momentous, yet largely unexplained, step of holding that a procedural injury “without some concrete interest that is affected by the deprivation”—what the Court called “a procedural right *in vacuo*”—did not, and apparently could never, meet the “minimum” requirements for Article III standing.¹⁵⁵ The procedural rights at stake in *Summers* were the statutorily conferred rights to notice of proposed agency action, the right

153. *Id.* at 448–49.

154. 555 U.S. 488 (2009).

155. *Id.* at 496.

to comment upon proposed agency action before it takes effect, and the right to appeal adverse final agency action in court. In short, the rights at issue were procedural rights that comprise conventional features of administrative decision-making—rights that promote democratic legitimation by enabling public participation in the processes of government.¹⁵⁶ These rights were first cousin to the statutorily conferred rights in *Public Citizen* that the Court held supported a finding of standing. In both cases, Congress created a right to information, whether of documents or notice of agency action; created a right to participate, whether to attend an open meeting or to offer comments to an agency engaged in policy deliberation; and created an appeal right to seek judicial review. With hardly a remark, the Court in *Summers* accorded these procedural rights no weight for purposes of Article III standing—describing them instead as rights “*in vacuo*,” unmoored from any concrete interest and insufficient to support standing when violated.

The Court decided *Summers* in 2009, but the back story dates to 1992. That year, the U.S. Forest Service proposed regulations to eliminate existing procedural rights to receive information about and to have an opportunity to submit comments on certain categories of forest projects.¹⁵⁷ The proposal elicited strong public comment,¹⁵⁸ and Congress countered the agency’s action by enacting the Forest Service Decisionmaking and Appeals Reform Act (ARA).¹⁵⁹ The ARA

156. See, e.g., Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 708 (1999) (describing ways in which notice and comment procedures “serve fundamental democratic purposes”).

157. Review of and Comment on National Forest Plans and Project Decisions, 57 Fed. Reg. 10,444, 10,444 (Mar. 26, 1992); see also *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 691 (9th Cir. 2007) (“Essentially, the proposal provided a categorical exclusion from notice, comment and appeal for projects the Forest Service deemed environmentally insignificant.”), *aff’d in part, rev’d in part sub nom.* *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

158. *Earth Island Inst.*, 490 F.3d at 691 (discussing the public response to the proposed regulations).

159. Pub. L. No. 102-381, tit. III, § 322, 106 Stat. 1419 (1992) (codified at 16

directed the Forest Service to administer a notice, comment, and appeals process that would preserve opportunities for individuals to participate in the agency's decision-making process.¹⁶⁰ The legislative history to the ARA included statements by members of Congress that the agency's proposal to curtail participation rights was "a slap in the face of democratic values,"¹⁶¹ and that the goal of the ARA was to "allow for continued citizens' rights to participate in and appeal decisions of the Forest Service while providing for more timely consideration of such appeals."¹⁶² In June 2003, the Forest Service issued its final regulations implementing the ARA.¹⁶³ Contrary to the statute's clear mandate, the proposed regulations expanded the categories of actions exempt from notice, comment, and appeal to cover such

U.S.C. § 1612 note), *repealed by* Pub. L. No. 113-79, tit. VIII, § 8006(a), 128 Stat. 913 (2014).

160. ARA § 322(a) provided:

IN GENERAL.—In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601 et seq.) and shall modify the procedure for appeals of decisions concerning such projects.

Id.

161. *Earth Island Inst.*, 490 F.3d at 698 (citing 138 CONG. REC. 18,112–13 (1992) (statement of Representative Richardson)).

162. 138 CONG. REC. 29,065 (1992).

163. Notice, Comment, and Appeals Procedures for National Forest System Projects and Activities, 68 Fed. Reg. 33,582 (June 4, 2003) (to be codified at 36 C.F.R. pt. 215). The Forest Service promulgated its initial ARA regulations in 1993, providing, among other things, that any agency action "categorically excluded" from the requirement of an Environmental Impact Statement would likewise be exempt from notice and comment and appeal under the ARA, other than timber sale decisions. Notice, Comment, and Appeals Procedures for National Forest System Projects and Activities, 68 Fed. Reg. at 33,585. A lawsuit challenged the exclusion as violating ARA § 322(a), and the dispute was resolved by a court-ordered consent judgment. *See Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 697 (7th Cir. 2003). The consent judgment required that the exempt categories of action be subject to ARA notice, comment, and appeal under interim rules, see 65 Fed. Reg. 61,302 (Oct. 17, 2000), and that the Forest Service promulgate final regulations.

matters as salvage timber sales of up to 250 acres, prescribed fire-burns of up to 4,200 acres, and forest-thinning of up to 1,000 acres.¹⁶⁴ Once the regulations went into effect—eliminating rights to notice, comment, and appeal for these projects—the Forest Service immediately applied them. One of those projects involved the sale of salvage timber from a fire that had taken place in Sequoia National Forest (the “Burnt Ridge Project”), a sale that the Forest Service authorized without notifying the public or accepting comments.¹⁶⁵

Plaintiffs in *Summers* were conservation organizations (the “Conservation Groups”) and their members who “used and enjoyed” national forests and were dedicated to their preservation, and often voiced their views and concerns about proposed Forest Service actions through the notice, comment, and appeal processes that had been in effect for decades. For present purposes, the Conservation Groups alleged two claims: a challenge to the regulations for having eliminated statutory rights to notice, comment, and appeal; and a challenge to the application of those regulations to approve the Burnt Ridge Project without public notice or

164. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,824 (June 5, 2003) (These categorical exclusions also appeared in Forest Service Handbook (FSH) 1909.15, ch. 30, § 31.2(11).); National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598 (July 29, 2003) (previously appeared in FSH 1909.15, ch. 30, § 31.2(13)). The Forest Service published its proposed amendment in the Federal Register, providing a 60-day comment period. Further, the Forest Service sent individual notice and invited comments from more than 160 national organizations and federal agencies. The proposed amendment elicited more than 25,000 comment letters. Some comments supported the proposal on the view that “the changes would improve procedural effectiveness and efficiency,” while others opposed the proposal, contending “the changes would reduce a citizen’s right to participate in the project planning process.” 68 Fed. Reg. 33,582 (June 4, 2003).

165. See *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005), *aff’d in part, remanded in part sub nom.* *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007), *aff’d in part, rev’d in part sub nom.* *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

comment.¹⁶⁶ The district court entered a preliminary injunction blocking the Burnt Ridge Project and later approved a settlement effectively removing that project from the case.¹⁶⁷ Plaintiffs nevertheless pressed their challenge to the regulations, which remained in force, arguing that those regulations illegally dispensed with the notice, comment, and appeal rights established by the ARA. In particular, the Conservation Groups argued that because the Forest Service was continuing to invoke the challenged regulations to permit development or disposal of lands without public notice and comment, the regulations threatened imminent harm to the concrete recreational and esthetic interests of thousands of the Conservation Groups' members who "use[d] and enjoy[ed]" national forest lands across the country.¹⁶⁸

In the lower courts, the government conceded that plaintiffs had standing to challenge the application of the regulations with respect to the Burnt Ridge Project; a member of the Conservation Groups frequently visited the Burnt Ridge site, had imminent plans to return, and "his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment."¹⁶⁹ These allegations clearly met the test set out in *Lujan*, that a procedural injury (the denial of the ARA's "procedural" right to notice and comment) must "impair a separate concrete interest"¹⁷⁰ ("recreational" or "even mere esthetic interests" in the Burnt Ridge forest).¹⁷¹ But the government argued that once the Burnt Ridge dispute had

166. *Summers v. Earth Island Inst.*, 555 U.S. 488, 491 (1992) ("The complaint also challenged six other Forest Service regulations implementing the Act that were not applied to the Burnt Ridge Project. They are irrelevant to this appeal.").

167. *Pengilly*, 376 F. Supp. 2d at 999.

168. *See Summers*, 555 U.S. at 497–98.

169. *Id.* at 494.

170. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992).

171. *Summers*, 555 U.S. at 494.

been resolved, plaintiffs no longer had standing to challenge the regulations curtailing the ARA's notice and comment rights, because plaintiffs could not show that loss of those rights imminently threatened their concrete recreational or esthetic interest in some other forest lands.¹⁷² The district court rejected that defense and entered a nationwide injunction barring enforcement of the regulations.¹⁷³ The Ninth Circuit Court of Appeals affirmed the injunction, with a minor modification, on two grounds: first, that blocking Conservation Group members from "participation in the appeals process may [cause them] diminished recreational enjoyment of the national forests"; and second, that the Conservation Groups "are injured *in the sense contemplated by Congress*" because the regulations bar them from appealing certain Forest Service decisions, as provided by the ARA.¹⁷⁴

The Supreme Court reversed. It held that the Conservation Groups lacked standing to challenge the regulations because no controversy remained as to the Burnt Ridge Project, and, as the Court saw it, no member of the Conservation Groups had adequately alleged plans to visit a site where the challenged regulations were being or about to be applied.¹⁷⁵ This ruling should have ended the Article III

172. *Id.* at 491–92.

173. *Earth Island Inst. v. Ruthenbeck*, 2005 WL 5280466, at *2 (E.D. Cal. Sept. 20), *order clarified by* 2005 WL 8176399 (E.D. Cal. Oct. 19, 2005).

174. *Ruthenbeck*, 490 F.3d at 693–94 (citations omitted). The Ninth Circuit confined the injunction to those regulations that the Forest Service had invoked to exempt the Burnt Ridge Project from notice, comment, and appeals requirements, concluding that challenges to regulations that had not been applied to Burnt Ridge were not ripe for review. *Id.* at 696 ("While Earth Island has established sufficient injury for standing purposes, it has not shown the sort of injury that would require immediate review of the remaining regulations. There is not a sufficient 'case or controversy' for us to review regulations not applied in the context of the record before this court.").

175. Quoting from *Lujan*, the majority held that respondents' alleged injury to recreational and esthetic interests was too remote and speculative to support a finding of standing: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—

discussion, because it addressed and rejected the sole argument for standing argued by the Conservation Groups in their briefs and oral argument to the Court. Instead the majority reached out to decide an issue that the Conservation Groups did not raise: whether the “pure procedural injury” caused by the Forest Service regulations—the denial of their statutory right to participate in agency decision-making—could itself count as a “concrete injury” absent a showing that the process denial threatened some “concrete” interest separate from the procedural right.¹⁷⁶ The majority thereby placed front and center the question posed by Justice Blackmun’s dissent in *Lujan*: whether “‘procedural injuries’ *as a class* are necessarily insufficient for purposes of Article III standing.”¹⁷⁷ Although the majority did not definitively answer that global question, the bottom line for the Conservation Groups was clear

do not support a finding of the ‘actual or imminent’ injury that our cases require.” *Summers*, 555 U.S. at 496 (quoting *Lujan*, 504 U.S. at 564). For good measure, the Court recited the statement from *Lujan* that the beneficiary of a regulation, as distinct from its target, faces a significantly higher burden in establishing standing, and, in this case, the challenged regulation governed the action of Forest Service officials, and not of environmentalists. *Id.* at 494.

176. *Id.* at 496. The Court maintained that respondents were pressing the argument that they had standing “because they have suffered procedural injury, namely, that they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied.” *Id.* But respondents consistently disclaimed this argument, instead emphasizing that they were basing standing on the violation of a procedural right *that caused injury to their concrete interest* in “the use and enjoyment of National Forests”—the interest that the Court already had found too remote and speculative to meet Article III now that the Burnt Ridge Project was no longer at issue:

The government takes pains to tear down a straw man in arguing that a procedural injury cannot support standing without a “tangible stake in the outcome of the agency’s decision-making process.” The Conservation Groups do not rely on purely procedural injury, but on violations of procedural rights “designed to protect some threatened concrete interest . . . that is the ultimate basis of [their] standing.” That concrete interest is the use and enjoyment of National Forests.

Brief for Respondents at 46, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2008) (No. 07-463).

177. *Lujan*, 504 U.S. at 601 (Blackmun, J., dissenting).

enough: what the Court characterized as the “bare procedural injury” of being denied the participation rights guaranteed by the ARA was not an Article III injury and did not support standing. By the Court’s lights, the challenged regulations did not “require or forbid” any action by the Conservation Groups and its members; the Conservation Groups were not “the object of the government action or inaction” at issue; and the ARA’s appeal standards “govern[ed] only the conduct of Forest Service officials.”¹⁷⁸

The Court’s analysis failed to acknowledge the obvious ways in which the challenged regulations directly impacted the Conservation Groups. The ARA unequivocally required the Forest Service to provide the public with advance notice of any decision it planned to take about timber conservation, to consider views presented to the agency before a specific decision became final, and to allow for appeal from an adverse decision. Likewise, the ARA conferred rights on members of the public, as individuals, to receive information in the form of notice, to participate in the decision-making process by enabling comment, and to appeal from an adverse decision. The challenged regulations, by eliminating the right to notice, eliminated the opportunity to receive information essential to knowing about the agency’s planned actions, and by eliminating the right to comment, eliminated the rights to petition the government and to participate in the formation and effectuation of policy. Notwithstanding the Court’s contrary assertion, the “object[s]” and “target[s]” of the challenged regulations were precisely individuals in the position of the Conservation Groups and their members, who thereby suffered the loss of participatory rights that they had enjoyed and exercised under earlier regulations, and which Congress had mandated the agency make available to them.¹⁷⁹ Indeed, during the two years preceding

178. *Summers*, 555 U.S. at 493–94 (quoting *Lujan*, 504 U.S. at 562).

179. 138 CONG. REC. 29,065 (1992). In a short concurrence, Justice Kennedy stated:

the litigation, the Forest Service conceded that it had conducted thousands of actions without affording the notice, comment, and appeal rights mandated by the ARA, and admitted that it would continue this practice by conducting “thousands of further salvage-timber sales and other projects exempted under the challenged regulations ‘in the reasonably near future.’”¹⁸⁰ Whether or not the denial of these rights produced an imminent injury to the recreational or esthetic interests of the Conservation Groups and their members, they suffered a continuing injury to their “pure procedural rights” to notice and an opportunity to participate in agency decision-making processes—individual rights of public participation that Congress explicitly conferred on them to promote democratic governance. The Court gave no weight at all to the infringement of these procedural rights, which it held did not count as a concrete injury. By the Court’s account, standing failed not because the pure procedural harm was not imminent, but because the infringement of these procedural rights of participation did not count as a concrete injury.

The Court did not explain why statutory rights enabling an individual’s participation in administrative decision-

This case would present different considerations if Congress had sought to provide redress for a concrete injury “giv[ing] rise to a case or controversy where none existed before.” [*Lujan*, 504 U.S.] at 580 (Kennedy, J., concurring in part and concurring in judgment). Nothing in the statute at issue here, however, indicates Congress intended to identify or confer some interest separate and apart from a procedural right.

Summers, 555 U.S. at 501 (Kennedy, J., concurring). The ARA quite clearly conferred a right to participate, and so it is difficult to make sense of Justice Kennedy’s statement in light of his concurring opinion in *Lujan*, where he acknowledged Congress’s power to confer rights and create causes of action for their enforcement, at least where Congress was explicit. Arguably, Justice Kennedy had shifted his position and now took the view that invasion of a procedural right could not in itself produce a concrete injury.

180. *Summers*, 555 U.S. at 506 (Breyer, J., dissenting) (citation omitted). At least one member of the Conservation Groups had a history of filing comments and wished to continue doing so but was being thwarted by the challenged regulations. *Id.* at 507.

making processes are of lower status—indeed, of no constitutional status—relative to other interests the Court has recognized (such as esthetic interests) or substantive rights that exist as common law entitlements. Indeed, despite the significance of the Court’s holding, its rationale spanned barely a paragraph:

Respondents argue that they have standing to bring their challenge because they have suffered procedural injury, namely, that they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied. But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.¹⁸¹

Citing *Lujan*, the Court added: “It makes no difference that the procedural right has been accorded by Congress. . . . [T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”¹⁸²

The existing doctrinal framework did not justify *Summers*’ demotion of procedural rights. The long-settled law of Article III standing demanded that a plaintiff have suffered a “concrete” “injury in fact” as opposed to an “abstract” injury or “generalized grievance”—not that a plaintiff have suffered a “non-procedural” injury. The conceptual counterpart to “concrete” had always been “abstract” (or “ideological”), not “procedural.”¹⁸³ The unstated assumption underlying *Summers*, that a procedural injury in itself can never be concrete, presupposes that procedure is valuable only for its instrumental role and not for its intrinsic worth. These propositions are not self-evident, and the Court failed to offer any principle, let alone a coherent one, to justify them. After all, it is far from

181. *Id.* at 496 (majority opinion).

182. *Id.* at 497 (citing *Lujan*, 504 U.S. at 572, 572 n.7), but this reference to *Lujan* did not illuminate the basis for the Court’s holding that the denial of plaintiffs’ participatory rights did not constitute a concrete injury.

183. See, e.g., *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (“When we have used the adjective ‘concrete,’ we have meant to convey the usual meaning of the term—‘real,’ and not ‘abstract.’”).

apparent why the sense of dignity that flows from a walk through a pristine forest receives Article III recognition,¹⁸⁴ but the sense of dignity that flows from attending an agency hearing or participating in processes of self-governance would not—especially when Congress has identified these interests in democratic engagement as worthy of legal recognition and judicial protection. Nor did the Court explain why *its* selection and prioritization of values should displace those of Congress, there being no discernible constitutional distinction between, for instance, the esthetic interests that the Court has recognized and the interests in democratic participation that it rejected in *Summers*.

Lujan, upon which the *Summers* Court heavily relied, did not compel, nor even support, the result in *Summers*. *Lujan* held only that the Endangered Species Act's authorization of suits by "any person" to enforce agency compliance with the statute violated Article III's ban on "generalized grievances." Nothing in that proposition supported the sweeping conclusion in *Summers* that "procedural" rights as a class are unenforceable unless attached to some separate, concrete, non-procedural interest. Nor did *Lujan* in any way decide that *all* statutory actions to enforce purely "procedural" rights are by definition "generalized grievances" and beyond the bounds of Article III. In relying on *Lujan*, the *Summers* majority ignored the critical differences between the ARA's "procedural" rights to notice and comment—to receive information from the government and to participate in the processes of policy formation—and the open-ended "procedural" right, invalidated in *Lujan*, that allowed any person to sue an agency "to vindicate the public's nonconcrete interest in the proper administration of the laws."¹⁸⁵ As Justice Ginsburg made clear during oral

184. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). The Court has repeatedly recognized esthetic interests as "concrete," even absent specific congressional recognition of that interest. *See, e.g., id.*; *Lujan*, 504 U.S. at 562.

185. *Summers*, 555 U.S. at 497 (quoting *Lujan*, 504 U.S. at 580–81 (Kennedy,

argument, the ARA's procedural mandate created for the public "essentially a right to a seat at the table" with respect to Forest Service timber-project decisions, and, by eliminating the notice, comment, and appeal rights, the Forest Service had "cut [plaintiffs] out from that seat at the table."¹⁸⁶ Yet at no point did the majority consider the particular nature, characteristics, or import of the procedural rights afforded by the ARA, or consider whether Congress had made a policy judgment that these participatory rights had value in themselves.

Moreover, the Court in *Summers* failed to acknowledge, much less grapple with, two prior decisions, *Public Citizen v. Department of Justice*¹⁸⁷ and *Federal Election Commission v. Akins*.¹⁸⁸ In both of these decisions, the Court had upheld the standing of members of the public to enforce congressionally conferred participatory rights—rights that cannot meaningfully be distinguished from those at issue in *Summers*. As we have seen, the ARA gave the public a right to information about agency action in order to facilitate public participation in agency decision-making processes.

J., concurring in part and concurring in the judgment)).

186. Transcript of Oral Argument at 13–14, *Summers v. Earth Island Inst.* (2008) (No. 07-463).

JUSTICE GINSBURG: . . . I am reading this ARA statute, and it seems to give people a right to notice, an opportunity to comment, and to undertake an administrative appeal. Why isn't this statute that says, interested public, you have those rights, you have essentially a right to a seat at the table, why isn't this statute like FOIA, like the statute that the Court considered in [*Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998)] . . . involving information about [AIPAC, the American Israel Public Affairs Committee]? These were people who said . . . we are being cut out from that seat at the table.

Id. Other than Justice Ginsburg's comments at oral argument, neither the parties nor any of the Justices addressed the question of whether a right of democratic participation could constitute a "concrete" interest sufficient to support standing. The majority and concurrence simply assumed that a "procedural right *in vacuo*" categorically did not meet the test.

187. 491 U.S. 440 (1989).

188. 524 U.S. 11 (1998).

Twenty years earlier, the Court in *Public Citizen* held that the denial of a statutory right to information about agency activity was a concrete injury in fact sufficient to support standing without any further harm to a non-procedural interest.¹⁸⁹ Similarly, nine years before *Summers*, the Court in *Akins* held that violation of a congressionally conferred public right to information concerning campaign expenditures was a concrete injury and gave rise to standing. Plaintiffs in *Akins* sought disclosure of campaign-finance related information from the American Israel Public Affairs Committee (AIPAC) pursuant to the Federal Election Campaign Act (FECA).¹⁹⁰ Plaintiffs sued the Federal Election Commission, seeking an order requiring the Commission to compel AIPAC to make the required disclosures, which would then become available to plaintiffs (and the public at large).¹⁹¹ Justice Breyer, writing for six members of the Court, rejected the government's argument that plaintiffs had suffered no concrete injury:

The “injury in fact” that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors . . . and campaign-related contributions and expenditures—that, on respondents’ view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them . . . to evaluate candidates for public office Respondents’ injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an “injury in fact” when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.¹⁹²

So, too, in *Summers*, the Forest Service withheld from the Conservations Groups and other members of the public information about administrative action to which Congress had given them a right in order to engage meaningfully in democratic activity. On the logic of *Akins*, *Summers* arguably

189. *Public Citizen*, 491 U.S. at 449–51.

190. *Akins*, 524 U.S. at 19–26.

191. *See id.* at 16.

192. *Id.* at 21.

stands as a stronger case for recognizing standing. The Conservation Groups and their members sought enforcement of rights that ran directly to them, while the *Akins* plaintiffs sought a judicial order directing the Executive to enforce the laws against a third party. The ARA, unlike FECA, thus posed no separation-of-powers problems, nor did it raise the Article II, § 3 “take care” issues cited by the dissent in *Akins* (as well as by the majorities in other decisions such as *Lujan* and *Allen*) as grounds for opposing standing.¹⁹³ Possibly the Court had decided in *Summers* that rights to information carry more weight when they relate to the franchise, as in *Akins*, or judicial selection as in *Public Citizen*. Some might consider the statutory rights at play in *Summers*—to comment about the Forest Service’s disposition of certain public lands—of a lesser order. This view, however, understates the democratic significance of the ARA notice right, which, like that of the Administrative Procedure Act, enables public participation and provides democratic legitimation for administrative decision-making. As Justice Thomas explained in his dissent in *Department of Homeland Security v. Regents of the University of California*,¹⁹⁴ notice and comment procedures “attempt[] to provide a ‘surrogate political process’ that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process.”¹⁹⁵ In any event, the Court in *Summers*

193. *See id.* at 36 (Scalia, J., dissenting); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992); *Allen v. Wright*, 468 U.S. 737, 752 (1984).

194. 140 S. Ct. 1891, 1918–1930 (2020) (Thomas, J., dissenting).

195. *Id.* at 1929 n.13 (citing Asimow, *supra* note 156, at 708); *see also* Asimow, *supra* note 156, at 708 (“Beyond these utilitarian calculations, notice and comment procedures serve fundamental democratic purposes. An agency that adopts rules makes new law without direct accountability to the voters. Notice and comment procedure is a surrogate political process. It helps to alleviate the undemocratic character of agency rulemaking and enhances the legitimacy of the process. It provides a channel that allows interested persons to exercise political power by indicating mass opposition to a proposed rule. Notice and comment also enhances the ability of Congress and the President to provide oversight of the rulemaking process.”). The legislative history to the APA confirms this view, explaining that the “principal purpose” of the notice and comment requirements

did not consider and did not explain why the agency's wholesale elimination of administrative notice-and-comment rights did not in and of itself produce a concrete injury to the right holders and instead carried no weight for Article III standing purposes.

Summers not only eliminated individual rights of participation; it also threatened to circumscribe Congress's power to enact procedural rights that the government must respect and enforce, and it did so without serious explanation. Merely reciting Article III provides no rationale for the Court's exclusion of procedural injury from the category of harms that give rise to constitutional standing. Article III draws no distinction between procedural and substantive injury—it does not define injury at all—and democratic theory would suggest that Congress, as a representative institution, has authority to devise procedural rights that enable participation and carry out the goal of self-governance.¹⁹⁶ Moreover, the Court's historical practice and professed principles of judicial restraint would seem to counsel deference to congressional judgment on such matters.¹⁹⁷ Denominating a right as “procedural” fails to

is to provide a check on unaccountable agency power by ensuring “that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice . . .” H.R. REP. NO. 79-1980, at 257 (1946).

196. See, e.g., Sunstein, *supra* note 102, at 163 (The question of what constitutes an “injury” is inevitably value laden and belongs to Congress, not the courts.). This is not to deny that the Court can use its judicial power to devise remedies and rights of participation. Significantly, however, the Court has narrowed Congress's power to create rights and remedies, while disclaiming its own judicial authority to do so. Indeed, the Court's refusal to imply remedies to redress constitutional and statutory violations, on the ground that Congress alone has power to devise judicial forms of relief, runs directly counter to its refusal to defer to Congress's decision to enact rights of democratic participation. See generally Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) (tracing the Court's narrowing approach to implied constitutional and statutory remedies).

197. See, e.g., Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 641 (1999) (“‘Injuries’ are not some kind of Platonic form, so that we can distinguish, without the aid of some understanding of law, between those that exist ‘in fact’ and those that do

supply the missing rationale for the doctrine announced by *Summers*; it merely offers an *ipse dixit* without explanatory power.

To compound the problem, beginning with its 2016 decision in *Spokeo, Inc. v. Robins*,¹⁹⁸ the Court appears to have extended the *Summers* rationale from the public administrative context to private commercial disputes. *Spokeo*, unlike the cases so far discussed, involved a private dispute between a consumer and a non-governmental actor—a website operator that was alleged to have published inaccurate information about the consumer, in violation of the Fair Credit Reporting Act (FCRA).¹⁹⁹ The FCRA requires covered entities to maintain reasonable procedures to reduce the risk of reporting inaccurate personal data about individual consumers. A person whose credit report contains inaccurate information has a right under the FCRA to alert the offending company to the factual error and to ask for its correction, and to sue the company for failing to follow reasonable procedures; the statute authorizes both actual and liquidated damages for a violation of its requirements.²⁰⁰ The district court dismissed the action for lack of standing, but the Ninth Circuit Court of Appeals reversed, holding that plaintiff had alleged a violation of his individual statutory

not exist ‘in fact.’ What is perceived, socially or legally, as an ‘actual’ injury is a product of social or legal categories giving names and recognition to some things that people, prominently people within the legal culture, consider to be (actual, cognizable) harms.”).

198. 578 U.S. 330 (2016). The Court has continued this trend of extending the logic of *Summers* to private law disputes. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (holding that receiving information in a format that violated a statutory procedural requirement does not show a concrete injury to support Article III standing); see also *Ward v. Nat’l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 362–63 (6th Cir. 2021) (holding that defendant’s alleged violation of the Fair Debt Collection Practices Act by failing to identify itself as a debt collector in its voice messages, failing to identify the true name of its businesses, and failing to disclose its identity during telephone calls did not establish concrete injury for purposes of Article III standing).

199. 15 U.S.C. §§ 1681–1692p.

200. See *HERSHKOFF & LOFFREDO*, *supra* note 60, at 532 (describing the statutory framework).

rights, not those “of other people,”²⁰¹ and therefore had demonstrated an Article III injury in fact. The Supreme Court agreed that the consumer had shown a “particularized” injury—after all, the inaccurate information pertained uniquely to this consumer—but vacated and remanded because the appellate court had failed to address whether the consumer had also shown a “concrete” injury, such as lost job opportunities or impaired credit ratings. In particular, the Court insisted that alleging a violation of a procedural requirement did not automatically establish a concrete injury because a “violation of one of the FCRA’s procedural requirements may result in no harm.”²⁰²

To support that proposition, the Court relied upon the statement in *Summers* that the “deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing.”²⁰³ However, a few sentences later, the *Spokeo* Court allowed that “violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact,” and in such a case, a plaintiff “need not allege any *additional* harm beyond the one Congress has identified.”²⁰⁴ Crucially, the Court supported this statement with citations to *Public Citizen* and *Akins*, which, as we have seen, involved statutory procedural rights to request information from the government and/or to participate in public decision-making processes—the same types of procedural rights that the Court deemed insufficient to support standing in *Summers*.²⁰⁵ Commentators have called

201. *Spokeo, Inc.*, 578 U.S. at 333–34.

202. *Id.* at 343.

203. *Id.* at 341 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

204. *Id.* at 342.

205. *Id.* The Court stated:

[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress

the analysis in *Spokeo* “puzzling,” and “unstable,”²⁰⁶ raising the concern that in future cases a regulated entity’s failure to provide information as required by statute—the kind of injury recognized as sufficient for standing in *Public Citizen* and *Akins* and currently treated by at least some lower courts as sufficient for Article III purposes²⁰⁷—will be treated as insufficient “unless such informational harm is linked to a more concrete sequelae.”²⁰⁸

Interpretive uncertainty thus surrounds the scope of the Court’s holding in *Summers* that the violation of an individual’s congressionally conferred procedural right *in vacuo* does not give rise to concrete injury sufficient to support Article III standing. The doctrine contains an

has identified. [See Fed. Election Comm’n v. *Akins*, 524 U.S. 11, 20–25 (1998)] (confirming that a group of voters’ “inability to obtain information” that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); [Pub. Citizen v. Dep’t of Just., 491 U.S. 440, 449 (1989)] (holding that two advocacy organizations’ failure to obtain information subject to disclosure under the Federal Advisory Committee Act “constitutes a sufficiently distinct injury to provide standing to sue”).

Id.

206. See, e.g., Craig Konnoth & Seth F. Kreimer, *Spelling Out Spokeo*, 165 U. PA. L. REV. ONLINE 47, 61 (2016).

207. See, e.g., *United to Protect Democracy v. Presidential Advisory Comm’n on Election Integrity*, 288 F. Supp. 3d 99, 108, 115 (D.D.C. 2017) (holding that advocacy group had “informational standing” under Article III to bring action against the Presidential Advisory Commission on Election Integrity and Office of Management and Budget, asserting a violation of the Paperwork Reduction Act, but that the commission was not an agency under the Act).

208. Konnoth & Kreimer, *supra* note 206, at 58. In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Court declined to characterize a regulated entity’s failure to provide information in the format required by federal law as a failure to provide information, holding that this violation did not provide a concrete and particular injury sufficient to support standing without a separate showing of “adverse effects.” *Id.* at 2212–14. The Court’s implicit suggestion is that formatting errors are trivial technicalities without legal consequences. That view upends legislative efforts to counter the adverse effects of contractual “fine print” by mandating the size and location of information disclosure in contracts and other documents affecting consumers, investors, tenants, and workers. See generally, e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014) (discussing the importance of disclosure format as a means of promoting consumer assent and democratizing the content of form contracts).

internal tension that potentially puts standing doctrine on a collision course with important democratic values, and the implications of *Summers* could be far reaching.²⁰⁹ If a congressionally conferred right to attend a public hearing is merely procedural, then is the exclusion of a person from a public meeting in violation of that right insufficient injury to meet Article III unless it causes some separate, non-procedural harm? Likewise, if a congressionally conferred right to speak at a public meeting is merely procedural, then is the refusal to place that person on the agenda in violation of that right an injury insufficient to meet Article III, because although particular to the person, it causes no separate non-procedural harm? And by this logic, on what principled basis would the right to vote—a procedural right to participate in democratic decision-making—differ from rights to information, rights to attend meetings, rights to comment and express views, and rights to petition the government during the administrative policy-making process? Is the right to vote only instrumental in the sense of being “preservative of other rights,” and without any intrinsic value in and of itself? Our question is not merely rhetorical; it goes to the core of whether the Court’s approach to participatory rights as a basis for standing can withstand democratic scrutiny.

III. DEMOCRATIC EROSION, PROCESS VALUES, AND PROCEDURAL STANDING

We return to our basic claim: that the Supreme Court’s refusal to treat violations of congressionally conferred procedural rights as injury for purposes of Article III

209. Some lower courts already have read *Summers* as making public notice-and-comment rights unenforceable absent a showing that the denial of those rights caused some independent “concrete” injury. *See, e.g.*, *Ctr. for Biological Diversity v. Haaland*, 849 Fed. App’x 2, 3 (D.C. Cir. 2021) (per curiam) (“When alleging the deprivation of a procedure such as notice and comment, the complainant must demonstrate that it has also ‘suffered personal and particularized injury.’” (quoting *Int’l Brotherhood of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1135 (D.C. Cir. 2005)).

standing is not simply wrong as a matter of existing doctrine, but also wrong as a matter of democratic principle. In our view, these decisions run counter to the “democratic society” which is said to compel standing restrictions in the first place and which derives legitimacy from participatory procedures. Nevertheless, before going further, we feel pressed to ask: Given the serious challenges confronting American democracy—authoritarian-style leaders, concentrated wealth, structural racism, government secrecy, and extreme partisan polarization—can we seriously contend that a picayune feature of an abstruse justiciability doctrine has contributed to the current democratic crisis? To borrow from Chief Justice Roberts, we say: “The short but emphatic answer is yes ‘[I]llegitimate . . . practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.’”²¹⁰

To be sure, the Court’s treatment of statutory rights of action has not triggered a democratic crisis along the lines of a military *coup d’état* or the current assault on voting rights. But the theory of democratic decline places less emphasis on seismic shifts in democratic practice than on erosion or backsliding, and it assesses changes in governance in terms of a continuum—as “a process related to yet still distinct from reversion to autocracy.”²¹¹ On this view, factors that can cause or contribute to democratic decline are defined pragmatically as “something that makes a difference” whether as a matter of structure or agency.²¹² Thus, as Tom Ginsburg, a leading writer on the topic, has explained, “[T]he steps in democratic backsliding are . . . incremental

210. *Stern v. Marshall*, 564 U.S. 462, 502–03 (2011) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

211. David Waldner & Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 21 ANN. REV. POL. SCI. 93, 94 (2018).

212. ELLEN LUST & DAVID WALDNER, U.S. AGENCY FOR INT’L DEV., UNWELCOME CHANGE: UNDERSTANDING, EVALUATING, AND EXTENDING THEORIES OF DEMOCRATIC BACKSLIDING 9 (2015) (prepared under a subaward funded by the U.S. Agency for International Development).

[T]he present danger today is not so much the sudden collapse of democracy, but instead its erosion in a series of small individual steps that, each on their own, may not appear alarming.”²¹³ Four decades ago, Juan J. Linz explained in his groundbreaking essay “Crisis, Breakdown, and Reequilibration” that even when regime change can be dated with a precise transfer of power, it is “in truth the culmination of a longer process, an incremental political change that has evolved over a more or less prolonged period.”²¹⁴ We resist viewing democratic decline as a process that is inevitable or foreordained, and instead emphasize that the maintenance of democracy requires vigilance—an effort that many commentators argue involves securing and maintaining “protective guardrails” to avert or mitigate backsliding and decline.²¹⁵

Legislatively conferred procedural rights are one such guardrail, and standing—affording access to federal court—extends protection when those rights are violated. By refusing to treat these procedural violations as injury sufficient in and of themselves to support standing, the Court

213. Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U. L. REV. 351, 355 (2018). On the question of whether the distinction between democracy and nondemocracy should be viewed in terms of dichotomy or gradation, see David Collier & Robert Adcock, *Democracy and Dichotomies: A Pragmatic Approach to Choices About Concepts*, 2 ANN. REV. POL. SCI. 537 (1999); see also Hans Lueders & Ellen Lust, *Multiple Measurements, Elusive Agreement, and Unstable Outcomes in the Study of Regime Change* (The Varieties of Democracy Inst., Working Paper No. 2017:52, 2017), https://gupea.ub.gu.se/bitstream/2077/53814/1/gupea_2077_53814_1.pdf (distinguishing between regime rupture and regime reform, and explaining the disagreement of whether to see democracy in a binary relationship with dictatorship or as a continuum).

214. Juan J. Linz, *Crisis, Breakdown, and Reequilibration*, in THE BREAKDOWN OF DEMOCRATIC REGIMES 1, 3 (Juan J. Linz & Alfred Stepan eds., 1978).

215. LEVITSKY & ZIBLATT, *supra* note 2, at 214–15, 217 (stating further that without procedural values, “our democracy could not work”). In a related context, the writer Toni Morrison wrote: “Let us be reminded that before there is a final solution, there must be a first solution, a second one, even a third. The move toward a final solution is not a jump. It takes one step, then another, then another.” Toni Morrison, *Racism and Fascism*, 64 J. NEGRO EDUC. 384, 384 (1995).

has withheld federal judicial recourse from those who have been blocked from exercising democratic rights—rights that safeguard democratic process and preserve individual equality, dignity, and respect. Although some commentators have argued that the Court ought to dispense with the injury requirement of Article III whenever Congress confers a procedural right, we instead have made the more modest claim that the Court ought to treat a violation of such a procedural right as injury for purposes of Article III.²¹⁶ The distinction is important: it goes to the core of our argument that process values are critical to democratic legitimation.

This Part discusses how the Court’s procedural standing decisions line up against some of the key markers that scholars associate with democratic erosion. We then show that the Court’s devaluation of intrinsic process values in its standing doctrine is not a unique feature of its Article III decision-making—rather, across the board, for at least the last four decades, the Court has gutted democratic procedure in ways that have reduced the public sphere, entrenched power by race and class, and shrunk the ability of certain groups such as workers and consumers to engage in collective action and individual participation. Overall, we argue, the judicial trend has been to remove or at least to hobble some of democracy’s most important “protective guardrails,” and, in our view, the doctrine requires an important course correction.

A. *Markers of Democratic Erosion and Procedural Standing*

Theorists of democratic erosion, like democratic theorists in general, do not share a concept of democracy or use the same measuring devices to assess alleged problems.²¹⁷ In

216. See, e.g., Hope M. Babcock, *The Problem with Particularized Injury: The Disjuncture Between Broad-Based Environmental Harm and Standing Jurisprudence*, 25 J. LAND USE & ENV’T L. 1, 17 (2009).

217. See Haemin Jee, Hans Lueders & Rachel Myrick, *Towards a Unified Concept of Democratic Backsliding*, DEMOCRATIZATION (Dec. 9, 2021),

particular, they disagree whether the focus ought to be only on the right to vote and changes in the electoral process, or whether to expand the lens to include broader participatory opportunities as well as “liberal” rights associated with self-governance.²¹⁸ Despite these disagreements, we think it is neither simplistic nor inaccurate to say that these theories of decline all recognize a role for process and procedure as entry points into democratic participation.²¹⁹ Moreover, these theories converge on a few basic ideas: that the markers of decline—even if the causal relationships are not consistently robust²²⁰—involve decreased executive accountability, increased inequality and concentrated economic power, and diminished participation by discrete sectors of the population.²²¹ These markers are consistent with a

<https://doi.org/10.1080/13510347.2021.2010709>; Lueders & Lust, *supra* note 213, at 25 (“[T]oo little is known about the factors driving transition, breakdown, liberalization, and backsliding. Debates over the role of economic conditions, political institutions, cultural characteristics, and other potentially facilitating factors can only be resolved when scholars consciously consider the measures they use and seek to develop research methods that promote cumulative knowledge building.”).

218. See, e.g., Huq & Ginsburg, *supra* note 2, at 87.

219. Although we focus on procedural rights and process values, we do not see them as exclusive forms of protective guardrails; however, the role of substantive commitments to democratic flourishing is beyond the scope of this Article.

220. On the causal relationship between democratic decline and inequality, see Stephan Haggard & Robert R. Kaufman, *Inequality and Regime Change: Democratic Transitions and the Stability of Democratic Rule*, 106 AM. POL. SCI. REV. 495, 495, 513 (2012) (stating that “attempts to demonstrate the relationship between inequality and regime type have yielded only mixed results,” and suggesting that the strength of “distributive conflict theories” may depend on the “capacity to overcome barriers to collective action”).

221. We draw these markers from, for example, Huq & Ginsburg, *supra* note 2, at 86–87, and Lueders & Lust, *supra* note 213, at 6–7. Attention also is given to Charles Tilly’s theory of “de-democratization,” examining the reversal or alteration of “processes” and “mechanisms” that facilitate the democratic capacities of the population that regularly interacts with political decision-makers, whether those interactive relations are equally distributed, and whether those interactions allow for consultation in matters affecting resources. See generally Charles Tilly, *Inequality, Democratization, and De-Democratization*, 21 SOCIO. THEORY 37 (2003). Linz associates democratic decline with a crisis in democratic legitimation, which can occur “when a loyal opposition” finds the “normal methods” of dissent to “seem inadequate.” Linz, *supra* note 214, at 93. In

conceptual approach that places “political freedom—i.e., self-determination— . . . at the core” of democracy; that extends to all members of the polity equal “*freedom of choice* . . . to decide their preferred policies and representatives”; and that recognizes the importance of “institutional safeguards” to protect against majoritarian or oligarchic tyranny.²²²

With these markers guiding the path, we contend that changes in the Court’s approach to procedural standing illustrate what Steven Levitsky and others have referred to as “little-noticed, incremental steps, most of which are legal and many of which appear innocuous” that nevertheless can exert significant negative effects on democratic life.²²³ The role of justiciability doctrine is particularly important in the United States, which has long been recognized to be “exceptional” in its emphasis on adversarial process to resolve social, economic, and political issues.²²⁴ Unlike European countries that depend extensively on centralized bureaucracies for regulatory enforcement, greater weight is placed in the United States on affording rights of public participation as a way to legitimate administrative action and to overcome the serious collective action problems that

our view, the narrowing of participatory options can incrementally contribute to this sense of inadequacy. *Cf.* Jee, Lueders & Myrick, *supra* note 217, at 4 (warning that “emphasizing larger changes can make scholars blind to incremental democratic decline which, accumulated over time, can have substantive effects”).

222. Jee, Lueders & Myrick, *supra* note 217, at 6. These authors argue that democratic constraints function horizontally, through a network of relatively autonomous institutions that includes the different branches of government; they also function through extra-governmental institutions that disseminate information and are sites of political action, both in service of accountability and freedom from tyranny. *Id.* They further argue that the democratic-enabling factors impact upon state capacity to govern. *Id.*

223. Robert Mickey, Steven Levitsky & Lucan Ahmad Way, *Is America Still Safe for Democracy? Why the United States Is in Danger of Backsliding*, 96 FOREIGN AFFS., no. 3, May/June 2017, at 20, 21.

224. See Richard Marcus, *Bomb Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?*, 107 NW. U. L. REV. 475, 482–503 (2013) (discussing the role of civil litigation for “social change” and regulatory improvements, and scholarly views of the practice).

may impede citizens from participating in the creation of policies and values by which they are bound.²²⁵ Nor are these legislatively conferred rights confined to public administrative matters; rather, Congress has created important judicial rights of action to secure anti-discrimination norms and to protect the dignity-value of living in racially diverse communities.²²⁶

Congress's creation of judicially enforceable procedural rights carries out a policy of using private litigation in the public interest, an interest that includes monitoring executive action to ensure compliance with statutory and regulatory requirements. In its strongest form, this kind of action has been considered a species of the "private attorney general,"²²⁷ a practice that traces back as a legislative matter to relator actions under *qui tam* statutes.²²⁸ As we recounted in our analysis of *Summers*, Congress was explicitly concerned with democratizing administrative participation as a means to ensure regulatory accountability in the administration of Forest Service stewardship funds.²²⁹

225. For a canonical discussion of the problem, see generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

226. See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

227. For a history of the private attorney general concept, see generally Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 L. & CONTEMP. PROBS., no. 1, Winter 1998, at 179; William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004); 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & HELEN HERSHKOFF, *FEDERAL PRACTICE AND PROCEDURE* § 3653 (4th ed. 2015).

228. See *Marvin v. Trout*, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government."); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (referring to "the long tradition of *qui tam* actions in England and the American Colonies").

229. Recall that *Summers* involved amendments to 16 U.S.C. § 1612, in which Congress conferred rights of participation out of a concern, among other things, that Forest Service stewardship funds would not "accurately reflect national

Certainly, when dealing with questions of participatory rights, the devil is in the details. Even legislatively conferred procedural rights may be democratically impermissible if in design or purpose they seek to defeat rather than effectuate substantive constitutional or statutory commitments.²³⁰ Moreover, we recognize that excessive administrative formality may tend toward “ossification and inflexibility of agency process,”²³¹ and that not every procedural right entails a full-blown adversarial hearing.²³² But these were not the reasons given by the Court in *Summers* for refusing to treat the Forest Service’s violation of a legislatively created procedural right as Article III injury. Nor was the Court asked to assess the sufficiency of the legislatively conferred procedural right as a matter of the Due Process Clause, which would have involved complex questions of constitutional balancing and policy tradeoffs. Rather,

needs.” H.R. REP. NO. 102-626, at 71 (1992). In a Senate debate occurring on August 6, 1992, Senator Fowler of Georgia spoke about Fowler Amendment No. 2902, see 138 CONG. REC. 21,989 (1992), designed to reform the Forest Service’s administrative decision-making and appeals process. 138 CONG. REC. 21,989–90 (1992) (statement of Senator Fowler). Senator Fowler emphasized the importance of creating a right to appeal a decision by the Forest Service, which Senator Fowler characterized as a “democratic right.” 138 CONG. REC. 21,989 (1992). Senator Fowler criticized the Forest Service’s new regulations, which he characterized as imparting the following message: “These are not the people’s forests; these are forests that we, the unelected Government, are going to decide how they are used.” 138 CONG. REC. 21,990 (1992). Senator Fowler further explained that adopting the amendment was the most cost-effective way forward, as the Forest Service’s promulgated regulations would otherwise be challenged in court due to a fundamental right to object to governmental decision-making inherent in the concept of democracy and codified since 1907. Finally, Senator Fowler reiterated that since Forest Service decisions concern public lands, “[t]hey should be managed through an open public process.” *Id.*

230. See Luke Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. (forthcoming 2022) (discussing the democratic uses and misuses of private participatory rights in administrative governance).

231. See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 264.

232. See Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1268 (1975) (explaining that not every adjudicative determination requires “full trial-type hearings,” and that some rulemaking determinations require more than “mere notice and comment procedures”).

Congress already had specified that some measure of participation was democratically warranted. By giving no weight to the violation of the congressionally conferred procedural right, the Court improperly substituted its value choices for the considered judgment of Congress, and effectively disabled Congress from choosing the means to ensure enforcement of its laws. In both respects, the Court's actions contributed to a loss of democratic accountability.

One might take the instrumental perspective and argue that procedural rights promote government accountability only if the participant ferrets out actual wrongdoing. To the contrary, participation also serves prophylactic goals, creating incentives for administrative regularity. An individual's invocation of a procedural right serves to make issues salient in the policy-making context; it compels a public authority to acknowledge the existence of an issue and brings that issue, even if briefly and temporarily, to the forefront of administrative attention. Relatedly, rights of participation support democracy by promoting the inclusion of discrete parties in governance and affording different points of access into the process of policy making. By enforcing only those procedural rights that are tethered to concrete interests traceable to common law entitlements, the Court's standing doctrine tilts the legal system in favor of those who challenge regulations and against those who are the beneficiaries of regulation. In effect, these standing decisions turn the theory of *Caroline Products* footnote four on its head by withholding judicial protection from legislation that seeks to unblock barriers to democratic politics.²³³ Indeed, the logic of the Court's procedural standing decisions—its insistence that a procedural right be in service of a “concrete” interest—tracks precisely Charles

233. Cf. Pamela S. Karlan, *The New Counter-majoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2325 (2021) (“Far from engaging in representation-reinforcing judicial review, the Court's decisions contribute to ‘the ins . . . choking off the channels of political change to ensure that they will stay in and the outs will stay out’ regardless of what the people would choose.” (footnote omitted)).

Tilly's account of the role of "categorical inequality" in a process of "de-democratization," in which "inequality's beneficiaries" are given access to "advantageous particular relations to government agents," and through that relation, can "shield[] themselves from onerous obligations" and "use[] their governmental access to extract more advantages from unequal relations with nongovernmental actors."²³⁴ Thus, even apart from the right holder's diminished dignity, respect, and equality, the Court's refusal to enforce congressionally conferred procedural rights impairs democratic practice.

B. *The Demise of Process Values and Democratic Erosion*

We so far have argued that the Court's procedural standing decisions display many of the features associated by political theorists with democratic erosion. Moreover, we have shown that the Court's refusal to accord constitutional weight to intrinsic process values was not an inevitable feature of Article III doctrine. The Supreme Court is, of course, a constrained actor, but precedent did not require deciding *Summers* or *Spokeo* as it did; the Constitution is not hardwired with only instrumental process values. Although some argue that democracy entails its own inevitable self-destruction,²³⁵ for present purposes we reject that position. Instead, drawing from Juan J. Linz's analysis, we argue that democratic leaders—and we see justices of the Supreme Court in that role—potentially "increase or decrease the probability of a [democratic breakdown]" through the actions

234. Charles Tilly, *Changing Forms of Inequality*, 21 SOCIO. THEORY 31, 35–36, 41 (2003); Tilly, *supra* note 221, at 41.

235. See, e.g., Mark Chou, *Sowing the Seeds of Its Own Destruction: Democracy and Democide in the Weimar Republic and Beyond*, 59 THEORIA, no. 133, Dec. 2012, at 21, 21 ("That all democracies have, by their very nature, the potential to destroy themselves is a fact too rarely documented by the acolytes of democracy."); see also Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1409 (2007) (discussing ways "to resist having the institutions of democracy harnessed to what may be termed 'illiberal democracy'").

they take.²³⁶ From this perspective, the Court's procedural standing decisions marked a "wrong turn" (to borrow the metaphor used by the great proceduralist David L. Shapiro in his well-known essay on the Eleventh Amendment)²³⁷—a conscious interpretive decision to exclude expressive and non-instrumental values of equality, respect, and dignity from its consideration of procedural rights.

Indeed, over the last forty years, the Supreme Court has taken a number of "wrong turns" in its approach to process values. To those who follow the nooks and crannies of civil procedure, the story we put forward is a familiar one. Much has been written about the Warren Court's "democratization of constitutional enforcement" and the role of rights of action, remedies, and other procedural mechanisms in seeking to expand democratic practice in the United States.²³⁸ The Court's later retrenchment in its treatment of procedural rights coincided with the emergence of a self-identified conservative movement that explicitly sought to counter the effects of New Deal and Great Society projects in broadening political access and extending social protection.²³⁹ Through

236. Linz, *supra* note 214, at 4.

237. See David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

238. See, e.g., Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 25 (2012); see also David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 843 (1976) ("The history of public law during the past decade has been, in no small part, a history of the expansion of procedural protection.").

239. Politically, some trace the movement to the now-famous memo of Lewis Powell to the U.S. Chamber of Commerce, written before his appointment to the Supreme Court, setting out a strategy for corporate mobilization "to transform American law and politics"; intellectually, commentators attribute the movement's fire power to the economic libertarianism of James M. Buchanan and his development of public choice theory. See NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* 125 (2017). To be sure, this history is contentious and normatively freighted. In our view, the conservative movement initially encouraged the Court's "hostility to litigation," Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006), at least as long as that hostility was coupled with

well-known doctrinal shifts, some effected through five-to-four majorities,²⁴⁰ the Court has narrowed procedural access in areas such as pleading,²⁴¹ case management,²⁴²

“skepticism about the general project of private regulatory enforcement.” David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 45–46 (2014). But the tides turned, and soon conservative advocacy groups saw the strategic benefits of both litigation and courts to their political ambitions. See Karen O’Connor & Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 HARV. J.L. & PUB. POL’Y 483, 493–501 (1984) (recounting the history of conservative litigation up through 1984). The legal strategy was very successful and produced groundbreaking precedents. See generally Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675 (2006); Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657 (2021) (discussing the conservative shift to private enforcement as a social change strategy). Some of these lawsuits faltered on the shoals of standing doctrine, leading some commentators to speculate whether the Court would reassess its approach to Article III standing and even to deconstitutionalize the doctrine. See generally Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551 (2012). The emergence and legal strategies of this conservative legal movement are beyond the scope of this Article.

240. See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 331 (2012).

The ideological 5–4 splits, in which the more conservative justices prevail, have not been random. The Court has divided sharply in cases addressing compelled arbitration of civil rights claims in lieu of litigation, class actions, and pleading in civil rights actions—all cases bluntly limiting certain plaintiffs’ access to the courts and constraining (as a legal or practical matter) the meaningful opportunity to obtain judicial remedies for violations of rights.

Id. (footnotes omitted).

241. Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 112 (2008) (arguing that the Court’s pleading decisions have “effectively created more barriers to access to the courts and . . . deviated from Lincoln’s idea of a representative government ‘for the people’”). On the impact of the Court’s plausibility pleading standard, see generally, for example, Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard*, 47 AKRON L. REV. 329 (2014).

242. See Helen Hershkoff & Rolf Stürner, *Managerial Judging and Procedural Convergence: Judicial Role as Democratic Practice*, in CONSTITUTIONAL TRANSPLANTS (Anat Scolnikov ed.) (forthcoming) (on file with the authors).

remedies,²⁴³ and arbitration²⁴⁴—a trend defended by those who cast litigation and administrative proceedings as too expensive, too time consuming, and too detrimental to productivity and wealth.²⁴⁵ Further, the Court’s overall approach has contributed to democratic backsliding by enabling the displacement of public rules of procedure with private contractual terms, often imposed by the stronger party without any meaningful consent by the weaker party.²⁴⁶ They have placed outsized emphasis on court savings at the expense of fairness and equity.²⁴⁷ They have reduced the accountability both of government and corporate actors.²⁴⁸ And they have exacerbated difficulties of “have nots” to secure relief, to organize, to make issues salient, and to leverage collective power for social mobilization.²⁴⁹

Are the Court’s procedural standing decisions simply one more data point in a chart marking this democratic erosion? Critically, we view these decisions as of a different order from, say, the Court’s approach to Federal Rule of Civil

243. See, e.g., Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 693–94 (2008).

244. See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 521–24 (2011). See also generally Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605 (2018).

245. See generally Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57 (2018) (questioning this criticism of litigation).

246. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619, 1624 (2018) (holding that mandatory arbitration agreements between employers and employees are enforceable notwithstanding Section 7 of the National Labor Relations Act).

247. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2006) (replacing the traditional standard of notice pleading under Federal Rule of Civil Procedure 8 with that of plausibility).

248. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) (dismissing pretrial detainee’s complaint as insufficiently alleged).

249. For a leading account of the concept of procedural “have nots,” see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974).

Procedure 23 on class actions²⁵⁰ or the Federal Arbitration Act²⁵¹—for the simple reason that the Court insists that its procedural standing decisions are constitutionally grounded in Article III. Refusing to treat the violation of a congressionally conferred right of action as injury for Article III purposes not only strips the right holder of the dignity, equality, and respect that comes through procedural access, but also strips Congress of its law-making capacity to recognize new forms of participatory rights that may be enforceable in federal court.²⁵²

The significance of the Court's interpretation of Article III is thus profound. With the close of the *Lochner* era, the Court adopted a broadly deferential posture towards "social and economic" legislation, reserving heightened forms of scrutiny for the protection of individual rights.²⁵³ That constitutional settlement began to unravel as the Court's ideology shifted through the turn of the last century, and the Court's procedural standing decisions have contributed to

250. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (denying class certification in employment discrimination suit).

251. See, e.g., *Epic Sys. Corp.*, 138 S. Ct. at 1619.

252. Cases like *Summers* and *Spokeo*, while interpreting Article III, serve to constrict Congress's Article I powers in ways that are analogous to *City of Boerne*, in which the Court interpreted Section 5 of the Fourteenth Amendment to bar Congress from creating remedies that purportedly change the meaning of a constitutional right. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that enactment of the Religious Freedom Restoration Act exceeded the enforcement power of Section 5 of the Fourteenth Amendment); see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003) (discussing the Court's narrowing of Congress's Section 5 power and the extent to which its approach is "fundamentally indifferent to the subtle but fundamental interconnections between the constitutional dimensions of our political life and the democratic dimensions of our constitutional culture").

253. See Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 U. PA. L. REV. 1277, 1281–86, 1290–93 (1993) (describing use of rationality review for economic legislation and its extension to social welfare legislation); see also David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1251 ("The footnote marked the end of the pre-New Deal era when the Court was hostile to social welfare and regulatory legislation, and it foreshadowed the Warren Court's attack on segregation and expansion of constitutional rights.").

the displacement of this constitutional equilibrium.²⁵⁴ These decisions distort participatory rights in favor of parties that support deregulatory initiatives, because those interests come armed with a procedural right that is attached to property or some other common law right, and so can show injury to a particular and concrete interest. In the Court's metric, no weight is given to a legislatively created right that lacks a close analogue in the common law—a view that would treat many democratic practices as no more than unenforceable procedural rights *in vacuo*. Although it generally is assumed that Congress can circumvent the effect of Supreme Court decisions through substitute forms of legislation,²⁵⁵ the Court's standing decisions go a long way toward preventing Congress from engaging in replacement strategies.²⁵⁶ Article III as reconceived by the Court thus may block legislative efforts to mitigate its negative effects on the separation of powers, federalism, and possibilities for democratic governance.²⁵⁷

254. See Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 117 (asking whether “the Court may soon converge on a maximally anti-*Carolene* stance: barring all institutions, not just federal courts, from correcting democratic failures”).

255. See Tushnet, *supra* note 40, at 1503 (“Finding some constitutional text obstructing our ability to reach a desired goal, we work around that text using *other* texts—and do so without (obviously) distorting the tools we use.”).

256. See generally Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159 (2011) (discussing numerous standing problems that Congress faces).

257. We acknowledge that Congress could enact rights of action to be enforced in state courts or by administrative agencies. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2224 & n.9 (2021) (citing Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211 (2021)) (noting that state courts are not bound by Article III and could continue to hear federal causes of action that do not meet Article III requirements). See generally Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (discussing constitutional and institutional differences between federal courts and the courts of the different states, including differences in their conceptions of the judicial power). These are incomplete solutions. For example, in private disputes heard in state court, generally a losing defendant will be able to assert standing on appeal to the Supreme Court, but a losing plaintiff could not. See *ASARCO Inc. v. Kadish*, 490

But there is more to the Court's approach to procedural rights that ought to raise democratic alarms; the procedural standing cases are only one of a number of interpretive "wrong turns" by which the Court has shorn the Constitution of intrinsic process values, diminishing procedure to only an instrumental role. Process, in the Court's analysis, has become a matter of adjudicative technology without regard to its democratic role. Efficiency is valued, as is accuracy—and although these are important features of any judicial system, in our view the work of the courts cannot be reduced to that of a business dispensing goods and services at the cheapest cost to users. More than that, the Court has not simply elevated instrumental values; it also has exiled intrinsic process values from the range of justifications that can support Congress's power to enact judicially enforceable procedural rights. This rhetorical move is allied with Richard Pildes's theory of "exclusionary reasons"—meaning, "reasons *not* to act."²⁵⁸ According to the Court, Congress cannot constitutionally act to protect the value of participation in and of itself; Congress can use procedure only in service of instrumental goals, without regard to its constitutive role in democratic practice. We offer two examples of the way in which the Court has extinguished consideration of intrinsic process values from constitutional analysis: the Court's approach to the Due Process Clause and to the Seventh Amendment civil jury right.

Since 1976, the question of whether state action complies with procedural due process has been subject to the three-factor balancing test of *Mathews v. Eldridge*,²⁵⁹ which looks to "the private interest that will be affected," then, the "risk of an erroneous deprivation" and "the probable value, if any, of additional . . . procedural safeguards," and finally, "the

U.S. 605, 618 (1989).

258. Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994).

259. 424 U.S. 319 (1976).

Government's interest."²⁶⁰ Before *Mathews*, the Court had resisted any formulaic conception of procedural due process; as Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath* put it, "[D]ue process' cannot be imprisoned within the treacherous limits of any formula Due process is not a mechanical instrument."²⁶¹ *Mathews* defined the government's interest in terms of alleviating "fiscal and administrative burdens that the additional or substitute procedural requirement would entail";²⁶² no regard was given to the democratic value of fair and open adjudication. Likewise, the private interest at stake was defined narrowly, confined to the actual financial benefit claimed to have been wrongly denied (in claimant Eldridge's case, cash disability payments). Very quickly the *Mathews* balancing test became the target of scholarly reproach, summed up in Jerry L. Mashaw's criticism that the decision "views the sole purpose of procedural protections as enhancing accuracy, and . . . [n]o attention is paid to 'process values' that might inhere in oral proceedings or to the demoralization costs that may result from the grant-withdrawal . . . sequence to which claimants . . . are subjected."²⁶³ As Jane Rutherford later commented, "By focusing on accuracy instead of participation, the discourse of due process shift[ed] from 'who participates?' to 'what works?' . . . [T]he individual's right to tell her story possesses no independent value."²⁶⁴ Some commentators have insisted that the *Mathews* Court did not intend to reduce the due process inquiry to a calculus or algorithm,²⁶⁵ and instead was

260. *Id.* at 335.

261. 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring).

262. *Mathews*, 424 U.S. at 335.

263. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976).

264. Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 48 (1992).

265. Gary Lawson, Katharine Ferguson & Guillermo A. Montero, "Oh Lord, Please Don't Let Me Be Misunderstood!": *Rediscovering the Mathews v. Eldridge*

trying only to provide a rhetorical frame to discipline a line of decisions that some viewed as “chaotic,”²⁶⁶ but others regarded as “serious efforts to deal with a complex legal issue: the relationship between procedural due process and the activities of an administrative state.”²⁶⁷ Accurate decision-making with due regard for facts is of course an important feature of government accountability.²⁶⁸ But whatever the Court’s original design in *Mathews*, later applications of the three-part balancing test have been clear in emphasizing accuracy as the “primary” goal of process without regard to its broader democratic role.²⁶⁹ In an illustrative case, issued shortly after *Mathews*, the Court stated that “the function of legal process is to minimize the

and Penn Central Frameworks, 81 NOTRE DAME L. REV. 1, 20–21 (2005) (describing the Court’s evolving treatment of *Mathews* as setting out “a framework in which legal actors can speak to each other about fairness,” in which the “framework is not meant to be exclusive,” to a “test” or “tool” or “decision-making algorithm” that displaced any inquiry into fairness and justified procedure solely for its instrumental power to reduce error).

266. Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 319 (1957).

267. Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1082 (1984).

268. See *Biestek v. Berryhill*, 139 S. Ct. 1148, 1162–63 (2019) (Gorsuch, J., dissenting) (“The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking Without it, people . . . are left to the mercy of a bureaucrat’s caprice.”).

269. See, e.g., *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (“[A] primary function of legal process is to minimize the risk of erroneous decisions.”); *Santosky v. Kramer*, 455 U.S. 745, 785 (1982) (Rehnquist, J., dissenting) (“[T]he standard of proof is a crucial component of legal process, the primary function of which is ‘to minimize the risk of erroneous decisions.’”); *Ingraham v. Wright*, 430 U.S. 651, 692 (1977) (White, J., dissenting) (“The reason that the Constitution requires a State to provide ‘due process of law’ when it punishes an individual for misconduct is to protect the individual from erroneous or mistaken punishment that the State would not have inflicted had it found the facts in a more reliable way.”); *Wilkinson v. Austin*, 545 U.S. 209, 225 (2005) (defining an incarcerated plaintiff’s interest as “avoiding erroneous placement at [a supermax prison]”); *Heller v. Doe*, 509 U.S. 312, 332 (1993) (“At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court.”).

risk of erroneous decisions.”²⁷⁰ An individual’s dignity or autonomy interests do not figure into the calculus²⁷¹—nor, as one federal district judge put it, does “the plain old value of process itself, *i.e.*, of simply knowing why the government has decided to take action against you.”²⁷²

The procedural right at issue in *Mathews* clearly was in service of a “concrete” benefit that could be cashed out in classic pocket-book terms.²⁷³ But the participation right afforded other benefits, as well, expressing the government’s respect for the claimant on a par with other members of the polity and affirming the claimant’s dignity.²⁷⁴ By shaping the relationship between the government and the governed, the procedure had democratic value separate and apart from its bottom-line effect on the accuracy of an agency’s decision.²⁷⁵

270. *Addington v. Texas*, 441 U.S. 418, 425 (1979) (overruling lower court determination that due process requires proof beyond a reasonable doubt in involuntary civil commitment case). So entrenched is this view that even Justice Kagan recently described *Mathews* as an “inquiry into the requested procedure’s usefulness in correcting erroneous deprivations of [individuals’] private interest.” *Kaley v. United States*, 571 U.S. 320, 334 (2014) (Kagan, J.).

271. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (recognizing a due process right to a hearing before terminating a claimant’s public assistance benefits, and explaining that “important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”).

272. *Hicks v. Colvin*, 214 F. Supp. 3d 627, 641 n.7 (E.D. Ky. 2016).

273. For the theory that treats welfare benefits on a constitutional par with common law property, see generally Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

274. Michelman, *supra* note 73, at 402 (arguing that “a political arrangement is defective if it fails to serve self-government in roughly the way that democracy, according to some theory, is supposed to serve it. . . . Democracy serves self-government by providing each individual with reason to identify his or her political agency with the lawmaking and other acts of political institutions, or to claim such acts as his or her own.”).

275. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1983) (offering an alternative to the conventional judicial review/adjudicative hearing approach of administrative legitimacy). Critics of the *Mathews* test recognized that an adversarial-type hearing was not the only procedure that could meet due process, but rather the process due, as Justice Brennan had recognized in *Goldberg v. Kelly*, was to be “tailored to the capacities and circumstances” of the claimants

As Edward L. Rubin has put it, the process value of dignity, “[p]roperly conceived, . . . is a theory about the stance that government should take toward the people it rules.”²⁷⁶ This relational aspect of due process, ignored by the *Mathews* Court, signals respect for the individual and is constitutive of democratic life.²⁷⁷ And more: the individual right to participate enables individuals who otherwise lack power to engage in collective action and social mobilization that potentially can influence the policies and values by which they are bound.²⁷⁸ To return to Sparer’s analysis of procedural rights:

The decision to pursue litigation and other efforts to gain recognition for a welfare recipient’s constitutional right to a hearing prior to termination of benefits was part and parcel of the organizing strategy of the welfare rights movement, designed to amplify the organized forces—particularly the organized welfare recipient forces—of the movement.²⁷⁹

and their claims. 397 U.S. at 268–69; *see also, e.g.*, Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1376 (drawing from a reconceptualized Due Process Clause the requirement of a “management system for assuring accurate and timely processing” of claims).

276. Rubin, *supra* note 267, at 1098. For a related argument grounded in social psychology, see Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 136 (2011) (associating due process with the fact that “individuals value being treated with courtesy and respect, because these factors ‘recognize[] and acknowledge[]’ individuals’ ‘dignity as people and as members of society’” (citing Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117, 122 (2000))).

277. For a similar argument, see Rubin, *supra* note 267, at 1101 (defining the “right” to procedural due process “in terms of interpersonal relationships without being separately contained in, or owned by, any of the participants in those relationships”).

278. For a criticism of the *Mathews* test and its impact on the political life of poor people at the end of the twentieth century, see Zietlow, *supra* note 98, at 9 (“To be a citizen is to be able to take part in the functioning of government, and in the process by which decisions are made. Yet, we are currently in the middle of an unheralded due process crisis, which threatens to exclude a large number of people—the poorest members of American society—from almost every aspect of participation in the processes by which decisions about them are made, and thus reduces their status to less than full citizenship.”).

279. Sparer, *supra* note 99, at 562; *see also* FRANCES FOX PIVEN & RICHARD CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 306–20

By eliminating intrinsic process values, the Court not only has ignored the injury suffered by the claimant to the basic right to self-governance, but also has entrenched power imbalances that upset democratic equilibrium.

The Court's approach to the Seventh Amendment civil jury right likewise has crowded out regard for the jury's intrinsic value as a democratic institution, replacing it with a focus on the cost and accuracy of the jury as a factual decision-maker. By its terms, the Seventh Amendment applies to actions "at common law," and at least since the First Judiciary Act, judges in civil jury cases have decided questions of law and jurors have decided questions of fact.²⁸⁰ In its American origin story, the jury was seen as "the essence of democracy Through the jury, the citizenry takes part in the execution of the nation's law, and in that way, each can rightly claim that the law belongs partly to him or her."²⁸¹ In the federal courts, this allocation of

(1971) (discussing the importance of procedural rights to political organizing efforts).

280. U.S. CONST. amend. VII. While there are historical debates about the recentness of the principle, there at least is long precedent for juries being given issues of fact. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 ("[T]he trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."). Scholars also note the substantial leeway early juries exerted over questions of law. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 1022–23 (11th ed. 2013) (collecting sources), and courts and commentators continue to press for the jury's role "to act as the conscience of the community," as Justice Tom Clark put it, to "add[] a humanistic touch to the strict demands of the law." John Gsanger & Reilly Gsanger, *The Seventh Amendment's Balance Between Community-Based Justice and the Appellate Courts*, 27 APP. ADVOC. 676, 684 (2015). This notion of community-based justice is to be distinguished from jury nullification, which has been criticized as anti-democratic because arguably it "denies the legislative process." Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 513 n.111 (1976).

281. William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT'L & COMPAR. L. REV. 305, 310 (2009); *see also* Jon D. Levy, *The Civil Jury: A Defining Element of Participatory Democracy*, 30 ME. BAR J. 232, 232 (2015) (acknowledging "the modern view is that . . . the civil jury trial is, by design, the cause of its own demise because, like businesses that grow out of touch with the needs of their customers, the civil jury trial is a 'product' that has become too inconvenient and too expensive relative to the alternatives").

decision-making was designed to operate not merely as a technical rule of administration, but rather as a principle of popular restraint on Article III judges that safeguards adjudicative legitimacy.²⁸² At the mid-twentieth century, Justice Brennan, writing in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,²⁸³ thus called the jury “[a]n essential characteristic” of the federal system—functioning as “an independent system for administering justice to litigants who properly invoke its jurisdiction”—that “distributes trial functions between judge and jury.”²⁸⁴ Two landmark decisions of the same vintage, *Beacon Theatres v.*

282. See Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1059 (1999) (discussing features of the civil jury, including its participatory and non-majoritarian, deliberative forms of decision-making, that enable it “to serve as a democratic check on the judicial branch, which is not itself a democratic institution”); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1421, 1433 n.94 (1997) (explaining that “the jury confers legitimacy ‘actually’ in the sense that individual representative citizens constitute the jury . . . [and] ‘vicariously’ in the sense that it promotes a general and collective sense of community involvement in the legal system, a belief that the community as a whole speaks when a jury renders a verdict”); see also *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 62–63 (1989) (discussing the jury as a check on “the decisions of judges who enjoy life tenure” and on non-Article III judges “who are appointed for fixed terms [and] may be beholden to Congress or Executive officials”).

283. 356 U.S. 525 (1958).

284. *Id.* at 537. So important was the jury to the federal system, that the *Byrd* Court did not follow the “outcome-determinative” logic of the earlier line of *Erie* cases: A federal court sitting in diversity was to apply its allocation of power in the face of an inconsistent state rule, even though, as Allen Ides has explained, “the outcome caused by the allocation of judge and jury functions was far from certain.” Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19, 55 (1995). The anti-democratic effects of the Court’s application of the *Erie* doctrine, together with its preemption of tort claims, is beyond the scope of this Article, both of which have been commented upon in the procedural literature. See, e.g., Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1389 (1996) (discussing the Court’s creation of a federal military contractor defense in tort actions as reflecting “disregard of separation of powers” and as having “invaded the province of the states”). See generally JoEllen Lind, “Procedural Swift”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717 (2004).

*Westover*²⁸⁵ and *Dairy Queen v. Wood*,²⁸⁶ emphasized the importance of respecting the civil jury right in “hybrid” cases, when the legal issue is combined in one suit with those that historically would have been heard in equity.²⁸⁷

It is well known that the number of civil jury trials has steadily declined—indeed it has “plummeted.”²⁸⁸ The Supreme Court has been a driver of the trend,²⁸⁹ through judicial case management that encourages the parties to settle,²⁹⁰ invigoration of disposition through early and summary procedures such as the Federal Rule 12 motion to dismiss and Federal Rule 56 motion for summary judgment,²⁹¹ and encouragement of contractual waivers that mandate alternative dispute resolution and are treated as

285. 359 U.S. 500 (1959).

286. 369 U.S. 469 (1962).

287. As Arthur R. Miller has commented, these decisions “signal[ed] the expansion of the jury trial right regardless of historical restraints” and “represent[ed] an extraordinary commitment by the Court to the civil jury institution.” Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1081 (2003).

288. Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 162 (2020); see also Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1503–04 (2003).

289. Warren Burger, as Chief Justice of the United States, took the lead in urging the profession to “think[] the unthinkable” and to consider limiting use of the jury in complex civil cases to blue-ribbon panels, on the view that the “ordinary juror” could not bring “common sense . . . to bear in a complex, economic, or scientific case.” Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 220 (1985); see Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 357 n.204 (2010) (“Perhaps this hostility toward the Seventh Amendment merely represents the judiciary’s hostility toward direct democracy.”).

290. Young, *supra* note 281, at 314.

291. Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1890 (2008). See generally John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012) (discussing case management, discovery, and summary judgment as eclipsing the trial and making it obsolete).

waivers of the civil jury right.²⁹² Although the Court has never devised a “complexity” exception to the Seventh Amendment—or directly endorsed use of the “blue ribbon” jury²⁹³—in *Markman v. Westview Instruments, Inc.*,²⁹⁴ it took a step in both directions. The case itself involved a patent dispute over a device used to track dry cleaning inventory. The Court found that interpreting the scope of a particular patentee’s rights under a patent claim is a task for judges.²⁹⁵ The opinion rests neither on historical practice nor precedent, and nowhere considered the jury’s democratic role. Instead, the Court looked to “functional considerations”—the Court’s estimation of the abilities of jurors,²⁹⁶ which it found deficient relative to the judge’s “trained ability.”²⁹⁷

Criticisms of the cost and inefficiency of the civil jury are not new.²⁹⁸ Some of the criticisms rest on empirical analysis,

292. See Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 19 (2003).

293. See Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155, 1172 n.110 (1980) (proposing use of a special jury in complex civil litigation where “special knowledge” is required that cannot be learned “during the course of the trial”).

294. 517 U.S. 370 (1996).

295. *Id.* at 388–91.

296. *Id.* at 388. Later, in *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1680 (2019), the Court held that the judge, and not the jury, is the “better positioned” decision-maker to resolve contested factual questions when the legal issue is whether a federal agency has disapproved a company’s practice (in this case, a change in pharmaceutical label).

297. *Markman*, 517 U.S. at 390. The decline in jury trials runs in tandem with a decline in civil trials overall. See Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2147 (2018) (“[W]e are witnessing both the disappearance and the downsizing of the American civil trial,” without knowing “what precisely is gained, and what is lost.”); see also William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006) (“[T]he civil jury trial has all but disappeared.”). For an evaluation of the negative effects of this trend, see, for example, Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1835–37 (2014).

298. See, e.g., Edson R. Sunderland, *The Inefficiency of the American Jury*, 13

even if flawed; some rest only on rhetoric.²⁹⁹ What is more difficult to measure is the damage done to democratic society when the Court declines to credit the civil jury as a “political institution,” in de Tocqueville’s sense³⁰⁰—and instead treats the jury as merely a form of judicial technology for the “resolution of factual issues.”³⁰¹ To borrow from Ellen Sward, “[T]he jury is the only governmental institution we have that reflects the ideal of direct citizen participation and deliberation, giving rise to “an institutional interest . . . in preserving the only governmental institution that reflects

MICH. L. REV. 302, 303 (1915) (Sunderland argued that the jury’s inefficiency “lies in its want of technical knowledge. Men temporarily called from the ordinary affairs of life, untrained in the law, are incapable of performing the functions of judges in any but the most primitive communities.”); Alfred C. Coxe, *The Trials of Jury Trials*, 1 COLUM. L. REV. 286, 289 (1901) (“It is the delay, the uncertainty, the expense, the inability to reach results, which has put the jury system out of touch with an age of intense material activity . . .”); see also Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 607–14 (1993) (citing Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 867, 884 (1934)) (discussing judicial efforts in the nineteenth century to curtail the role of the jury in tort cases; tracing the “rhetoric of efficiency” that emerged in the twentieth century; and criticizing the flawed empirical work of Charles E. Clark, “no friend of the jury,” in arguing that the jury was “expensive, cumbersome and comparatively inefficient”).

299. Empirical studies do not support claims that jury verdicts are unreasonable, outside the law, or lacking in deliberation. See Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 403 (2011) (stating that “those consulting systematic empirical evidence rather than anecdotes find that the attacks on the jury are unsupported”).

300. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 281 (Alfred A. Knopf, 15th ed. 1985) (1830). *But see* Renée Lettow Lerner, *The Surprising Views of Montesquieu and Tocqueville about Juries: Juries Empower Judges*, 81 LA. L. REV. 1, 6 (2020) (“For Montesquieu and Tocqueville . . . the main point of juries was to mask judicial power . . . [J]udges should gently but authoritatively guide jurors to a proper understanding of law and facts. According to Tocqueville, the main point of jurors’ education in the ‘free school’ for *democracy* was to learn to defer to a more competent authority—the judge.” (emphasis added)).

301. *Colgrove v. Battin*, 413 U.S. 149, 157 (1973); see Landsman, *supra* note 298, at 579 (explaining that in *Colgrove v. Battin*, “[r]ather than considering the . . . multiple functions served by the jury, the Court focused on only a single aspect of the jury’s work as adjudicator”).

these values.”³⁰² The jury thus helps both to constitute and to legitimate what Paul D. Carrington and others have called the “democratic courthouse,”³⁰³ making legislators “doubly accountable to the people, who first elect their lawmakers and are then called to administer the laws those representatives make.”³⁰⁴ And participation in the jury, which has become more inclusive (although barriers to selection and eligibility remain),³⁰⁵ contributes to a sense of legal trust and political community.³⁰⁶ Unquestionably, we anticipate criticisms that the democratic defense of the jury is overstated—nostalgic, idealized, and without credibility or hard data to support the basic claim.³⁰⁷ Empirical studies can measure cost and delay and thus tilt against preserving the jury. Empirical studies, however, may be less faithful indicators of intangible injuries, and certainly of the intangible injury to democracy when citizens are blocked from processes of self-governance because they are said to be incompetent, and their participation is treated as an

302. Sward, *supra* note 282, at 1118.

303. Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMPAR. & INT’L L. (SPECIAL ISSUE) 79, 79 (2003); *see also* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 16 (2011) (referring to the “vanishing trial” and the privatization of process).

304. Carrington, *supra* note 303, at 85; *see* Albert W. Dzur, *Democracy’s “Free School”: Tocqueville and Lieber on the Value of the Jury*, 38 POL. THEORY 603, 623 (2010) (“The jury is a reminder that the power of judgment is to be grounded in widespread citizen participation not only in extraordinary circumstances, . . . but constantly and concretely day after day in ordinary American courtrooms.”).

305. *See* Shari Seidman Diamond & Mary R. Rose, *The Contemporary American Jury*, 14 ANN. REV. L. & SOC. SCI. 239, 244 (2018) (stating that “[a]lthough the contemporary American jury is far more heterogeneous and representative than it has ever been, systematic underrepresentation . . . persists,” and arguing that underrepresentation affects the “legitimacy for the jury system” and the quality of “deliberation”).

306. Carrington, *supra* note 303, at 87 (arguing that “a republic trusting its citizens to sit as jurors is more likely to be trusted by them, and on that account is more likely to remain a republic”).

307. *See, e.g.*, Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1334–36 (2012) (arguing that the democratic role of the jury is overstated).

unnecessary expense.

C. *Reorienting Procedural Standing Doctrine*

The metaphor of “wrong turn” might suggest that the anti-democratic tendencies in the Court’s procedural standing decisions can be fixed with an interpretive reversal³⁰⁸—redefining Article III injury to include violations of congressionally conferred procedural rights. We do think the Court should take that step. But as the discussion of due process and the civil jury right suggests, the Court’s suppression of intrinsic process values has not been confined to justiciability doctrine. Nor have the effects been cabined to the courthouse, for the Court’s approach has amplified the ability of litigants to challenge or hobble laws that seek to make American democracy more inclusive³⁰⁹—laws that address democratic processes such as the right to vote, legislative districting, and campaign finance.³¹⁰ Justice

308. Cf. Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 1000–01 (1994) (“The metaphor of a Court that has simply taken a ‘wrong turn’ no longer seems descriptive. . . . Even if the Court were repopulated with liberals, one must doubt whether they would simply return to the old project.”).

309. See James Sample, *The Decade of Democracy’s Demise*, 69 AM. U. L. REV. 1559, 1615 (2020) (“Over the past decade, the Court’s decisions in both the campaign finance and voting rights contexts have undermined representation-reinforcing values by increasing the concentration of political power in the rich and powerful and, in turn, reducing the role of the average citizen in his or her democracy.”); see also Shah, *supra* note 37, at 215–22 (questioning whether the Court has applied its procedural standing doctrine in racially disparate ways).

310. See Sample, *supra* note 309, at 1562.

In the span of a decade, a majority of the Court has imposed its will on nearly every major element of our democratic processes: from voting to gerrymandering to campaign finance and even to bribery and misconduct. In these decisions, the Court majority systematically disregarded legislative will at their leisure and replaced it with their own judgment of fairness and societal need. During the past decade, the Court consistently rejected legislative attempts at equalizing access to democracy, dismissed attempts by Congress to target quid pro quo corruption, narrowed the definition of quid pro quo public corruption to the eye of a needle, and rolled out the red carpet for partisan gerrymandering. Even more consequentially, there is a snowball effect at play: the decade of new high

Frankfurter, concurring in *Malinski v. New York*, wrote, “The history of American freedom is, in no small measure, the history of procedure.”³¹¹ The history of American democratic decline might similarly be measured.

CONCLUSION

We have argued that standing doctrine as it treats the violation of congressionally conferred procedural rights threatens democratic erosion by denying the intrinsic worth of democratic self-governance, blocking the procedural pathways through which democracy is practiced, and giving insufficient weight to validly enacted laws. As a matter of doctrine, we have urged a course correction: that the Court treat the violation of a congressionally conferred procedural right to participate as a particular and concrete injury even if the right holder anticipates no financial pay-out or suffers no non-procedural harm separate from the denial of the right. The concern we raise, while it may appear narrow, provides a window into the broader problem of how procedure needs to be devised to protect and sustain American democracy.³¹²

In 1943, reckoning with the potential triumph of fascism, Harold D. Lasswell and Myres S. McDougal asked: “Which procedures actually aid or hamper the realization of human

Court precedent in the areas of campaign finance and voting rights gets extended yet further as waves of more and more conservative justices join the federal bench.

Id. at 1561–62. Compare Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 251–56 (2002) (drawing on and adding content to the *Carolene Products* theory of constitutional review), with Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 322 (2014) (Scalia, J., concurring) (urging that the cases supporting “the political-process doctrine . . . be overruled”).

311. *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

312. Cf. Edward B. Foley, *Electoral Dispute Resolution: The Need for a New Sub-Specialty*, 27 OHIO ST. J. ON DISP. RESOL. 281, 286 (2012) (calling for renewed attention to “attempts to develop new and better procedures for operating a democratic society”).

dignity? How can the institutions of legislation, adjudication, administration, production, and distribution be adjusted to democratic survival?”³¹³ These questions present themselves today with special urgency. In this Article, we have attempted a candid assessment of how well the Court’s approach to procedural violations as a basis for standing supports democratic values. We have argued that even before the current crisis, the Supreme Court—distrusted conceptually as a counter-majoritarian institution—suppressed intrinsic process values that we place at the core of democracy: equality, respect, and dignity. Others have urged reforming the Supreme Court to align constitutional interpretation with democratic values.³¹⁴ Still others have sought to reimagine administrative practice.³¹⁵ Without engaging in these arguments, we have sought to reorient standing doctrine in ways that would enable the Supreme Court to function as a “limited” partner in “democratic society,” and not as its assailant.

313. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 214 (1943).

314. Cf. Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1720 (2021) (“[T]he progressive frame challenges the background assumption that the Supreme Court achieves normative legitimacy when it engages in apolitical or neutral exercise of its power, rather than the amount of power consistent with democratic values. Its frame points in the direction not of re-legitimizing but reallocating judicial power.”).

315. See BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 1–2 (Oxford Univ. Press 2019) (acknowledging that the “administrative state . . . appears not to be democratic,” and calling for ways to “structure the state to empower the public sphere” by setting out legal obligations that “guarantee a condition of shared freedom among all of the political community’s members”).