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The Metaphor of Standing and the Problem of Self-Governance

Steven L. Winter
Wayne State University

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The Metaphor of Standing and the Problem of Self-Governance

Steven L. Winter*

But the greatest thing by far is to be a master of the metaphor.¹

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* Associate Professor of Law, University of Miami; B.A., Yeshiva College 1974; J.D., Columbia University 1977. This article is dedicated to Adolph Lyons and to the six people who died while the legal system failed adequately to respond to his claim.

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1. ARISTOTLE, *POETICS* 255 (I. Bywater trans. 1954) (ch. 22, para. 1459a).

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I. THE QUEST FOR COHERENCE

[C]onstitutional standing [is] . . . a word game played by secret rules.²

"Come, Watson, come!" he cried. "The game is afoot."³

It is almost *de rigueur* for articles on standing to quote Professor Freund's testimony to Congress that the concept of standing is "among the most amorphous in the entire domain of public law."⁴ One of the traditional criticisms of standing law is that it is confusing and seemingly incoherent. Even the staunchest judicial advocates of the doctrine readily admit as much: "We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency"⁵

Nevertheless, the courts treat standing as a "bedrock requirement" delimiting the scope of the judicial process.⁶ It is generally accepted black letter law that the "case or controversy" requirement of article III means that a party who invokes the court's authority must show personal injury or "injury-in-fact."⁷ The Burger Court has expanded the

2. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (describing majority opinion).

3. A. C. DOYLE, *The Adventure of the Abbey Grange*, in 2 THE COMPLETE SHERLOCK HOLMES 636 (1930).

4. *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 89th Cong., 2d Sess. 498 (1966).

5. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982) (Rehnquist, J.); *see also* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such."); *Flast*, 392 U.S. at 95, 97 ("Justiciability is itself a concept of uncertain meaning and scope."). Professor Jaffe has noted that even "Justice Frankfurter found himself reduced to a nearly unprecedented degree of inarticulateness" in discussing standing. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1268 (1961). Jaffe was referring to Justice Frankfurter's opinion for the Court in *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953), where the Justice noted that: "It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases." *Id.* at 156.

This article focuses on the purely constitutional, article III law of standing. The concept of standing probably raises all or most of the same problems in other areas such as administrative law, antitrust, and the fourth amendment. I do not treat them here. For a cogent explanation of the policy considerations that make the stakes in the standing analysis somewhat different in administrative law, see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1742 (1975). For a discussion of the way in which fourth amendment standing reflects the same considerations and entails the same problems presented by article III standing, see notes 591 & 722 *infra*.

6. *Valley Forge*, 454 U.S. at 471.

7. The "injury in fact" terminology comes from the majority opinion in *Data Processing*, 397 U.S. at 152. The introduction of the injury-in-fact criterion was part of an effort to expand standing. *See* *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976).

“irreducible minimum”⁸ to include the requirements that the plaintiff also show that the injury was caused by the defendant’s allegedly illegal conduct and that the injury is one that can be redressed by the court’s decision.⁹ The net effect has been increasingly to restrict citizens’ claims against their government. The Court has insisted on these minima with an amazing degree of orthodoxy: “Any other conclusion,” the Court has warned, “would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.”¹⁰

Despite the purported constitutional warrant and the seeming clarity of the new black letter, standing law remains largely intractable. We have traditionally bridged the gaps in one of two ways. The traditionalists have attempted to harmonize the cases in terms of a coherent doctrine of standing¹¹ or to elaborate a coherent doctrine in place of standing.¹² Others have acknowledged openly the doctrinal and conceptual inconsistencies of the cases and accounted for them in either a Realist or post-Realist manner. Commentators in this group have concluded that the doctrine of standing is either a judicial mask for the exercise of prudence to avoid decisionmaking¹³ or a sophisticated manipulation for the sub rosa decision of cases on their merits.¹⁴

8. *Valley Forge*, 454 U.S. at 472.

9. The causation/redressibility requirement first appeared in *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973), and was constitutionalized in *Warth v. Seldin*, 422 U.S. 490, 504 (1975).

10. *United States v. Richardson*, 418 U.S. 166, 179 (1974).

11. Section V of this article attempts to demonstrate that the Court has not been successful in articulating such a coherent doctrine, either in majority opinions or in dissents. For attempts by scholars to harmonize the law, see Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297 (1979); Burnham, *Injury for Standing Purposes When Constitutional Rights Are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57 (1985); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983). See also Stewart, *supra* note 5, at 1723-41.

12. Scholars who have attempted such analyses include Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 425-29 (1974); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WISC. L. REV. 37; Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); Schnurer, “*More than an Intuition, Less than a Theory*”: *Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564 (1986) (student author). See also Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 41 (1982). For a discussion of the problems with these analyses, see note 88 *infra* and accompanying text.

13. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 119-27 (1962).

14. See, e.g., Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1715 n.72 (1980) (“Doesn’t the fact that the Court issues so many inconsistent decisions tend to indicate that the entire concept of standing is awfully prone to manipulation and incoherence?”). Although it is probably impossible to document, I suspect that most academics and practicing lawyers at least share the suspicion that standing law is nothing more than a manipulation by the Court to decide cases while not appearing to decide their merits.

Perhaps the most sophisticated version of this thesis appeared in the first edition of H. FINK & M. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 319-23 (1st ed. 1984) [hereinafter H. FINK & M. TUSHNET (1st ed.)]. Originally, Professors Fink and Tushnet suggested that:

The purpose of this article is to suggest an alternative vision. Its *modus operandi* is to employ recent scholarship on human cognition to map the underlying conceptual structure of standing law and, thus, to provide a better understanding of its incoherences. Implicit in this approach is the assertion that concepts do matter: that one cannot account for standing doctrine simply in terms of instrumental manipulation. Rather, the underlying concepts frame and constrain the instrumentalist choices. The basic tools, which I explain in Section II and employ throughout, are the concepts of cognitive models and metaphors.

Part of this endeavor will involve a challenge to the historical assumption that the Constitution speaks to the question ordinarily thought to be comprehended within the rubric of standing. Rather, a painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional phrase “cases or controversies” or that it is a prerequisite for seeking governmental compliance with the law. I will show that the modern doctrine of standing is a distinctly twentieth century product that was fashioned out of other doctrinal materials largely through the conscious efforts of Justices Brandeis and Frankfurter. I will use the materials on models and metaphors to describe how this shaping was effectuated.

I am not so heretical as to suggest that there is no such thing as an article III “case or controversy” requirement that limits the judicial power to actual disputes. But a fuller account of our history shows that article III was not limited to the kinds of private disputes characterized by standing. I argue that there are serious negative consequences to the idea that the legal system is or should be circumscribed by such a concept. This article seeks instead a historically more accurate and democratically more meaningful approach to the uses of adjudication in a self-governing society.

A recent case, *City of Los Angeles v. Lyons*,¹⁵ highlights the dysfunctional aspects of current standing doctrine that justify this endeavor.

The doctrines are manipulated to allow the Court to reach the merits openly in some cases while disguising its rulings on the merits in other cases. . . . It may be that the Court conceals its rulings on the merits by using the injury-causation test in cases where it believes the public disapproval of an overt rejection of the claims on the merits would exceed public disapproval of an apparent door-closing decision, and conversely that it rules on the merits openly where it believes that public approval of the rejection of the claims would exceed public approval of the denial of standing.

Id. at 319. It would be difficult to document this hypothesis, and there are counter-examples that suggest this is only a partial truth. See, e.g., text accompanying notes 742-743 *infra*. The second edition of the casebook no longer contains this passage, but it suggests a similar theme in its discussion of standing doctrine. See H. FINK & M. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 303, 321 (2d ed. 1987) [hereinafter H. FINK & M. TUSHNET (2d ed.)].

15. 461 U.S. 95 (1983).

Adolph Lyons was stopped for a traffic violation by Los Angeles police officers. He was subjected to a restraining chokehold and severely injured. He claimed that the police were employing such chokeholds routinely, even though they were not threatened with the use of deadly force by the victim. The record demonstrated that the chokeholds were often fatal.

The Supreme Court held that Mr. Lyons did not have standing to obtain an injunction barring the practice. In the majority's view, it was entirely speculative that Mr. Lyons would ever again be subjected to this potentially fatal practice.¹⁶ The four dissenters complained that: "The court's decision removes an entire class of constitutional violations from the equitable powers of a federal court. . . . The federal judicial power is now limited to levying a toll for such a systematic constitutional violation."¹⁷

On one level, *Lyons* represents a jurisprudential dispute between the majority and the dissent over the relative efficacy of retrospective damage remedies and prospective injunctive relief to deter constitutional violations. On another level, this case concerns a related dispute about the role of federal courts in our system. But there was an underlying reality: Human lives were at stake. Mr. Lyons obtained a preliminary injunction against the chokehold practice; both the court of appeals and the Supreme Court issued a stay of that order while the appeal was pending. Six additional people were choked to death by Los Angeles police while the courts determined that no one had standing to stop the practice.¹⁸ Yet, two years later when the Court considered the same substantive constitutional theory in a related factual context, it held that it was unconstitutional for the police to use deadly force against nondangerous suspects. This holding was precisely the same as that sought by Mr. Lyons on the merits of his case.¹⁹

There are many other examples of dysfunctionality; I will discuss them in later sections. At this point, it may be more helpful to describe some of the problems of standing law that I hope to illuminate.

1. *The historical conundrum.*

The notion that standing is a bedrock requirement of constitutional law has a surprisingly short history. *Frothingham v. Mellon*,²⁰ which re-

16. See *id.* at 106 n.7 ("[I]n any event, . . . Lyons would have to credibly allege that he faced a realistic threat from the future application of the City's policy.").

17. *Id.* at 137 (Marshall, Brennan, Blackmun & Stevens, JJ., dissenting).

18. *Id.* at 116 n.3.

19. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). *Garner* applied the fourth amendment to invalidate the fleeing felon doctrine of the common law. Under *Garner*, an officer must have probable cause to believe the suspect dangerous before he or she may resort to deadly force to prevent escape. For a discussion of the metaphors underlying the *Garner* decision, see *Winter, Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. OF LAW & SOC. CHANGE 679 (1986).

20. 262 U.S. 447 (1923).

jected a taxpayer suit to enjoin a federal spending program, is generally thought of as the first modern standing case.²¹ In fact, it is not. *Fairchild v. Hughes*,²² decided a year before *Frothingham* and authored by Justice Brandeis, was the first case to reject a taxpayer suit because the "[p]laintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding."²³ The *Frothingham* Court reached its conclusion that Ms. Frothingham could not sue without citing or identifying any precedent either for that conclusion or the premises it offered in support of that conclusion.²⁴

Perhaps more surprising, *Frothingham* was preceded by three federal and two state taxpayer actions that the Court adjudicated on the merits.²⁵ Moreover, as late as 1935, neither Professors Frankfurter nor Hart discussed *Frothingham*, *Fairchild*, or the concept of standing in their writings on article III justiciability limits on federal courts.²⁶ All of this

21. See *Flast v. Cohen*, 392 U.S. 83, 91 (1968) ("This Court first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in federal court in *Frothingham v. Mellon* . . .") (footnote omitted). Typically, contemporary casebooks on the law of federal courts and on constitutional law discuss *Frothingham* but fail altogether to note its predecessor, *Fairchild v. Hughes*, 258 U.S. 126 (1922). See, e.g., M. REDISH, *FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS* 16-17 (1983); P. LOW & J. JEFFRIES, *FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS* 40 (1987); H. FINK & M. TUSHNET (2d ed.), *supra* note 14, at 295-96; D. CURRIE, *FEDERAL COURTS CASES AND MATERIALS* 12-13 (3d ed. 1982); G. GUNTHER, *CONSTITUTIONAL LAW* 1543-44 (11th ed. 1985); W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS* 1632-34 (5th ed. 1980); accord H. HART & H. WECHSLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 158-60 (1953). The one contemporary exception is P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973), which notes both *Fairchild* and *Frothingham*. *Id.* at 180, 181.

22. 258 U.S. 126 (1922).

23. *Id.* at 129. In *Frothingham*, too, the plaintiff's claim was rejected because she failed to show that she had "sustained . . . some direct injury . . ., and not merely that [s]he suffers in some indefinite way in common with people generally." *Frothingham*, 262 U.S. at 488.

24. *Id.* at 486-89. *Fairchild*, in contrast, relied on two of the general justiciability cases and one of the *ius tertii* cases. See note 330 *infra*.

25. *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Millard v. Roberts*, 202 U.S. 429 (1906); *Wilson v. Shaw*, 204 U.S. 24 (1907); *Hawke v. Smith*, 253 U.S. 221 (1920); *Leser v. Garnett*, 258 U.S. 130 (1922) (the companion case to *Fairchild*).

26. See, e.g., F. FRANKFURTER & J. DAVIDSON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* 194-363 (1932); Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 93-95 (1935). In his casebook, Professor Frankfurter devoted almost 200 pages to the scope of the judicial power and to questions of justiciability, treating such classic federal courts issues as advisory opinions, political questions, and legislative courts. The casebook does not invoke either the term or the concept of standing, does not include either *Frothingham* or *Fairchild*, and does not treat any of the cases that Justice Frankfurter later cited in his opinions on standing. Compare F. FRANKFURTER & J. DAVIDSON, *supra*, with *Coleman v. Miller*, 307 U.S. 433, 460-70 (1939) (opinion of Frankfurter, J.), and *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 150-57 (1951) (Frankfurter, J., concurring).

In their 1935 review of the previous term, Professors Frankfurter and Hart discussed the general "jurisdictional limitations," including "the threshold requirement of the existence of a 'case' or 'controversy' . . ." Frankfurter & Hart, *supra*, at 94. Their only reference to "standing" was the rejection of "any practice which would make of the Court a standing body of expert expounders of the Constitution." *Id.* See also Frankfurter & Fisher, *The Business of the Supreme Court at October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 623-32 (1938) (discussing restrictions on constitutional claims in terms of equity and avoidance of constitutional issues).

is unusual to say the least. One legitimately may wonder how a constitutional doctrine now said to inhere in article III's "case or controversy" language could be so late in making an appearance, do so with so skimpy a pedigree, and take so long to be recognized even by the primary academic expositors of the law of federal courts.

The traditional answer places heavy emphasis on the function of the common law writ system to do the work now done by the concept of standing.²⁷ According to this analysis, the concept of standing could only arise after the breakdown of the writ system and of common law pleading. Standing then developed as an elaboration of the essence of the private causes of action previously embodied in the writs.²⁸ As such, the modern concept of standing, with its focus on injury-in-fact, is thought to be only the preservation of the private rights model²⁹ of adjudication known to the Framers.

The traditional account is, however, inconsistent with the historical data. It cannot account for the five taxpayer actions that preceded *Frothingham* and *Fairchild*.³⁰ Moreover, it ignores the established practice in state courts, throughout the nineteenth century, that provided for public rights suits brought by plaintiffs who had no personal interest or injury-in-fact.³¹ Finally, it is disproved by the fact that the Supreme Court, in 1875, specifically approved of this public rights

27. "Courts, whose jurisdiction was defined by the system of writs, did not need to speak of standing. The question was whether a challenger was entitled to a writ, whether he had a cause of action, whether the writ lay." J. VINING, *LEGAL IDENTITY* 55 (1978). Thus, in his concurring opinion in *McGrath*, Justice Frankfurter began his discussion of standing by observing that: "A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts." 341 U.S. at 152 (citing *United States v. Lee*, 106 U.S. 196 (1882)) (Frankfurter, J., concurring).

The earlier notion of justiciability referred to in *United States v. Lee* did not include a fixed idea about the relationship between the party's status and a generalized conception of legal process. Rather, the Court in *Lee* described justiciability in purely formalistic terms: "a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court,—a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court." *Lee*, 106 U.S. at 219; *accord In re Pacific Ry. Comm'n*, 32 Fed. 241, 256 (C.C.N.D. Cal. 1887).

28. For a version of this traditional account, see, e.g., Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 8-10 (1982).

29. The term "private rights model" is taken from Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365-68 (1973).

30. See notes 20-26 *supra* and accompanying text.

31. See notes 150-161 *infra* and accompanying text. Professors Jaffe and Berger reveal the origins of these practices in English and pre-Revolutionary American law. Jaffe, *supra* note 5, at 1269-75; Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 258-61 (1961); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 818-27 (1969). Professor Jaffe's canvass of the English mandamus cases led him to conclude that: "I have encountered no case before 1807 in which the standing of plaintiff is mooted, though the lists of the cases in the digests strongly suggest the possibility that the plaintiff in some of them was without a personal interest." Jaffe, *supra* note 5, at 1270. "It was not, so far as I can find, until the end of the [nineteenth] century that our question was mooted." *Id.* at 1271. Even then, the English cases reached opposing conclusions on the necessity of a personal stake. *Id.* at 1271-73.

practice in a federal case without any constitutional objection.³² I expand and develop this history in Section III; I then chart and attempt to explain its demise in Section IV.

2. *The terminological conundrum.*

The term "standing" does not appear either in *Frothingham* or in *Fairchild*. Consistent with the traditional historical explanation of the late arrival of standing doctrine, Professor Vining has suggested that the American usage of the term developed haphazardly in this century without specific introduction.³³ He has also hypothesized that it was derived from the late nineteenth century English parliamentary term *locus standi*.³⁴ As I demonstrate below, however, each of these assumptions is incorrect. The term "standing" was in use early in the nineteenth century and did have two apparently accepted meanings unrelated to the modern doctrine of standing.³⁵ The explicit adoption of the term to signal a new article III concept of justiciability occurs first in Justice Frankfurter's concurring opinion in *Coleman v. Miller*.³⁶

3. *The Frothingham conundrum.*

Frothingham is sometimes read as embodying only the prudential as-

32. *Union Pac. R.R. v. Hall*, 91 U.S. 343 (1875). See notes 135, 169-173 *infra* and accompanying text.

33. J. VINING, *supra* note 27.

The word *standing* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our own century. No authority that I have found introduces the term with proper explanations and apologies and announces that henceforth *standing* should be used to describe who may be heard by a judge. Nor was there any sudden adoption by tacit consent. The word appears here and there, spreading very gradually with no discernible pattern. Judges and lawyers found themselves using the term and did not ask why they did so or where it came from.

Id. at 55. Vining traces its first American usage to the headnote in *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U.S. 207 (1903). *Id.*

Vining does note a canonic, medieval precedent for the term "standing" that is clearly procedural: *excommunicatus non habet personam standi in iudicio* (one who has been excommunicated has no standing in court). J. VINING, *supra* note 27, at 190 n.33.

34. "There seems little doubt that American usage is derived from the British." *Id.* at 55. In this view, the term "standing" is derived from the English legal concept of *locus standi*—literally, "a place to stand on." See 2 W. JOWITT, *THE DICTIONARY OF ENGLISH LAW* 1115 (2d ed. 1977); J. VINING, *supra* note 27, at 55. The term *locus standi* has its origin in parliamentary practice "with reference to the question whether a person who objects to a private Bill has the right to appear by counsel and summon witnesses to support his objection before the select committee." W. JOWITT, *supra*, at 1115; EARL OF HALSBURY, *THE LAWS OF ENGLAND* 749-50 (1912); accord J. VINING, *supra* note 27, at 55. In modern English administrative law, however, the term *locus standi* has taken on a meaning similar to that of standing in American administrative and constitutional law. S.A. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 366-67, 407-09 (3d ed. 1973).

35. See text accompanying notes 251-260 *infra*. In the late nineteenth and early twentieth centuries, its primary usage was in equity to express the substantive limits of its jurisdiction. This equity usage evolved in a manner that helped lay the groundwork for the development of the modern constitutional doctrine of standing. See text accompanying notes 261-289 *infra*. I will describe these developments in some detail in Section IV, below.

36. 307 U.S. 433, 464-68 (1939).

pects of standing,³⁷ as contrasted with the core, article III criteria of injury-in-fact, causation, and redressability.³⁸ Nevertheless, sixty years later, "Frothingham's reasoning remains obscure."³⁹ As I indicated above, *Frothingham* drew neither on the existing terminology of standing nor on the existing precedent of *Fairchild*. In light of the modern doctrine of standing, this seems strange. But, viewed in its original historical context, much of what is cryptic in *Frothingham* can be understood in terms of traditional equity doctrines unrelated to standing, the earlier prerogative writ practice, and older justiciability doctrine. I develop this analysis in Section IV.

4. *The causation conundrum.*

In the 1970s, the Burger Court added causation as an element of the threshold determination of standing.⁴⁰ Professor Chayes has observed that: "Any first year law student, at least after he has read the *Palsgraf* case, could predict what would happen when the metaphysically undisciplined concept of causation is introduced. . . ."⁴¹ From tort law, we would have assumed that the necessary causal chains would vary as different policies and purposes are implicated.⁴² Yet one of the oddities of standing law is that, in its treatment of the issue of causation, a strange uniformity predominates instead.⁴³ I explain the conceptual groundwork for this phenomenon in Section II and further explore the connections in Section V.

5. *The injury conundrum.*

One of the constant analytic loops of standing law is the characterization of the injury that is sufficient to confer standing. Under the older legal interest test, the relationship between standing and the mer-

37. See *Flast v. Cohen*, 392 U.S. 83, 92 n.6 (1968); Jaffe, *supra* note 31, at 302-03; Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, 1963 SUP. CT. REV. 1, 15 ("I do not know whether *Frothingham v. Mellon* is a constitutional decision or a prudential one.").

38. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (majority opinion).

39. *Id.* at 496 (Brennan, J., dissenting); see also note 37 *supra*.

40. See *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

41. Chayes, *supra* note 28, at 19 (citing *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928)).

42. See, e.g., *Palsgraf*, 248 N.Y. at 352-53, 162 N.E. at 104 (Andrews, J., dissenting). Professor Chayes suggested that "[O]ur mythical first-year law student knows that there are no 'direct' or 'indirect' injuries. There are only causal chains of different lengths. The question is, 'how long is too long?' The answer can readily be made to vary, if not with the length of the Chancellor's foot, then with the interests and sympathies of shifting configurations of five justices." Chayes, *supra* note 28, at 19.

43. See H. FINK & M. TUSHNET (1ST ED.), *supra* note 14, at 320 ("Why do tax law and equal protection law embody identical injury-causation requirements?"). But compare *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (upholding standing on the basis of an attenuated line of causation between the Price-Anderson Act and a reduction in property values of houses situated near nuclear power plants).

its was "demonstrably circular,"⁴⁴ because what conferred standing was a legally *protected* interest, and you only had that if the court agreed with you on the merits of your legal theory. The focus of modern standing law on an objective injury-in-fact, which was designed to straighten this out, has proved to be equally dependent on underlying legal assumptions.⁴⁵ Thus, in *Baker v. Carr*,⁴⁶ a voter's interest in the relative weight of his or her vote—a matter that is a purely legal construct dependent on one's conceptualization of a properly weighted vote⁴⁷—may be sufficient. Similarly, the Court has recognized Congress's power "to create new interests the invasion of which will confer standing."⁴⁸ Thus, a request for information under the Freedom of Information Act⁴⁹ is a justiciable controversy even without the usual showing that the person has suffered any "palpable injury."⁵⁰

This conundrum is more intractable when one considers *United States v. Richardson*.⁵¹ There, the Court rejected a parallel claim under the statement and account clause⁵² for information about government expenditures because the plaintiff was not "in danger of suffering any particular concrete injury. . . ."⁵³ In fact, the Court has treated these kinds of constitutional claims as only generalized, political grievances and not "*injury* of any kind, economic or otherwise, sufficient to confer standing."⁵⁴ I will explore the inherent inconsistencies of these doctrines in Section V and will attempt to provide an explanation for and a different means of reconstructing these issues in Section VI.

44. "[I]f the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected." C. WRIGHT, *LAW OF FEDERAL COURTS* 65-66 (4th ed. 1983). See also K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22.04 (1958).

45. Chayes, *supra* note 28, at 15-16. In his latest article on standing, Professor Nichol concludes that the injury prong of standing doctrine is actually two different requirements: a requirement of injury-in-fact and a requirement of legally cognizable interest (or legal injury). Nichol, *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1918-19 (1986). As I suggest below, particularly in Section V, this analysis misses the mark because it ignores the cognitive processes implicated by terms such as "injury."

46. 369 U.S. 186 (1962).

47. "Talk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth." *Id.* at 300 (Frankfurter, J., dissenting).

48. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976) (citing *Linda R.S.*, 410 U.S. at 617 n.3, and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)).

49. Freedom of Information Act, 5 U.S.C. § 552 (1982).

50. *Cf. Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Simon*, 426 U.S. 26, 40-41 & n.22 (1976).

51. 418 U.S. 166 (1974). The inconsistency between the Freedom of Information Act and the holding in *Richardson* was raised in Justice Stewart's dissent. *Id.* at 204-05.

52. U.S. CONST. art. I, § 9, cl. 7, which provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

53. *Richardson*, 418 U.S. at 177.

54. *Valley Forge Christian College v. Americans for Separation of Church and State*, 454 U.S. 464, 486 (1982) (emphasis in original).

6. *The particularization conundrum.*

One of the primary thrusts of standing law has been the requirement of an injury particular to the individual invoking the court's power.⁵⁵ This particularization requirement is usually justified as serving the separation of powers policies often identified with standing law: It "forecloses the conversion of courts of the United States into judicial versions of college debating forums."⁵⁶ Yet the Court continues to reaffirm the decision in *United States v. SCRAP*,⁵⁷ where the injury that supported standing was an injury to the environment shared by everyone. Similarly, in the fair housing context, the Court continues to recognize interests in integrated living that can be asserted by citizens living in relatively broad geographic areas, such as entire counties.⁵⁸

This apparent inconsistency in the application of the particularization requirement has led some commentators to ask whether there are some constitutional rights that are "group rights" and others that are "personal rights."⁵⁹ In Section VI, I suggest that this false dichotomy is an artifact of standing law, that it is out of sync with social reality, and that it is responsible for much of the perceived incoherence of standing doctrine.

7. *The democracy conundrum*

The most appealing justification of standing law is that, in preserving the separation of powers, it protects the majoritarian political process from undue intrusion by the unelected judiciary. But not all issues are amenable to the political process. All too often, the inevitable consequence of a decision denying standing is "that the most injurious and widespread Governmental actions c[an] be questioned by nobody."⁶⁰ In those cases, standing law undermines the notion of accountability that supports a constitutional system premised on the rule of law. In Sections VI C and D, I propose a means of recapturing these values.

There is a single thread that holds together the tapestry of this article. What lies behind each of these conundra is our current over-glorification of individualism. It was not always so. At the time of the Framers and in succeeding generations, American law provided several constitutionally acceptable models for the adjudication of group rights at the behest of any member of the public, without regard to the neces-

55. See, e.g., *Valley Forge*, 454 U.S. at 472; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

56. *Valley Forge*, 454 U.S. at 473.

57. 412 U.S. 669, 678 (1972).

58. *Gladstone*, 441 U.S. at 99.

59. See, e.g., Doernberg, "We the People": *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52 (1985); Schnurer, *supra* note 12, at 588-92 (concluding that the distinction between group and personal rights cannot reliably be made).

60. *SCRAP*, 412 U.S. at 688.

sity of personal interest, injury, or standing. In this article, I apply the concepts of cognitive models and of metaphor to explain this history and how these models were lost. I will also chart how doctrines unrelated to article III were successfully fashioned by liberal justices into an individualist article III limitation on an activist conservative Court. I will then dissect some of the more important modern standing cases to show the disordering effects of standing on our legal analysis and of the private rights model when applied to the public context.

In the final section, I will construct a framework for reconstituting standing doctrine. The warp of that attempt is provided by those modern justiciability cases which have already implicitly abandoned the unidimensional, individualist model of standing. The woof is provided by a theory of human cognition which demonstrates that multiple models and metaphors are necessary to meaningful interaction with the world. Because the individualist weave of current doctrine interferes with meaningful self-governance, I conclude with a discussion of the role of litigation in a democratic society that would employ models of "standing" better grounded in the nature of human cognition and more reflective of human experience. The purpose of this endeavor is to create new models, models that are reconstitutive rather than alienating.

II. THE MEANING OF A METAPHOR

Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional.⁶¹

A. *Metaphors of Thought*

The law is committed to the use of reason. New discoveries about the nature of reason, therefore, have a natural and necessary place in legal scholarship. To fail to recognize them ultimately would be to deny the role of reason in law.

In ordinary legal discourse, we treat the term "standing" as a legal term of art—a label for a concept or body of doctrine. But much of what goes on in standing can be understood in terms of metaphors and their relation to human cognition. The key to understanding—and to

61. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24 (1913) (footnote omitted).

The use of the term standing "is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coastline R.R.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring) (referring to the use of the term "assumption of risk"). Ironically, Justice Frankfurter capitalized on just this process with respect to the term "standing." See text accompanying notes 246-288 & 393-468 *infra*.

unlocking the barrier of standing law—lies in an appreciation that the term “standing” is a metaphor.⁶² Its origin no doubt comes from the physical practices of the courtroom: A court will only hear a participant if he or she is standing. “Standing” is therefore a natural metaphor for when a court will consider a litigant’s claim;⁶³ the metaphor is *motivated* by our experience.⁶⁴

The power of a metaphor is that it colors and controls our subsequent thinking about its subject. “This is so, in part, because the concepts by which language expresses an otherwise unrepresentable . . . reality are themselves generalizations importing preconceptions about the reality to be expressed.”⁶⁵ Recent scholarship on human cognition suggests that metaphor is powerful because it is a fundamental component of human reasoning.⁶⁶ Metaphor enables us to see systems of analogies not previously recognized.⁶⁷ It allows us to use a source do-

62. To prevent confusion, I use quotes—“standing”—when I refer to the metaphor and do not do so when I refer to the legal doctrine.

63. See G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* 14 (1980): “[M]etaphorical orientations are not arbitrary. They have a basis in our physical and cultural experience.” *Id.* “[W]e feel that no metaphor can ever be comprehended or even adequately represented independently of its experiential basis.” *Id.* at 19. (emphasis in original); cf. C. LEVI-STRAUSS, *THE SAVAGE MIND* 93 (1962) (“The mythical system and the modes of representation it employs serve to establish homologies between natural and social conditions . . .”).

The term “standing” may also have antecedents in the practice and structure of the royal ensemble or political court—one’s status at court could be judged by how close one stood to the king; one’s status was evident in one’s standing.

64. G. LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 113 (1987). Lakoff’s use of the term “motivation” has nothing to do with conscious intent. Rather, he uses the term to convey that, as products of human imagination, metaphors, models and concepts are neither arbitrary nor entirely predictable. The concept of motivation addresses what “*makes sense of*” a system of thought; it does not provide “principles that *generate*, or *predict*, the system.” *Id.* at 96 (emphasis in original). See also text accompanying notes 493-494 *infra*.

65. *Culombe v. Connecticut*, 367 U.S. 568, 604 (1961) (Opinion of Frankfurter, J.).

66. See, e.g., G. LAKOFF, *supra* note 64; M. JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* (1987); G. LAKOFF & M. JOHNSON, *supra* note 63. The account of reasoning that follows diverges sharply from traditional objectivist accounts, which view reasoning as propositional and knowledge as correspondence with an objective reality. See G. LAKOFF, *supra* note 64, at xi-xii. For a further discussion of the central role of metaphor in thought see notes 676-730 *infra* and accompanying text. In a forthcoming piece, I will discuss the relationship between the experientialist epistemology that follows and standard philosophical accounts of reasoning and knowledge. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law* (manuscript in preparation on file with the *Stanford Law Review*).

67. See M. BLACK, *MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY* (1962):

A memorable metaphor has the power to bring two separate domains into cognitive and emotional relation by using language directly appropriate to the one as a lens for seeing the other; the implications, suggestions, and supporting values entwined with the literal use of the metaphorical expression enable us to see a new subject matter in a new way. The extended meanings that result, the relations between initially disparate realms created, can neither be antecedently predicted nor subsequently paraphrased in prose. We can comment *upon* the metaphor, but the metaphor itself neither needs nor invites explanation and paraphrase. Metaphorical thought is a distinctive mode of achieving insight, not to be construed as an ornamental substitute for plain thought.

main with an existing conceptual structure to understand and structure another conceptual domain.⁶⁸ That is, the structure or attributes of the source domain are "carried over"⁶⁹ and applied to the target domain.

This process of metaphoric projection is essentially the same as the way in which we use models. "[M]odels . . . too, bring about a wedding of disparate subjects, by a distinctive operation of transfer of *implications* of relatively well-organized cognitive fields."⁷⁰ A model, thus, is another way of describing the source domain of a metaphor or an analogy. Recent scholarship indicates that these reasoning processes are cognitively and epistemologically central.

There is a developing body of work on human cognition which suggests that human thought is grounded in physical experience and extended by means of idealized cognitive models and metaphoric projections.⁷¹ According to this theory, basic preconceptual experiences (or schema) provide the organizing principles for the construction of conceptual models.⁷² Examples include *link* schema (such as the umbilical cord, hand holding); *container* schema (we experience our

Id. at 236-37 (emphasis in original).

68. Max Black explained the function of metaphor by means of two metaphors: *A metaphor is a filter and a metaphor is a lens.* *Id.* at 39-41.

69. The word "metaphor"—itself a metaphor from physical experience—is derived from the Greek words *pherein*, "to carry," and *meta*, "over." T. HAWKES, *METAPHOR* 1 (1972).

70. M. BLACK, *supra* note 67, at 236-37 (emphasis in original).

71. See G. LAKOFF, *supra* note 64; M. JOHNSON, *supra* note 66. Lakoff's and Johnson's works draw on an extensive body of empirical work in experimental psychology, linguistics, and anthropology. See, e.g., G. LAKOFF, *supra* note 64, at 22-50, 58-64, 91-113, 119-30, 313-17, 330-34, 416-17. An important part of this work concerns the phenomenon of "prototype effects" discussed in the text. See text accompanying notes 76-81 *infra*; see, e.g., Rosch, *Natural Categories*, 5 *COGNITIVE PSYCHOLOGY* 328 (1973); Rosch, *Principles of Categorization in COGNITION AND CATEGORIZATION* 27-48 (1978); Rosch, *Prototype Classification and Logical Classification: The Two Systems*, in *NEW TRENDS IN CONCEPTUAL REPRESENTATION: CHALLENGES TO PIAGET'S THEORY* 73-86 (E. Scholnick ed. 1983).

Although the account of reasoning that follows may appear oversimplified, this appearance is a necessary by-product of compression. In fact, Lakoff provides a sophisticated and extensive account of the structure of cognitive processes. For example, I have highlighted only the role of image-schemata and metaphor in the construction of cognitive models. Lakoff, however, identifies other kinds of cognitive models structured by means of propositions, scenarios, and metonymies. G. LAKOFF, *supra* note 64, at 113-14. He also describes in detail how it is that we construct and extend these cognitive models. *Id.* at 281-92.

72. Like any theory, this theory has antecedents. The concept of schemata as mediations between sense experience and conceptualization derives from Kant. See I. KANT, *CRITIQUE OF PURE REASON* A138-41, B177-80 (N.K. Smith trans. 1963). For a discussion of how the theory of schemata adumbrated in the text is culled from but is somewhat different than Kant's, see M. JOHNSON, *supra* note 66, at 23-24, 152-57. The nonobjectivist approach to categorization, in which members of the same category have some features in common but no essential criteria, owes much to Wittgenstein's concept of family resemblance. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31-34 (G. Anscombe trans. 1953) (describing board games, Olympic games, and gaming with dice as "games" that only bear a family resemblance to one another). The concept of an idealized cognitive model as a basic structure of thought is influenced by Hilary Putnam's concept of stereotypes. See Putnam, *The Meaning of "Meaning,"* in 7 *MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE* 131 (K. Gunderson ed. 1975). A survey of the intellectual history of the movement from which experientialist cognitive theory has developed is provided in H. GARDNER, *THE MIND'S NEW SCIENCE: A HISTORY OF THE COGNITIVE REVOLUTION* (2d ed. 1987).

bodies as having an in-out orientation); *part-whole* schema (we experience directly the relationships between our hands and the rest of the body);⁷³ and *source-path-goal* schema (from earliest childhood, we move from one place to another to obtain desired objects).⁷⁴ The human capacity to conceptualize allows us to project these structures and to use them to conceptualize other aspects of our experience. To take a simple example, we conceptualize purposes in terms of the *source-path-goal* schema; this gives rise to systematic *source-path-goal* metaphors that we use in our thinking about purposes. We can therefore perceive our purposive efforts as *going a long way toward* our goal, conceptualize something or somebody that interferes with our purposes as an *obstacle that gets in our way*, and describe some of our failings in terms of being *sidetracked*.⁷⁵

An important part of this theory is premised on the phenomenon of *prototype effects*. In the classical theory of categorization, all objects having the same relevant criteria are classed together. In this view, no category member is any more "representative" of a category than another. Empirical work in psychology, however, has shown that people within cultures, and sometimes across cultures,⁷⁶ pick out the same "prototypes" or best examples of categories. Thus, robins and sparrows are typically identified as prototypical birds; owls and eagles, although birds, are not viewed as prototypical.⁷⁷

What explains this phenomenon is the notion that categories have an internal structure which produces these perceptions of best examples. The claim is that categories are structured by means of *idealized cognitive models*—culturally shared "theories" of how to organize some portion of our experience. These models may be organized in terms of image-schemata like the *source-path-goal* schema or in terms of a group of related propositions grounded in a physical/cultural experience. An example is the stereotypical conceptualization of "mother" by means of an idealized cognitive model that assumes natural childbirth by a woman who is married to the biological father, and who is also the primary nurturer and full-time caretaker of the child. Women who fit this idealized cognitive model are prototypical "mothers" and are referred to as such. But nonprototypical mothers are marked as such by the linguistic conventions resulting from this model: They are *stepmothers*, *surrogate mothers*, *biological mothers*, *foster mothers*, *working mothers*, or *unwed*

73. The *part-whole* schema gives rise to metonymy: The use of one entity or part to refer to another, as when one refers to a class as *a lot of faces*. See G. LAKOFF, *supra* note 64, at 77-79; G. LAKOFF & M. JOHNSON, *supra* note 63, at 35-40; see also G. FAUCONNIER, *MENTAL SPACES: ASPECTS OF MEANING CONSTRUCTION IN NATURAL LANGUAGE* 3-5 (1985).

74. "Yes; it seems quite simple. But I doubt if we ever know why we do things. The only really simple thing is to go straight for what you want and grab it." G.B. SHAW, *MAN AND SUPERMAN, Act IV* (1903) (Ann Whitefield).

75. G. LAKOFF, *supra* note 64, at 275-80.

76. See, e.g., *id.* at 330-34.

77. *Id.* at 40-46.

mothers.⁷⁸ Thus, the overall category of "mother" can be understood as a *radial* category—that is, a category defined by a central model extended by certain "conventionalized variants."⁷⁹

Because "prototypes act as *cognitive reference points* of various sorts and form the basis for inferences,"⁸⁰ they tend to play an important role in reasoning about categories. Sometimes, we may not distinguish the variants from the prototype of the idealized cognitive model. An extreme example is when a child thinks that the teacher or daycare worker is the mother of the other children. In that case, we have a *radical prototype effect* in which the prototype overshadows the rest of the category. Other times, we simply fail to perceive the variants as examples of the same category; some might not see any of the nonprototypical mothers as *real* mothers. In that case, we have a *reduction-to-prototype effect* in which the category is reduced to the central case of the model, resulting in the exclusion of nonprototypical cases. One consequence of these extreme prototype effects⁸¹ is that the variants may be left unexpressed by the linguistic conventions of the culture. Because they have no name, these variants become suppressed aspects of our social consciousness. Examples would be women who supply an egg to be planted in someone else's womb, legal guardians who do not provide nurturance (Auntie Mame), or transsexuals who had a child before their sex change operation.

B. "Standing" as Metaphor

To the reader unfamiliar with this new scholarship, this may seem either strange or far afield for an article about the law of standing. But by bringing to the surface the models and metaphors that animate standard legal thinking, we will be able to see and talk about both the history of standing and troublesome aspects of the doctrine in a new and enlightening way.

Metaphor is successful in structuring understanding—that is, metaphor is interactive and has *ontological* effect—because in organizing our

78. *Id.* at 74, 79-84. The idealized cognitive model discussed in the text reflects the traditional conception of "mother" in a patriarchal culture. This phenomenon illustrates the role that language plays in encoding and preserving social practices. See note 96 *infra*. The underlying cognitive model and the language will no doubt change as society moves towards real sexual equality and the gender roles within and without the family change.

In the meantime, these assumptions exert a powerful influence on legal thinking. Recently, Professor Minow discussed the effects such idealized cognitive models and unstated social assumptions have on the many questions of difference that the courts regularly confront. Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); see *id.* at 13-14, 44 (discussing Lakoff's description of "mother" as a radial category); *id.* at 31-57 (discussing the underlying assumptions in the law that obliterate difference).

79. See G. LAKOFF, *supra* note 64, at 84-85. A radial category is itself structured in terms of the preconceptual *center-periphery* schema. *Id.* at 287.

80. *Id.* at 45 (emphasis in original) (citing Rosch, *Cognitive Reference Points*, 7 COGNITIVE PSYCHOLOGY 532, 544-46 (1975)).

81. The terminology used in this paragraph was worked out in collaboration with George Lakoff.

view of the target domain it both highlights similarities with the source domain and suppresses and hides dissimilarities, which become a species of epistemic "noise."⁸² Metaphor can, thus, have as great a potential to mislead as to enlighten.

[W]hile metaphors can be abused in many different ways, the most serious and interesting danger is that a given metaphor or its allegorical extension may be transformed into myth. . . . [M]yth results when the mask, lens filter, or construing subject is mistaken for or equated with the subject construed. By suppressing those aspects of the principal subject which are not amenable to the subsidiary subject, or by allowing the subsidiary subject to exert an undetected influence on the principal subject, the difference between the two referents of the metaphorical sign focus tends to be lost altogether. The metaphor is turned into, not only a literal truth, but *the* literal truth about the principal subject in question.⁸³

The metaphor of "standing" is a myth that has become "*the* literal truth" and shaped—or misshaped—our thinking about adjudication. It has shaped our thinking about adjudication to conform to two separate "truths" embedded in the metaphor, and to think about them as one. The first is the "truth" of individualism: One stands alone; one stands up; one stands apart; one stands out; one stands head and shoulders above the crowd.

The metaphor of "standing" is thus the lens through which we view the question of who has rights and who may assert them. Through this lens we see only the disconnected individual in a fragmented society. But this perspective obscures the fact that individuals exist only as part of groups and larger communities of interest. And it obscures our ability to think about how best to protect and effectuate those interests in an interdependent world. In the metaphorically structured reality of

82. See M. BLACK, *supra* note 65, at 39-41. Donald Davidson rejects Black's interactive view of metaphor. "No doubt metaphors . . . do provide a kind of lens or lattice, as Black says, through which we view the relevant phenomena. The issue does not lie here but in the question of how the metaphor is related to what it makes us see." Davidson, *What Metaphors Mean*, 5 CRITICAL INQUIRY 31, 45 (Autumn 1978). Assessing the operation of metaphor from the standpoint of a more mainstream semantics, Davidson concludes that it must act outside the domain of objectivity and truth and, instead, in the domain of art and subjectivity. In his view, "there is no test for metaphor that does not call for taste." *Id.* at 31.

The work of Lakoff and Johnson, G. LAKOFF & M. JOHNSON, *supra* note 63; G. LAKOFF, *supra* note 64; M. JOHNSON, *supra* note 66, is inconsistent with this approach. (For a discussion of the relationship of Davidson's view to the work of Lakoff and Johnson, see M. JOHNSON, *supra* note 66, at 71-72.)

Lakoff and Johnson view human understanding as largely imaginative and metaphoric. The substantial explanatory power of their work is revealed, for example, in Black's use of the *filter* and *lens* metaphors to explain the concept of metaphor. See M. BLACK, *supra* note 67, at 39-41. Another example is cited by Black: "[A]nalogical procedure seems characteristic of much intellectual enterprise. There is a deal of wisdom in the popular locution for 'what is its nature?' namely: 'What's it like?'" M. BLACK, *supra* note 67, at 240 (quoting M.H. ABRAMS, *THE MIRROR AND THE LAMP* 32 (1953) (emphasis in original)). See also notes 676-730 and accompanying text.

83. Berggren, *The Use and Abuse of Metaphor, I*, 16 REV. METAPHYSICS: PHIL. Q. 236, 244-45 (1962-63) (emphasis in original).

the law of standing, there are no forests and no ecosystems. There are only trees; and only the trees have "standing."⁸⁴

The second "truth" embodied in the metaphor is that the individual must have a particular kind of relationship to the court whose power he or she is seeking to invoke: A court will only consider what a party has to say if he or she is standing (read: has "standing"). This view colors our thinking because it focuses us on the relationship between a party's status and a generalized conception of legal process.

Modern standing law defines this relationship between the individual and the process in terms of a particular cognitive model: the private rights model. We structure this model by means of two metaphors premised on the *source-path-goal* schema: a causal *source-path-goal* metaphor and a remedial *source-path-goal* metaphor. We identify the subject matter of a lawsuit through the elements of the causal schema.⁸⁵ The defendant's act is the *source*, the causal chain is the *path*, and the plaintiff's injury is the *goal*. The remedial *source-path-goal* metaphor is virtually a mirror image of the causal one: The individual's injury is the *source* of a process that has as its *goal* an order from the court redressing that injury; the *path* that connects them is the plaintiff's proof that the acts of the defendant caused the injury.⁸⁶ The mirror image quality of these two *source-path-goal* metaphors gives rise to the conception of damages and other forms of legal redress as designed "to put the plaintiff *back in the position he occupied*"⁸⁷ (or as near as possible) before occurrence of the legal wrong.

The model just described is the idealized cognitive model of a pri-

84. Cf. *Sierra Club v. Morton*, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting) (suggesting that inanimate objects should have standing, and citing Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972)).

85. We understand prototypical causation in terms of an agent that is the energy source, a subject that is the goal, and a transfer of energy from agent to subject (usually by a set of controlled physical actions) effecting a change. G. LAKOFF, *supra* note 64, at 54-55; G. LAKOFF & M. JOHNSON, *supra* note 63, at 70-72. Causation is thus grounded in the same kind of preconceptual *source-path-goal* experience as purposes.

Although typically absent from legal thinking, we frequently use metaphors of kinship to express concepts of causation, as in the adage: "Necessity is the mother of invention." For a discussion of the prevalence of kinship metaphors in literature, see M. TURNER, *DEATH IS THE MOTHER OF BEAUTY: MIND, METAPHOR, CRITICISM* (1987).

86. The source of the term "cause of action" lies in these *source-path-goal* metaphors. The plaintiff's proof of the causal *source-path-goal* metaphor is the cause of the court's action: the remedial order. Cf. J. VINING, *supra* note 27, at 15. The use of the *source-path-goal* metaphor is also reflected in our description of the judicial event as a *proceeding*. The "stuff" of such proceedings are legal *rights*: a word that derives from the Latin *rectus* or "straight." For more on the metaphoric implications of the notion of rights, see Winter, *supra* note 66.

87. *Sullivan v. O'Connor*, 363 Mass. 579, 583, 296 N.E.2d 183, 187 (1973) (Kaplan, J.) (emphasis added); W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 537 (7th ed. 1982) (Compensatory damages are intended to "restore [the plaintiff] to the position he occupied before the tort."); C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 560 (1935) ("damages for a tort should place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred, and . . . damages for breach of contract should place the plaintiff in the position he would be in if the contract had been fulfilled.").

vate cause of action.⁸⁸ The tripartite test of standing which focuses on injury, causation, and redressability is thus an extrapolation from the essential elements of the *source-path-goal* schema of the private rights model. This reductive legal test is a natural byproduct of the "standing" metaphor's ontological effect.

This analysis may seem reminiscent of the traditional view of the origins and functions of the law of standing that I referred to above.⁸⁹ What differentiates these perspectives is that the traditional view sees standing law as a rational deduction from objective historical practice. In contrast, I am suggesting that it is historically incorrect and, thus, can only be explained as a function of particular cognitive processes. My view is premised on the recognition that the use of a particular cognitive model has ontological effects in the real world. For example, the primacy of *purpose* or *intent* in the definition of widely disparate causes of action⁹⁰ is the result of a coherence prototype effect⁹¹ arising from the

88. I part company from Albert, *supra* note 12, and Currie, *supra* note 12, because their focus and reliance on the concept of "cause of action" merely recreates the private rights model. Albert, for example, notes that:

This doctrine of official accountability under the private law . . . worked well enough in the nineteenth century when litigation often involved resisting official impositions on one's person or property It worked less well in maintaining official accountability where claims to bonuses, pensions, and public lands were involved. And it worked very badly in accommodating nonstatutory review under the proliferation of spending and regulatory programs in the twentieth century.

Albert, *supra* note 12, at 434 (footnotes omitted). But when Professor Albert applies his "claim for relief" analysis to the problems of standing, he concludes that "[p]ublic . . . interests and claims are similar to private ones long vindicated in judicial proceedings . . ." *Id.* at 474-75. Having recreated the private rights model, he cannot explain why, as a practical matter, it has failed to accommodate these public claims. The answer is, in my view, that to stay within the private rights model of standing makes it difficult to escape the individualist premise of the metaphor. Thus, Professor Albert would treat most third-party standing cases as cases of derivative personal right. *Id.* at 465-68.

In contrast, Professors Chayes and Stewart recognize the public dimensions of the adjudicatory process that call for representational, Chayes, *supra* note 28, at 24-26, or surrogate, Stewart, *supra* note 5, at 1742-44, standing. Once we have freed standing doctrine from its mistaken historical and individualistic premises, as I do in the sections below, we will be able more fully to appreciate the value and necessity of the public dimensions of adjudication. See notes 590-784 *infra* and accompanying text.

89. See notes 27-29 *supra* and accompanying text.

90. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285 (1976) ("The basic conceptions governing legal liability [in the late nineteenth century] were 'intention' and 'fault.'"). See, e.g., *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (equal protection claim by women must show that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects"); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977) (employee who claims that he was dismissed because of his exercise of first amendment rights must show "that this conduct was a 'substantial factor'—or to put it in other words, a 'motivating factor' in the Board's decision not to rehire him") (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270-71 n.21 (1977)); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (requiring proof of scienter for claim of securities fraud under Rule 10b-5); *Washington v. Davis*, 426 U.S. 229 (1976) (proof of intent necessary for claim of racial discrimination under the equal protection clause); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) ("the finding of a violation normally turns on whether the discriminatory conduct was motivated by an anti union purpose."). See also *Asahi Metal Indus. Co. v. Superior Court*, — U.S. —, 107 S.Ct. 1026, 1033 (1987) (plurality opinion) (jurisdiction based on

overlap of related cognitive models. Our use of the causal *source-path-goal* metaphor to conceptualize the *subject matter* of a lawsuit overlaps with our use of *source-path-goal* metaphors to structure our view of both *purposes* and *causation*. A cause of action is defined in terms of the confluence or intersection of these *source-path-goal* metaphors. In defining causes of action, we unconsciously experience *purpose* as prototypical because it is coherent—that is, it fits the entailments of all three uses of the schema.

Thus, we do not ordinarily define a cause of action in terms of the experience of the plaintiff (the *source* of the remedial *source-path-goal* metaphor).⁹² Rather, we define it in terms of the purposive, causal aspects of defendant's behavior. This explains the Court's otherwise bizarre statement in *Daniels v. Williams* that "the word 'deprive' in the Due Process Clause connote[s] more than a negligent act. . . ."⁹³ The victim, of course, experiences precisely the same physical deprivation whatever the defendant's mental state. Similarly, a bystander who simply observes the events would see exactly the same physical actions with exactly the same consequences for the victim regardless of the defendant's state of mind. But the Court, whose view of the scenario is necessarily mediated by cognitive processes, perceives a different and narrower reality. The Court then asserts that its perception is the product of a conventional linguistic expression (that is, "the word . . .

minimum contacts requires "an action of the defendant purposefully directed toward the forum State." (emphasis in original)).

91. G. LAKOFF & M. JOHNSON, *supra* note 63, at 41-45, demonstrate how even inconsistent metaphors may be coherent because they share mutual entailments. (An entailment is an intuitive relationship such that, because *A* and *B* are connected, whenever we take *A* to be the case we also take *B* to be the case.) Mixed metaphors can be coherent when for metaphors *A* and *C*, *A* entails *B* and *C* also entails *B*. *Id.* at 87-96. For Lakoff's discussion of motivation on which my analysis of the coherence effect is based, see G. LAKOFF, *supra* note 64, at 346 ("Motivation is a central phenomenon in cognition. The reason is this: *It is easier to learn something that is motivated than something that is arbitrary.* It is also easier to *remember* and *use* motivated knowledge than arbitrary knowledge." (emphasis in original)).

In one sense, all prototype effects are coherence effects. A prototype is chosen as a best example of a category precisely because it fits (i.e., is coherent with) the particular idealized cognitive model. I use the term coherence effect, however, to highlight the ontological version of this cognitive phenomenon that can be observed in more complex conceptual settings, as in the case of converging cognitive models and radial categories involving diverse and inconsistent schemata. See notes 205-245 *infra* and accompanying text.

92. See *Washington v. Davis*, 426 U.S. at 245 ("we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail. . . ."). *But cf.* *Rylands v. Fletcher*, 1868, L.R., 3 H.L. 330, 338; D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON TORTS* 610 (5th ed. 1984) (discussing strict liability in tort).

93. 474 U.S. 327, 330, (1986). A recent dissent by Justice O'Connor provides an interesting example of the cognitive overlap of the *source-path-goal* metaphors for intent and causation. In *City of Springfield v. Kibbe*, — U.S. —, 107 S. Ct. 1114 (1987), Justice O'Connor invoked this coherence effect in arguing that "the law has been willing to trace more distant causation when there is a cognitive component to the defendant's fault" *Id.* at 1121 (O'Connor, White, Powell, JJ., and Burger, C.J., dissenting).

connote[s]").⁹⁴

There are analogous narrowing effects in the context of standing. When the metaphor of "standing" becomes the conduit of certain "truths," it structures our perception of the boundaries of the legal world in a way that is distorting.⁹⁵ The "standing" metaphor affects both how we perceive our past and what we receive from it in terms of available legal tools.⁹⁶ Viewed through the lens of "standing," adjudication was always about the settlement of private disputes; questions of public values are implicated only incidentally. But this was not always the case. At the time of the Framers, non-individualistic, group models of adjudication, like mandamus and informers' actions, had been designed to deal with public issues.⁹⁷ These public rights models were structured in terms of other schemata very much at odds with the modern conceptualization of standing. The "standing" metaphor, therefore, deprives us of a knowledge of our own history. As a result, we lose an understanding of what that history could say to us about our possibilities.

The "standing" metaphor also interferes with our practical ability to face the underlying substantive issues that confront us. When we focus in standing cases on what the metaphor makes us see, we miss some of the suppressed aspects of our reality. The law of standing is, thus, an example of the obfuscatory power of metaphor.⁹⁸ We focus on issues such as the role of prudence in standing law or the relationship between standing and the separation of powers, while other real and important issues in the cases remain hidden and largely unexamined.⁹⁹ In

94. See text accompanying note 93 *supra*.

95. In focusing on the "standing" metaphor, we see only what the metaphor brings us to see. "[I]t is so hard to decide, even in the case of the simplest metaphors, exactly what the content is supposed to be. The reason is . . . that we imagine there is a content to be captured when all the while we are in fact focusing on what the metaphor makes us notice." Davidson, *supra*, note 82, at 46.

96. See P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967): [T]he sum of linguistic objectifications pertaining to my occupation constitutes [a] . . . semantic field, which meaningfully orders . . . the routine events I encounter in my daily work. Within the semantic fields thus built up it is possible for . . . historical experience to be objectified, retained and accumulated. The accumulation, of course, is selective, with the semantic fields determining what will be retained and what "forgotten" of the total experience of . . . the society.

Id. at 41.

97. See text accompanying notes 121-172, 184-198 & 218-245 *infra*.

98. Cf. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 490 (1982) (Brennan, J. dissenting) ("[T]his accounts for the phenomenon of opinions, such as the one today, that tend merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law."); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Brennan, J., concurring in the judgment) (referring to "[t]he Court's further obfuscation of the law of standing").

99. Professor Stewart, for example, provides a good explanation of how the zone of interest analysis in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 190 (1970), distorted the Court's analysis of the merits. Stewart, *supra* note 5, at 1732-33. In Section V, I dissect several major standing cases to demonstrate that this suppression of the merits entailments of standing determinations is an inevitable consequence of standing doctrine.

a case like *Lyons*, the substantive issue left unexamined may be a matter of life or death.

In every standing case, the unexamined issues concern the nature of the right that society is being asked to recognize and the shape of the correlative remedy that it is willing to bestow. They concern the role of law in shaping a self-governing society. Viewed from this perspective, the question "who may sue?" is really a question of "what are rights and how may they best be effectuated?"¹⁰⁰—a question at the heart of law. Standing obscures consideration and analysis of the underlying questions of rights and remedies, of policies and values, by imposing a single, unidimensional conceptual ordering of the process of adjudication. But, these questions in fact present disparate policy choices that a democratic society must make across an entire spectrum of vastly different problems of social organization.

Analytically, then, standing doctrine is neither a series of rules about when a court will reach the merits nor a shill for a decision on the merits. It is a determination that, regardless of the blinders we employ, necessarily entails considerations that go to the merits. It is not so much a question of the *who* or the *when*,¹⁰¹ as it is inevitably a question of the *what*. Standing is a decision about the scope of and the policies governing rights and remedies in the underlying subject matter area. Its shape can therefore change from area to area: The question "who may sue?" will be answered differently depending on what they wish to sue about. It may be answered differently in a first amendment case than in an antitrust or tax case. In each, it is a question about how far the benefits of the particular law at issue extend, about the ability of those affected to assert their interests, and about what we gain and what

100. This insight was prompted by two observations of Professor Wechsler's.

More precisely stated, the question of standing . . . is the question whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons, to warrant giving him the relief, if he establishes the illegality alleged—and, by the same token, to warrant recognizing him as entitled to invoke the court's decision on the issue of illegality. *So viewed, the question becomes inextricably bound up with the whole law of rights and remedies, does it not?*

P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 156 (emphasis added). (This paragraph also appears in essentially the same form in the original edition, H. HART & H. WECHSLER, *supra* note 21, at 174 (1953)). Subsequently, Professor Wechsler observed that:

Only when the standing law, decisional or statutory, provides a remedy to vindicate the interest that demands protection against infringement of the kind that is alleged, a law of remedies that ordinarily at least is framed in reference to rights and wrongs in general, do the courts have any business asking what the Constitution may require or forbid . . .

Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959). Professor Wechsler makes certain assumptions that, despite my deep personal respect for him, I cannot share. He assumes a set of principles governing standing—"a law of remedies that ordinarily at least is framed in reference to rights and wrongs in general"—generalizable across subject matter areas in a "neutral" way. *Id.*

101. See Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363 (1973).

we lose when we encourage perception of and action upon shared interests. It is these important questions of policies and values that are obscured by the metaphoric individualist and process oriented approach to standing.

A determination of who has standing, moreover, is a determination about the way society is shaped and structured. In structuring and ordering the universe of legal relationships, standing law inevitably orders the way rights and other legal interests may be distributed. When we persist in seeing only the individual as a cognizable social unit, we limit also the recognizable interests that are available for our consideration either in adjudication or legislation. Thus, for example, there is no meaningful legal interest in a public report of Central Intelligence Agency appropriations because no individual can document a concrete injury as a result of the lack of knowledge about these appropriations.¹⁰² But once a court has said that the citizen has suffered no injury, it will be difficult for the rest of society to see why it should be concerned about the issue at all. If no one is harmed, there seems little reason to devote time and energy in the legislative process to deal with what appears to be a nonproblem. Standing law thus becomes a sort of "harmless error" doctrine for the political process. In this way too, our perception of the *who* affects our understanding of the *what*.¹⁰³

The question of standing, thus, is also a question about the nature of our relationships in society and our ability to sustain our community. It divides us from one another by reinforcing our individual and conflicting self-interests and by submerging our common stake in the community. It alienates us so that we do not control our government or, ultimately, our fate.

I have stated my thesis. But the test of a theory is in its application. I will develop these ideas in the nitty-gritty of legal doctrine and real cases. We begin with our history.

102. *United States v. Richardson*, 418 U.S. 166 (1974). Cf. Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829, 1847-48 (1986) (reviewing R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)) ("We recognize what rights we have simply by seeing what remedies we are entitled to. Legal thought distorts our perception because we . . . come to believe there can be no problem, no significant interest to vindicate unless we can imagine how a legal right might vindicate it.")

103. Professor Vining argues that our shared understanding of the relevant social interests affects our ability to recognize the legal identity of the individual as a proper claimant in court—that is, that the *what* motivates the *who*. He gives as an example a litigant who favors an entirely blue landscape suing to prevent the construction of a nearby red house. In Vining's view the court would not reach the merits because of

the absence, to the court's eyes, of a "you" to be harmed; and what prevents the court from seeing a "you," a person, is the absence of any public value to define a class for which the individual voice might speak. To say "I am an all-blue lover . . ." does not have meaning until the love of blue . . . becomes . . . widely enough shared to permit us to recognize it as a social role.

J. VINING, *supra* note 27, at 61. It is unclear, however, why Vining thinks a court would dismiss for lack of standing and not on the merits for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6).

III. THE ORIGINS OF THE PUBLIC RIGHTS MODEL

These . . . are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect.¹⁰⁴

A. *Of Framers and Relators, Informers and the Forms of Action*

A famous Holmesian dictum has it that "a page of history is worth a volume of logic."¹⁰⁵ The history of standing suggests, however, that history without logic can be easily mislaid. In this section, we will rediscover that history and reconstruct its logic.

The modern doctrine of standing often is justified as grounded in a historical understanding of the language of article III respecting "case[s] or controvers[ies]" or "the judicial Power of the United States"¹⁰⁶ Justice Frankfurter argued that the provisions of article III:

mean that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.¹⁰⁷

Recent decisions continue to reflect this syllogism.¹⁰⁸ Yet, the English, colonial, and post-constitutional practices suggest that the contemporaneous understanding of the "case or controversy" clause considered as

104. SIR WALTER SCOTT, *GUY MANNERING* 249 (1815).

105. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

106. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1950) (Frankfurter, J., concurring) (quoting U.S. CONST., art. III).

107. *McGrath*, 341 U.S. at 150.

108. See, e.g., Justice Harlan's opinion in *Glidden Co. v. Zdanok*, 370 U.S. 530, 563 (1962) (plurality opinion) (quoting *United Steelworkers v. United States*, 361 U.S. 39, 44, 60 (1959) (Frankfurter, J., concurring)); see also *Flast v. Cohen*, 392 U.S. 83, 95-97 (1968) ("Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."); cf. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring) (Congress may not assign to non-article III judges state law actions for "damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."). But see *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982) ("The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process."). Note, however, that the Court's statement in *Valley Forge* reflects the degree to which current standing law is defined in opposition to the traditional syllogism.

In *Glidden*, Justice Harlan noted that suits against the government fell within that tradition:

Suits against the English sovereign by petition of liberate, *monstrans de droit*, and other forms of action designed to gain redress against unlawful action of the Crown had been developed over several centuries and were well-established before the Revolution. . . . Similar provisions for judicial remedies against themselves were made by the American States immediately after the Revolution.

Glidden, 370 U.S. at 563.

justiciable actions concerning general governmental unlawfulness, even in the absence of injury to any specific person, and even when prosecuted by any common citizen with information about the alleged illegality. In other words, there was a public rights model structured in terms of alternative schemata.

At the time of the Framers, the concept of justiciability did not embrace notions of standing as we think about them today. It was necessary that a legal question "assume such a form that the judicial power is capable of acting on it."¹⁰⁹ But the Court did not express that concept in terms of "standing" or the essentials of a private cause of action. Rather, it expressed it in formalistic terms, in what I shall call the *sylogism of the forms*: "[Judicial] power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case . . ." ¹¹⁰ This understanding of justiciability predominated until the middle of the twentieth century, from Marshall¹¹¹ to Story¹¹² to Field¹¹³ to Day¹¹⁴ to Taft¹¹⁵ to Brandeis.¹¹⁶ What a court looked for was whether the matter before it fit one of the recognized forms of action.

This justiciability standard reflected the mediating influence of the common law forms of actions on the procedure and substance of private rights. Law was that body of rules that defined the rights of citizens and, concurrently and coextensively, provided a remedy to the injured party. The forms of action stood as the gatekeepers of this system. Thus Blackstone could speak simultaneously of "the several inju-

109. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) (Marshall, C.J.); *accord* *Weston v. Charleston*, 27 U.S. (2 Pet.) 449 (1829) (Marshall, C.J.) (holding that appeal from denial of writ of prohibition to restrain an allegedly unconstitutional tax was a "case" or "suit" and therefore within the Court's jurisdiction).

110. *Osborn*, 22 U.S. at 819.

111. *Id.*

112. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1640 (1833).

113. In *In re Pacific Ry. Comm'n*, 32 F. 241 (C.C.N.D. Cal. 1887), Justice Field summarized the law of justiciability—that is, the meaning of "cases or controversies"—in precisely these terms, quoting from the extrajudicial writings of Marshall and Story as well as from the cases. *Id.* at 255-56.

114. *Muskat v. United States*, 219 U.S. 346, 356-58 (1911). Justice Day's opinion for the Court relied on *Pacific Ry. Comm'n*, and on Marshall's opinions in *Osborn* and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

115. *Keller v. Potomac Elec. Co.*, 261 U.S. 428, 444 (1923) ("[T]he jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them . . .").

116. *Tutun v. United States*, 270 U.S. 568 (1926) (naturalization petition). Justice Brandeis emphasized that it is the *form*, and not the *substance*, that determines [w]hether a proceeding which results in a grant is a judicial one. [It] does not depend on the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. . . . Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status.

Id. at 576-77.

ries cognizable by the courts of common law, with the respective remedies applicable to each particular injury,"¹¹⁷ and of the principle "that where there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded."¹¹⁸ Based upon these principles, Chief Justice Marshall could draw the more extensive conclusion that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."¹¹⁹ Under the eighteenth century common law, rights were synonymous with remedies,¹²⁰ remedies were synonymous with the forms of action, and, by algebraic logic, the forms of action were synonymous with the concept of redressable (that is, cognizable) injuries. In this traditional doctrine, one can see reflected the mirror image quality of the remedial and causal metaphors of the private rights model.

One might infer from this that the practice at the time of the Framers was consistent with the private rights model of the "case and controversy" requirement and modern standing law's focus on "injury-in-fact." Although the common law forms of action dominated the legal process and jurisprudential thought of the time, they did not exhaust it.¹²¹ There were other matters of "such a form that the judicial power is capable of acting on" them.¹²² Characterized neither by the private rights model of the seven common law forms of action nor by the "injury-in-fact" paradigm of modern standing doctrine, these matters took forms astonishingly similar to the "standingless" public action or "private attorney general" model that modern standing law is designed to thwart.

Prior to the Revolution, other writs as well as equity practices brought before the courts cases in which the plaintiff had no personal interest or "injury-in-fact." Under the English practice, "standingless" suits against illegal governmental action could be brought via the prerogative writs of mandamus, prohibition, and certiorari issued by the King's Bench.¹²³ The jurisdiction of King's Bench to superintend local governmental authorities by means of these writs developed at the

117. 3 W. BLACKSTONE, COMMENTARIES *115. See also *id.* at *109 ("For it is the settled and invariable principle in the laws of England, that every right when withheld must have a remedy and, every injury its proper redress.")

118. *Id.* at *23 (emphasis in original).

119. *Marbury v. Madison*, 5 U.S. (1 Cranch) 87, 102 (1803). Marshall drew this dictum directly from the passages in Blackstone quoted in the text.

120. See *Bivens v. Six Unknown Agents*, 403 U.S. 388, 400 n.3 (1971) (Harlan, J., concurring) (citing *Marbury* and referring to the Framers' "contemporary modes of jurisprudential thought which appeared to link 'rights' and 'remedies' in a 1:1 correlation . . .").

121. This dominance was so marked that Blackstone referred to "such injuries or encroachments as may occur between the crown and the subject" as cases in which the remedy "is generally of a peculiar and eccentric nature." 3 W. BLACKSTONE, COMMENTARIES *115-16.

122. *Osborn v. United States Bank*, 22 U.S. 738, 819 (1824).

123. Also in this category was the writ of *quo warranto*. See Berger, *supra* note 31, at 823. On the "justiciability" in early American law of writs of prohibition, see *Weston v. Charleston*, 27 U.S. (2 Pet.) 449 (1829), discussed in note 109 *supra*.

close of the seventeenth century.¹²⁴

The very availability of these writs as means to control governmental action belies the private rights model; these procedural devices were designed to restrain unlawful or abusive action by lower courts or public agencies, especially actions that were beyond their jurisdiction.¹²⁵ These writs fit easily within the jurisprudential thought of the time.¹²⁶ As Blackstone explained it, mandamus and prohibition redressed the legal injuries of "refusal or neglect of justice"¹²⁷ and "encroachment of jurisdiction,"¹²⁸ respectively. Neither of these concepts entails a view in which only individuals can be rights-holders. To the contrary, "neglect of justice" and "encroachment of jurisdiction" are essentially communal concerns.¹²⁹ And, if Blackstone's definitions of these "injuries" sound strange to modern ears, it is because today's jurisprudence treats "injury-in-fact" in literalist terms. But the common law usage of the term "injury" was plainly metaphoric.¹³⁰ The term "injury" referred to "any infringement of the rights of another . . . for which an action lies at law."¹³¹ Legal injuries were conceptualized in terms of the experience of physical injury, but the former was not confused with the latter. It is only in this sense that there could be a notion of *damnum absque injuria*—that is, damage without cognizable legal injury.

Unlike the common law writs, the prerogative writs were not structured in terms of the *source-path-goal* schema. Rather, the subject matter of the prerogative writs was understood in terms of the *part-whole* schema: The King's Bench acted on behalf of the King himself (the

124. S.A. DE SMITH, *supra* note 34, at 337-38; *Rex v. Glamorganshire Inhabitants*, 1 Ld.Raym. 580 (1700) (The Cardiff Bridge case). "Local government bore a judicial aspect It was assumed that the writs of certiorari and prohibition, by which [local governments] were controlled in their capacity as courts of summary jurisdiction, were equally appropriate devices for superintending the exercise of their multifarious governmental functions." S.A. DE SMITH, *supra* note 34, at 337-38.

125. By contrast, the classic rhetoric of standing doctrine denies access to plaintiffs who claim a "right, possessed by every citizen, to require that the Government be administered according to law . . ." *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922). *Cf.* *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (not sufficient that plaintiff "suffers in some indefinite way in common with people generally"); *Baker v. Carr*, 369 U.S. 186, 286-87 (1962) (Frankfurter, J., dissenting) ("the policies underlying the requirement of 'standing' [are] that the litigant who would challenge official action must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government—a complaint that the political institutions are awry."); *United States v. Richardson*, 418 U.S. 166, 179 (1974) ("[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of . . . the political process.").

126. *See* 3 W. BLACKSTONE, COMMENTARIES *109.

127. *Id.* The original writ of mandamus was a means by which the King regulated or recovered certain of his tenancies. *See* T. BLOUNT, NOMO-LEXICON: A LAW-DICTIONARY (1670) (facsimile ed. 1970).

128. 3 W. BLACKSTONE, COMMENTARIES *111.

129. *See, e.g., Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 620 (1838) ("mandamus . . . is a prerogative writ, and [is] grantable when the public justice of the state is concerned").

130. *See* notes 499-589 *infra* and accompanying text.

131. *Cf.* 1 W. JOWITT, THE DICTIONARY OF ENGLISH LAW 977 (2d ed. 1977).

whole of the government) to superintend lower organs (the *parts*) rather as the head rules the body.¹³² Indeed, exactly this metaphor was used by the courts, which described mandamus as "one of the flowers of the crown"¹³³

The private rights model entails two *source-path-goal* schemata, one to structure the subject matter of and another to structure the adjudicative process invoked by the model. Similarly, the public rights model embodied in the prerogative writs entailed a second use of the *part-whole* schema to structure the adjudicative process. Any *part* (that is, citizen) could invoke the power of the *whole* to secure observance of the law; any *part* could *stand for* the *whole*, a legal metonymy. This model therefore required neither injury nor "standing." At common law, these writs were available by suit of a stranger.¹³⁴ The citizen-plaintiff's lack of a direct, personal interest did not require that the court ignore the plaintiff's petition. Rather, because these writs invoked the discretionary authority of the royal prerogative, the court retained the power to adjust or withhold the remedy.¹³⁵

The English relator practice, which applied also in equity, provided a formalized procedure for this *part-whole* metonymy. On issues of public rights or public duties, where the English attorney general could sue on behalf of the Crown, any person might seek one of the prerogative writs or bring a suit for an injunction in the name of the attorney general. The litigant, or relator, needed only to obtain the *fiat* or permission of the attorney general to use his name; such permission was

132. See G. LAKOFF, *supra* note 64, at 273-74 (discussing the caste system in India) ("Families (and other social organizations) are understood as wholes with parts. . . . [S]ociety is conceived of as a body (the whole) with . . . parts . . . structured metaphorically according to the configuration of the body. . . . The general concept of structure itself is a metaphorical projection of the CONFIGURATION aspect of PART-WHOLE structure.") A common example of a metaphor motivated by the use of this cognitive model for society is *the body politic*. See *Munn v. Illinois*, 94 U.S. 113, 124 (1877) (" 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' ").

133. *Kendall*, 37 U.S. at 620.

134. "Stranger" is a term of art: "[I]n Law it hath a special signification for him that is not privy, or party to an Act" See T. BLOUNT, *supra* note 127. In contrast, neither the terms "standing" nor "*locus standi*" appear in Blount's seventeenth century legal dictionary.

135. S.A. DE SMITH, *supra* note 34, at 367-70. According to de Smith, the nineteenth century English practice varied with the nature of the stranger's claim. Some claims brought by strangers "obliged [the court] to allow the application," *id.* at 367 (citing *Buggin v. Bennett* (1767) 4 Burr. 2037), others were refused "unless he [the stranger] makes out a strong case," *id.* (citing *Foster v. Foster & Berridge* (1863) 32 L.J.Q.B. 312, 314). On this point, de Smith characterizes the nineteenth century English cases as "a fog that is not easily penetrated." *Id.*

Some of this confusion may be explained by the intermediate nature of the public rights model embodied in these prerogative writs. See notes 205-245 *infra* and accompanying text. In any event, it is clear that, in the United States, these writs were treated as quasi-equitable and therefore involving discretion. See *Union Pac. R.R. v. Hall*, 91 U.S. 343, 356 (1875); *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359-60 (1933). In *Hall*, the Supreme Court allowed a mandamus petition despite the argument that the petitioners had failed to show any personal interest. See notes 168-172 *infra* and accompanying text.

granted as a matter of course. Once permission was obtained, the relator prosecuted the action at his or her own expense and without direction from the attorney general.¹³⁶ The attorney general, however, was not a necessary party—that is, his *fiat* was not needed—“where the interference with the public right is at the same time an interference with some private right or is a breach of some statutory provision for the protection of the plaintiff.”¹³⁷ This latter rule demonstrates that the relator practice clearly contemplated actions by those without a direct stake in the controversy. Thus, as a practical and historical matter, the relator’s action extended the availability of judicial remedies to persons not immediately affected by the challenged action by allowing any *part* to invoke the name and the power of the *whole* and represent its interests before the courts.

These English versions of the public rights model were familiar to the Framers as “the business of the Colonial courts and the courts of Westminster”¹³⁸ *Hayburn’s Case*¹³⁹ illustrates that, although the specific procedural form of the relators’ practice did not survive in America, the acceptability of the *part-whole* schema of the public rights model did survive.

In *Hayburn’s Case*, Attorney General Randolph filed in the Supreme Court a petition for a writ of mandamus to the federal circuit court for Pennsylvania to enforce a congressional statute providing disability pensions to Revolutionary War veterans.¹⁴⁰ The statute empowered the federal circuit courts (which were the superior trial courts) to serve as commissions, determining the amount of the pensions and certifying those determinations to the secretary of war. The secretary of war, however, could disallow a pension and refer the case to Congress. The circuit courts refused to accept these cases.

The Attorney General first sought mandamus in his own behalf, *ex officio*, to enforce the statutory scheme. He argued that section 35 of the Judiciary Act of 1789¹⁴¹ authorized the attorney general to act in this manner.¹⁴² But, only a few months before the argument in *Hayburn’s Case*, Congress had rejected an amendment to the Process Act of 1792,¹⁴³ proposed by Randolph, that would have explicitly authorized such actions.¹⁴⁴ A divided Court denied the *ex officio* motion.¹⁴⁵ Ray-

136. 37 HALSBURY’S LAWS OF ENGLAND ¶¶ 230-231 (4th ed. 1982).

137. *Id.* at ¶ 231 (footnotes omitted).

138. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1950) (Frankfurter, J., concurring).

139. 2 U.S. (2 Dall.) 409 (1792).

140. Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 243 (repealed 1793).

141. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92.

142. Randolph premised his argument on the English practice, which had also characterized procedure in Virginia where he had also served as attorney general. J. GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 563-64 (1971).

143. Process Act of 1792, ch. 36, 1 Stat. 275.

144. J. GOEBEL, JR., *supra* note 142, at 563 & n.49.

145. *Hayburn’s Case*, 2 U.S. at 409.

burn's response was to seek mandamus on behalf of Hayburn, an interested party.¹⁴⁶

A majority of the members of the Court, while sitting in the circuit courts, had expressed the view that the exercise of "judicial power" contemplated by article III was inconsistent with a power to revise the judgment reserved to either the legislature or an executive officer.¹⁴⁷ *Hayburn's Case* was rendered moot by an amendment to the pension statute; today it stands for the principle expressed by the Justices while sitting in the circuit courts below. But the only issue the Court *actually* considered in *Hayburn's Case* was whether the attorney general had the power to sue *ex officio*. The Court's deadlock on this issue eliminated the availability of the English relator action: The relator could hardly invoke the "standing" of the attorney general if the attorney general had none.

But *Hayburn's Case* did not affect the viability of adjudicatory models premised on the *part-whole* schema—that is, it did not reflect a rejection of the English practice treating such cases as justiciable. Rather, the concern in *Hayburn's Case* was with the proper definition of the *whole* in a constitutional system of separated powers. The English practice upon which Randolph relied presupposed a sovereign with plenary power to enforce its laws through its attorney general and its courts. It was this premise that the Court did not accept. The executive was no longer the "head" of the body politic, and the federal courts, unlike the King's Bench, could no longer assume that they were free to speak for the *whole*. Rather, both organs were limited to the exercise of powers given either by the Constitution or, within constitutional limits, by the Congress.¹⁴⁸ Congress was the branch most representative of the American sovereign—the people. It was, therefore, the closest American equivalent to society's "head."

Different institutional premises, rather than doubts about justiciability, led to the demise of the relator form of action in the federal courts. Indeed, *Hayburn's Case* affirmed another adjudicatory model premised on the *part-whole* schema. That is, if the Court had intended to require that plaintiffs must have personal injuries in order to estab-

146. *Id.* The action became moot after Congress passed a new pension bill taking the circuit court out of the process. *Id.* at 409-10. Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.

147. *Hayburn's Case* 2 U.S. at 410 n.a. This view was expressed in an opinion and two letters written by the Justices. These documents are described in a footnote to *Hayburn's Case*. *Hayburn's Case* is further discussed in *United States v. Ferreira*, 54 U.S. (13 How.) 39, 49-50 (1851).

148. Today, the "standing" of the attorney general to enforce the law is recognized when conferred by statute. *See, e.g.*, 42 U.S.C. §§ 1971, 1997, 2000(1-5) (1982). *Cf.* *United States v. Philadelphia*, 644 F.2d 187 (3rd Cir. 1980) (absent statutory authorization, attorney general has no authority to bring suit to prevent pattern and practice of constitutional violations by police). At the turn of the century, however, the Court recognized the attorney general's "standing." *See In re Debs*, 158 U.S. 564 (1895); *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425-26 (1925) (Holmes, J.). *Debs* is discussed below in text accompanying notes 270-273 *infra*.

lish a "case or controversy," then it would have dismissed Randolph's *ex officio* action at the outset for want of justiciability. Similarly, it would have held the case unjusticiable even after Randolph declared that he was suing on behalf of another.

The Court did not dismiss Randolph's actions for lack of justiciability because it did not repudiate the essence of the public rights model. Today we would see Randolph's actions as an instance of *jus tertii*—raising the rights of third parties—or what I will call a *representational model*. The *Hayburn* Court accepted Randolph's invocation of a representational model, premised on a *part-whole* structure, that did not require allegation of specific, personal injury: Randolph, a representative of *the whole*, was allowed to proceed with the mandamus petition on behalf of *Hayburn*, a *part*.¹⁴⁹

Although *Hayburn's Case* undermined the institutional premises of the relator action, American courts continued to entertain similar suits premised on a *part-whole* schema. Those courts familiar with the English precedents invoked them to allow citizens without particularized injury or interest to question governmental authority. In *State v. Justices of Middlesex*,¹⁵⁰ the New Jersey Supreme Court invoked the theory that jurisdiction lay to redress what Blackstone called "neglect of justice"¹⁵¹ to hold that certiorari was available to challenge the conduct of an election. The court found support for its conclusion in the writings of the English jurists, including Coke¹⁵² and Hawkins, who observed that "whatever crime is manifestly against the publick good, it comes within the conusance of this court [the King's Bench], *though it do not directly injure any particular person . . .*"¹⁵³ The New Jersey court indicated that its discretionary power of certiorari "is sometimes exercised before an injury actually accrues to any one, by issuing a *mandamus . . .*"¹⁵⁴ The Court justified this power in communitarian terms:

Where the injury is extensive, and involves any considerable portion of the community, it is better to take up the business in gross The reason is [that] the power is necessary for the preservation of the peace of the community;—and with what colour can it be pretended that this court, whose duty it emphatically is to take care that justice is done to

149. Compare the characterization in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 90: "[T]he Attorney General reached in his pocket and pulled out Mr. Hayburn *as a client*. . . . Who did the Attorney General think were the parties before then?" *Id.* (emphasis added).

150. 1 N.J.L. (1 Coke) 244 (1794). The suitors were "some of the Inhabitants of ———." *Id.* at 245 (blank in original). See also Jaffe, *supra* note 5, at 1275-76.

151. See note 127 *supra*.

152. According to Coke, the jurisdiction of the King's Bench extended to "errors and misdemeanors extrajudicial, tending to the breach of the peace or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment . . ." *Middlesex*, 1 N.J.L. at 249 (quoting 4 COKE'S INSTITUTES *71).

153. *Id.* at 250 (quoting 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 7 (I. Curwood 8th ed. 1824)) (emphasis added).

154. *Id.*

every one, has no power to protect the interests, and redress the wrongs of an entire county.¹⁵⁵

Although *Middlesex* was apparently reversed on appeal "before *governor and council*,"¹⁵⁶ its statement of the received common law concerning the prerogative writs nevertheless reflected a great number of the American mandamus decisions. In *County Commissioners v. People ex rel. Metz*,¹⁵⁷ the Illinois Supreme Court rejected, in language similar to, but directly contradicting, modern standing doctrine,¹⁵⁸ the argument that the plaintiff had not shown sufficient interest to maintain the suit.

The question, who shall be the relator . . . depends upon the object to be attained by the writ. Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced, must become the relator A stranger is not permitted officiously to interfere, and sue out a mandamus in a matter of private concern. *But where the object is the enforcement of a public right, the People are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced. . . .* No doubt is entertained of the right of Metz to become the relator, and pursue this remedy.[sic] The object of the suit is not a matter of individual interest, but of public concern. Any citizen of the county, especially of the locality interested in having the improvement prosecuted, could become the relator, and obtain the mandamus.¹⁵⁹

Other courts emphasized that citizens have a *duty*, as well as a right, to take legal action when a public right is violated or a public grievance committed.¹⁶⁰

Even without the formal procedural structure of the English relator practice, these American decisions continued to employ the *part-whole* structure of the common law mandamus action. *Metz* thus justified the invocation of the court's jurisdiction by a citizen interested in having the laws executed on the ground that there is a live controversy with the

155. *Id.* at 252.

156. *Id.* at 255 (reporter's note).

157. 11 Ill. 202 (1849). This case involved state appropriations to a county to pay for improvements in a navigable creek. Mr. Metz was appointed commissioner to oversee the work. He drew three of four installments from the appropriated funds. The county commissioners refused to authorize the final payment, deciding to use that money for other purposes pursuant to a later statute. Mr. Metz sued to require payment of the fourth installment to him for disbursement. In the terms of the modern standing doctrine, Mr. Metz's standing is that of a governmental officer attempting to execute the duties of his or her office. *See, e.g.*, *Board of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968) (dictum) (standing not challenged by appellees). For criticism of the Court's recognition of standing in *Allen*, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 182-83.

158. *See* note 125 *supra* for the contrasting rhetoric of modern standing doctrine.

159. *Metz*, 11 Ill. at 207-08 (emphasis added). *Accord* *Union Pac. R.R. v. Hall*, 91 U.S. 343, 355 (1875). The common law practice continued in the state courts for some time. *See, e.g.*, *Bancroft v. Building Comm'r*, 257 Mass. 82, 84-85, 153 N.E. 319 (1926).

160. *See, e.g.*, *People ex rel. Case v. Collins*, 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837) (mandamus); *People ex rel. Blacksmith v. Tracy*, 1 Denio. 617, 618 (N.Y. Sup. Ct. 1845) (general rule unless statute provides otherwise).

people who are regarded as the *real party*.¹⁶¹ There was no requirement of injury-in-fact or typicality as with the representation of the interests of a class in the modern class action. Given the *part-whole* structure of the relationship between the parties, I will refer to this original "standingless" model as a *constituent model*.¹⁶²

State practice was far from uniform. By the middle of the nineteenth century, many courts read the English cases as requiring the relator to allege a private right.¹⁶³ These courts concluded that, in cases involving public rights, only state officers such as the attorney general or district attorney could sue.¹⁶⁴ Elsewhere, courts and litigants borrowed the form of the relator action,¹⁶⁵ but altered the substance.¹⁶⁶ These cases reflect certain legal and historical misconceptions,¹⁶⁷ and,

161. *Metz*, 11 Ill. at 162.

162. The difference between the representational and constituent models is in the relationship between the litigant and the affected parties. In the representational model, the litigant sues directly *on behalf of* an affected party. In the constituent model, the litigant *is*, as a citizen, an affected party. In this latter context "affected" does not connote concrete injury or injury-in-fact as it does in modern standing doctrine.

163. In *People ex rel. Drake v. Regents of the Univ. of Mich.*, 4 Mich. 98 (1856), the Michigan Supreme Court declined to follow the New York and Illinois mandamus practice. In the view of the Michigan court, these state courts had deviated from the practice of the English courts, which "molded," "formed," and "transmitted" the common law. *Id.* at 103. See also *Mississippi & Mo. R.R. v. Ward*, 67 U.S. (2 Black) 485, 492 (1863) (injunctive action "to abate a public nuisance" described as similar to the former English action "information in Chancery," in which a "private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard"). *But cf.* notes 134-137 *supra* and accompanying text. The account of English law given in the *Ward* case was directly contradicted by the Supreme Court in *Union Pacific R.R. v. Hall*, 91 U.S. 343, 355 (1875) (discussing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (*The Wheeling Bridge Case II*)).

164. *Heffner v. Commonwealth ex rel. Kline*, 28 Pa. 108, 112 (1857); *People ex rel. Drake v. Regents of the Univ. of Mich.*, 4 Mich. at 103 ("this is a case in which the action of the attorney-general would have been proper and necessary"); *Sanger v. Commissioners of Kennebec*, 25 Me. 291, 296 (1845); *In re Wellington*, 33 Mass. (16 Pick.) 87, 105 (1834) (stating general rule); *Cleary v. Deliesseline*, 12 S.C.L. (1 McCord) 35 (1821); see also *State v. Deliesseline*, 12 S.C.L. (1 McCord) 52 (1821) (observing that cases brought by the attorney general on information are of two kinds: *ex-officio* and those filed at the request of an individual).

165. In mandamus cases, private parties asserting their own rights continued the English form, bringing suit in the name of the United States, presumably on the theory that the individual beneficiary was also vindicating the public's right to lawful governmental action. See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *United States ex rel. McBride v. Schurz*, 102 U.S. 378 (1880); *Indiana ex rel. Anderson v. Brand*, 30 U.S. 95 (1938) (mandamus in state courts). A similar practice developed in habeas corpus. See, e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (habeas by state prisoner); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (habeas by excluded alien).

166. Sometimes, the party brought suit on behalf of a relator who was the real party in interest, such as the attorney general seeking quo warranto or mandamus at the instigation of a citizen. See, e.g., *State v. Deliesseline*, 12 S.C.L. (1 McCord) 52 (1821); *State ex inf. Barker v. Duncan*, 265 Mo. 26, 34-36, 175 S.W. 940, 942 (1915).

167. The most likely source of these misconceptions is Blackstone, who discussed mandamus only in the context of private, injured parties. 3 W. BLACKSTONE, COMMENTARIES *110-11. Dean Thomas Cooley, who annotated Blackstone's discussion of mandamus, exacerbated the problem by citing only the minority view cases. 2 COOLEY'S BLACKSTONE 935 n.1. Cooley and several state courts, see notes 163-164 *supra*, relied on *Wellington*, 33 Mass. 87, for their understanding of the appropriate relators in public rights mandamus petitions.

In *Wellington*, however, the court actually adjudicated a public rights mandamus premised

in their period, were perceived by the United States Supreme Court as minority views.

Professor Jaffe documented the development of mandamus in the state courts.¹⁶⁸ Yet the approval of the constituent model in the *federal* courts has gone virtually unnoticed. In 1875, in *Union Pacific Railroad v. Hall*,¹⁶⁹ the United States Supreme Court explicitly endorsed *Metz* and declared: "There is . . . a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such" ¹⁷⁰

In *Hall*, the Supreme Court considered a petition for mandamus against the federally chartered railroad brought by merchants seeking to require the railroad to maintain a line over the Missouri River that ran from Iowa to Nebraska. As the Court characterized it, these merchants "had no interest other than such as belonged to others" and sought only to enforce "a duty to the public generally."¹⁷¹ The relevant statute provided only that the circuit courts "shall have jurisdiction to hear and determine all cases of mandamus to compel said Union Pacific Railroad Company to operate its road as required by law."¹⁷² Union Pacific challenged the sufficiency of the plaintiffs' interest to maintain the petition. The Court did not discuss this challenge in justiciability or constitutional terms. Rather, it first upheld Mr. Hall's claim on the merits and then, at the close of the opinion, upheld his right as a member of the public to petition for mandamus on a matter of public right. Basing its judgment on English¹⁷³ and American prece-

solely on third-party rights. *Id.* at 97-105. It questioned the sufficiency of the plaintiffs' interest only at the close of the opinion. It indicated substantial confusion on this point: "[A]lthough the proceedings . . . are in some measure public proceedings, inasmuch as the ultimate object is to acquire an easement for the public, yet by the course of the proceeding as presented and regulated by statute, it assumes in some degree the form of a private adversary suit." *Id.* at 105 (emphasis added). In the end, the court did not resolve the personal interest question; it considered instead the risks to third party interests. *Id.* at 105-06. Although *Wellington* did state the general rule in terms of the minority rule, *id.* at 105, its action was inconsistent with this statement. *Id.* at 105-06. Thus, *Wellington* provides weak evidence of early nineteenth century practice in public rights cases, and is not an antecedent of modern justiciability doctrine. See also text accompanying notes 307-317 *infra*.

Subsequent Massachusetts cases treated as open the question whether a mandamus petitioner had to show a personal interest. *E.g.*, *Attorney General v. Boston*, 123 Mass. 460, 479 (1877). Ultimately, the Massachusetts courts held that no such showing was necessary. *Cox v. Segee*, 206 Mass. 380, 381, 92 N.E. 620 (1910); *Bancroft v. Building Comm'r*, 257 Mass. 82, 85-86, 153 N.E. 319 (1926).

168. Jaffe, *supra* note 5, at 1275-82.

169. 91 U.S. 343 (1875). The only reference to *Hall* in the literature is in L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 468 n.44 (1965). It appears as part of a string cite of cases supporting the public mandamus action.

170. *Id.* at 355.

171. *Id.* at 354.

172. Act of Mar. 3, 1873, ch. 226, § 4, 17 Stat. 485, 509.

173. *Hall*, 91 U.S. at 354 (citing *The King v. Severn & Wye Ry. Co.*, 2 Barn. & Ad. 646, in which "a private individual, without any allegation of special injury to himself, obtained a

dent, the Court concluded that the petition was proper and affirmed the decision below granting the writ.

With the exception of cases like *Hall*, the federal mandamus practice remained underdeveloped. The reason is that the Court had systematically rejected general jurisdiction over mandamus actions in the federal courts in a series of three early nineteenth century cases. In *Marbury v. Madison*,¹⁷⁴ the Court held that Congress could not vest mandamus jurisdiction in the Supreme Court because it was an original action not provided for in article III. Ten years later, in *McIntire v. Wood*,¹⁷⁵ the Court held that the All Writs Act¹⁷⁶ was not intended to confer general mandamus powers on the federal courts, but only to authorize mandamus in support of jurisdiction otherwise obtained.

These decisions were reaffirmed in *Kendall v. United States ex rel. Stokes*.¹⁷⁷ There, the Court explained that the federal courts had neither residual common law authority to issue the writ nor sovereign prerogative as in England.¹⁷⁸ The federal courts, therefore, could only issue the writ when Congress provided mandamus jurisdiction. But the Court did not question that jurisdiction when Congress provided it; the Court merely invoked the syllogism of the forms. "That the proceeding on a *mandamus* is a case within the meaning of the act of congress, has been too often recognised in this court to require any particular notice. It is an action or suit brought in a court of justice, asserting a right; and is prosecuted according to the forms of judicial proceedings."¹⁷⁹ The Court recognized jurisdiction over mandamus only in the District of Columbia Circuit Court on the ground that the congressional statute organizing the District adopted the common law of Maryland and, therefore, adopted as well its common law jurisdiction over mandamus.¹⁸⁰

One might conclude that the Court engaged in this extended guerrilla warfare against mandamus jurisdiction precisely because it feared a general judicial power to superintend government. But this argument undermines the historical basis of modern standing doctrine. Had it been available, the standing concept would have solved the Court's fears. It certainly would have made *Kendall* an easy case. *Kendall* was a

rule upon the company to show cause why a *mandamus* should not issue commanding them to lay down again and maintain part of a railway which they had taken up").

174. 5 U.S. (1 Cranch) 87 (1803).

175. 11 U.S. (7 Cranch) 317 (1813).

176. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82, (codified as amended at 28 U.S.C. § 1651 (1982)).

177. 37 U.S. (12 Pet.) 364, 431-32 (1838).

178. The power to issue a writ of mandamus in the courts of the United States "is not exercised, as in England, by the king's bench, as having a general supervising power over inferior courts . . . [but rather] it is in a special, modified manner, in which the writ of *mandamus* is to be used in this court, and in the circuit courts . . ." *Kendall*, 37 U.S. at 434 (discussing the notion that federal courts are courts of limited jurisdiction).

179. *Id.* at 429.

180. *Id.* at 432-33.

case of private right brought by four postmasters to compel the postmaster-general to pay their salaries.¹⁸¹ Instead of justifying the exercise of judicial power on the theory that *Kendall* was a case of private rights, the Court engaged in a lengthy discourse on mandamus under the new constitutional system and justified the specific invocation of the judicial power in this mandamus case in a roundabout way.¹⁸² In *Hall*, on the other hand, the Court accepted jurisdiction even though the plaintiff lacked a personal, private interest.¹⁸³ The Court adjudicated the mandamus petition even though it was premised on the *part-whole* schema of the constituent model; it did so without question because Congress had explicitly conferred the jurisdiction.

Yet another form of public action thrived in America under the Constitution. "Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, had been in existence for hundreds of years in England, and in this country ever since the foundation of our Government."¹⁸⁴ These were called "*popular* actions because they were given to the people in general."¹⁸⁵

An English statute of 1424, for example, imposed a penalty on customhouse officials who embezzled duties paid by merchants.¹⁸⁶ Any informer, unrelated to the transaction, could sue to collect the trebled penalties provided by the statute; the informer sued in his own behalf and on behalf of the King. If successful, the informer kept a third of the judgment. This device was used in the context of regulatory or criminal enforcement and was also employed to enforce legal obligations on governmental officers that did not otherwise give rise to private rights. In a later statute, Parliament provided that an informer could collect a penalty of 500 pounds from an officer who neglected to take the required oath of allegiance to the government.¹⁸⁷

The full extent of the popularity and use of informers' statutes in America has not been documented previously.¹⁸⁸ The colonies and the states employed informers' statutes in a wide variety of cases, including the enforcement of regulatory statutes and morals legislation.¹⁸⁹

181. *Id.* at 367-68.

182. The statute that the Court read as adopting the common law of Maryland was, at best, ambiguous on that point. See *id.* at 432; text accompanying note 180 *supra*.

183. *Union Pac. R.R. v. Hall*, 91 U.S. 343 (1875).

184. *Marvin v. Trout*, 199 U.S. 212, 225 (1905). See W. HOLDSWORTH, 4 A HISTORY OF ENGLISH LAW 356-57 (1925); Berger, *supra* note 31, at 825-26.

185. 3 W. BLACKSTONE, COMMENTARIES *161 (emphasis in original).

186. 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 240 (1926) (citing 3 Henry VI c. 3).

187. 2 W. BLACKSTONE, COMMENTARIES *437.

188. Professor Berger devoted only one and one half pages to the subject, noting *Marvin v. Trout* and the 1692 New York statute mentioned in the text accompanying note 190 *infra*. Berger, *supra* note 31, at 826 & n.55.

189. See, e.g., *Beadleston v. Sprague*, 6 Johns. 101, 102-03 (N.Y. Sup. Ct. 1810) (informer's suit to enforce statute prohibiting sale of liquor without a license); *Rowe v. State*, 2 S.C.L. (2 Bay) 565 (1804) (suit by informer to recover his moiety, that is, his portion of fine to

These statutes provided a common mechanism to regulate, by judicial sanction, governmental officials where there was likely to be no aggrieved party with a private cause of action. One of the earliest statutes was adopted in New York in 1692. Under a statute "for the restraining and punishing of Privateers and Pirates," all commissioned officers within the colony were required to arrest or kill any pirates within their jurisdiction. Any informer could enforce this duty by suit to collect a statutory penalty.¹⁹⁰ An early New Hampshire statute required the officials in each town to erect and maintain a pound for cattle; and it made the obligation enforceable by the public at large through the medium of the informer's suit.¹⁹¹

The Framers, in their roles as members of the first Congress, passed legislation both creating and facilitating informers' suits. The first Congress was in session only two months when it passed a customs-house informer statute; it subsequently provided federal jurisdiction over informer suits in the Judiciary Act of 1789.¹⁹² These actions suggest that the Framers did not view the "case or controversy" requirement of article III as limiting such "popular actions" as informers'

be collected by sheriff where the original informer's action was brought for "killing a negro by undue correction.").

190. 1 THE COLONIAL LAWS OF NEW YORK 279, 281 (1894) (statute passed September 10, 1692).

191. See *Fairbanks v. Town of Antrium*, 2 N.H. 105, 106 (1819) (statute of Feb. 9, 1791, authorizing a 10-pound penalty "to any person who may sue for same"); see also *Pike v. Madbury*, 12 N.H. 262 (1841) (penalty must be paid in United States currency).

The earliest "taxpayer's action" appears to be an 1807 New York statute creating an informer's suit to compel town supervisors to fulfill their obligation "to raise such sums of money as they are directed to raise and levy by acts of the legislature." 1807 N.Y. Laws 43. This was the statute at issue in *Caswell, qui tam v. Allen*, 10 Johns. 118 (N.Y. Sup. Ct. 1813). "[P]laintiff, who sued as well for himself as for the people," sought a \$250 penalty from the supervisor of the Town of Scipio. *Id.*

In *Dozier v. Williams*, 47 Miss. 605 (1873), *Dozier* sued the clerk of the probate court who, without the father's consent, had illegally performed the marriage ceremony for *Dozier's* minor son. The suit was brought pursuant to a Mississippi informers' statute that provided for a penalty of \$1000.

Beadelston, *supra* note 189, and *Dozier* suggest a possible source of another justiciability doctrine: the prohibition of friendly suits. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 102-07; *United States v. Johnson*, 319 U.S. 302, 305 (1943). Multiplicity of litigation was a problem inherent in informers' suits. At common law, the statutory right to recovery attached to the first plaintiff to file such a suit. All suits filed thereafter were subject to dismissal. This rule gave rise to collusion between defendants and friendly plaintiffs. Potential defendants sometimes obtained their own informers to bring suit, who could discharge or remit the statutory penalty and whose judgment could be used to bar all subsequent suits. Several doctrines developed to prevent such collusion. See, e.g., 2 W. BLACKSTONE, COMMENTARIES *437 (first informer loses priority if collusion revealed); *Dozier*, 47 Miss. at 606 (subsequent plaintiffs can plead fraud or coveture); *Caswell*, 10 Johns. at 118 (informer can only recover judgment, cannot discharge debt).

192. This informer's suit was directed against custom collectors who failed to post fee and duty schedules or who overcharged individuals. Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45. Federal jurisdiction over these suits was conferred in the first Judiciary Act. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (authorizing federal district court jurisdiction "of all suits for penalties and forfeitures incurred, under the laws of the United States"). 3 W. BLACKSTONE, COMMENTARIES *161.

suits.¹⁹³ The second Congress implicitly approved the practice of informers' suits, providing rules for the award of costs in cases brought by "any informer or plaintiff on a penal statute to whose benefit the penalty or any part thereof if recovered is directed by law . . ." ¹⁹⁴ And, in 1794, the third Congress created informers' suits to enforce its prohibitions against the slave trade.¹⁹⁵ Subsequent Congresses, from 1834¹⁹⁶ to 1986¹⁹⁷ continued to use informers' suits for the enforcement of rights accruing to the public at large.¹⁹⁸

The informer's suit employed multiple cognitive models. Informers' suits like those provided for in New York and New Hampshire used the constituent model with a simple *part-whole* structure as in *mandamus*: Any member of the body politic with the relevant information was empowered to sue to vindicate the policy choice made by the *whole* in passing the underlying regulatory law. Any member of the community could enforce the collection of taxes, the provision of police protection, or the maintenance of an animal pound once the community had so determined.

Other informers' suits like those federal actions regulating customs practices, applied more complex models. These statutes presupposed an injury to someone, who would also have a private cause of action modelled on the remedial *source-path-goal* schema. These statutes nevertheless authorized suit by a stranger with information, allowing the informer to act in a representational capacity. Thus, these informers' actions were examples of a representational model—they were struc-

193. 3 W. BLACKSTONE, COMMENTARIES *161-62.

194. Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277 (an act for regulating processes in the courts of the United States). This provision was subsequently codified at 28 U.S.C. § 823, but was deleted as obsolete in the revision of 1948. In fact, this deletion was erroneous because there are still informer statutes on the books. See, e.g., notes 197-198 *infra*.

195. Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (an act to prohibit the carrying on of the slave trade from the United States to any foreign place or country).

196. See Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733 (codified as amended at 25 U.S.C. § 201 (1982)) (an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers); see also *United States v. Stocking*, 87 F. 857 (D. Mont. 1898) (dealing with the Act of June 30, 1834).

197. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3155-57; Act of Sept. 13, 1982, Pub. L. No. 97-258, §§ 3729-3730, 96 Stat. 877, 978 (1982) (codified as amended at 31 U.S.C. §§ 3729-3730 (1982 & Supp. III 1985)) (providing for cause of action brought by "a person" in the "name of the Government" against those committing frauds or making false claims against the government). This statute was first passed during the Civil War to control false claims by military personnel. Act of Mar. 2, 1863, ch. 67, §§ 4, 6, 12 Stat. 696, 698 ("An Act to prevent and punish Frauds upon the Government of the United States"). It was amended in 1943, Act of Dec. 23, 1943, ch. 377, 57 Stat. 608-09, and more recently in 1982 and 1986.

198. See, e.g., Act of Feb. 9, 1909, ch. 100, § 7, 35 Stat. 614 as amended by Act of Jan. 17, 1914, ch. 9, 38 Stat. 275, 277, *repealed* by Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1291 (1970) (informers' suits relating to importation of certain drugs); Act of Oct. 19, 1888, ch. 1210, § 1, 25 Stat. 566, Act of Apr. 28, 1904, No. 34, 33 Stat. 591, Act of Mar. 4, 1913, ch. 141, § 3, 37 Stat. 737, *all repealed* by Act of June 27, 1952, ch. 477, § 403, 66 Stat. 163, 279 (informers' suits to enforce prohibitions on importation of certain aliens); Act of July 4, 1864, ch. 249, § 9, 13 Stat. 390, 392, and Act of Feb. 28, 1871, ch. 100, § 48, 16 Stat. 440, 454 (informers' suits to regulate passenger travel on steamships and other vessels).

tured in terms of the *source-path-goal* schema of an ordinary private cause of action¹⁹⁹ and a *link* schema. One *link* was the informer's information about the injury to the actual victim.²⁰⁰ The other *link* was provided by the *part-whole* schema: One *part* could speak for the other since each was a *constituent* of one *whole*.

Suits by those without personal injury who were acting as representatives of others were not viewed as raising constitutional problems under article III. In *Adams, qui tam, v. Woods*,²⁰¹ Chief Justice Marshall expressed the view that informers' suits were common and ordinary: "Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information. . . ."²⁰² The Court never questioned the plaintiffs' "standing" in three subsequent informers' actions that it decided in 1885, 1905, and 1943.²⁰³ On the basis of these cases, Justice Harlan, dissenting in *Flast v. Cohen*, conceded that suits brought by nontraditional plaintiffs—that is, plaintiffs without injury-in-fact—were *not* barred by article III.²⁰⁴

B. *Cognitive Structure, Prototype Effects, and the Public Rights Model*

The public rights model coexisted comfortably with the conceptual system of nineteenth century legal thought. It was in many ways traditional in its structure, even though premised on alternative schemata. Because the public rights model overlapped structurally with the private rights model, however, it seemed like a variant of the latter model. As such, it was vulnerable to the extreme prototype effects discussed in Section II above.

In his classic article on modern public law litigation,²⁰⁵ Professor Chayes described the traditional, private rights model in terms of five "defining features." He described traditional litigation as bipolar, retrospective, self-contained, party-initiated and controlled, and characterized by an approach that treats right and remedy as interdependent.²⁰⁶ In contrast, Chayes described the emerging public

199. See *Adams, qui tam v. Woods*, 6 U.S. (2 Cranch) 336 (1805).

200. Authorization of informers' suits made sense when the victim was unaware of the overcharge or the failure to post the schedule. No doubt the victim could also sue if he or she were aware of the illegality. Yet, the lack of awareness by the victim was not a precondition to the informer's suit. For a discussion of the metaphors that make information a particularly good candidate as a *link* schema, see text accompanying notes 699-700 *infra*.

201. 6 U.S. (2 Cranch) 336 (1805) (concerning a suit brought under the Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, regulating the slave trade).

202. *Id.* at 341.

203. *The Laura*, 114 U.S. 411 (1885); *Marvin v. Trout*, 199 U.S. 212 (1905); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

204. *Flast*, 92 U.S. 83, 121 (1968).

205. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

206. Thus, the traditional model has two opposing parties or interests, it is focused on a limited set of completed events, the court's involvement ends with a decree whose direct impact is limited to the parties, the parties shape the issues and marshal proof while the judge serves as the neutral arbiter of the law, and the scope of the relief is logically deduced from the substantive violation. *Id.* at 1282-83.

law model as flexible and sprawling in shape, predictive in its fact-finding and prospective in its approach to remedy, judicially managed and activist rather than party controlled, and characterized by a dispute over the operation of public policy rather than over private right.²⁰⁷

In these aspects, at least, the public rights models of mandamus and of the informer's action that we have considered had more in common with the traditional version of the private rights model than with the emerging public law model described by Chayes. These nineteenth century public rights models were bipolar, initiated by a single citizen against an officer of the government. The litigation was often retrospective; in any event, it was well-bounded by a specific duty or omission and its subject matter concerned quite precise "consequences for the legal relations of the parties."²⁰⁸ The suit was entirely party-initiated and controlled. Right and remedy were interdependent, controlled no less by the writ system than were the common law forms of action.²⁰⁹ The lawsuit was only partially self-contained in the sense employed by Chayes: The entry of judgment ended the court's involvement, but its impact was not confined to the particular litigant who prosecuted the action. Rather, it affected the "real party in interest": the entire community.²¹⁰

These similarities between the original public and private rights models reflect a common experiential grounding by means of the conventional metaphor *rational argument is war*.²¹¹ In our culture, we conceptualize rational arguments in terms of basic physical combat: "There is still a position to be established and defended, you can win or lose, you have an opponent whose position you attack and try to destroy and whose argument you try to shoot down. If you are completely successful, you can wipe him out."²¹² This same set of

207. *Id.* at 1302-03.

208. *Id.* at 1282.

209. As discussed in Section II, the private rights model consists of two mirror image *source-path-goal* metaphors: One structures our understanding of the causal behavior of the defendant that is the subject of the suit; the other structures the remedial or adjudicative process. The public rights models, too, used a mirror image structure. In the constituent model, like mandamus, the *remedial part-whole* schema mirrored its *substantive part-whole* schema. Thus, any citizen, or *part*, could sue and ask the court, acting for the *whole*, to order the governmental agent, another *part*, to comply with the law, as decided by the *whole*. The representational models were more complex. Sometimes, as in *Hayburn's Case*, the remedy mirrored the causal *source-path-goal* schema of the subject's private cause of action. Other times, as in the informers' actions, it was specified by the statute that also specified the right and authorized the *link*.

210. Compare Chayes, *supra* note 205, at 1283.

211. See G. LAKOFF & M. JOHNSON, *supra* note 63, at 61-62.

212. *Id.* at 63.

This metaphor allows us to conceptualize what a rational argument is in terms of something that we understand more readily, namely, physical conflict. Fighting is found everywhere in the animal kingdom and nowhere so much as among human animals. Animals fight to get what they want—food, sex, territory, control, etc. . . . The same is true of human animals. . . . Part of being a rational animal . . . involves getting what you want without subjecting yourself to the dangers of actual physical

conceptualizations governs in legal matters.²¹³ Thus, Professor Chayes described traditional litigation as “a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-take-all-basis.”²¹⁴ Here we have a reference to the array of opposing forces in battle and the principle of “to the victor belong the spoils” that have characterized warfare throughout much of human history.

Our use of the *rational argument is war* metaphor to organize our models of litigation is not arbitrary or accidental, but rather is motivated by human experience. Physical combat and rational argument are both means of obtaining desired ends such as food, property, status, and control. Until the development of sophisticated weaponry in modern times, even organized combat was inherently hand-to-hand and one-on-one. The bipolar, individualized nature of the private rights model thus reflects directly the historical experience of combat.

The public rights models of the nineteenth century retained this bipolar structure by employing a representational model, a metonymy premised on the *part-whole* schema and motivated by the battle metaphor. Opposing forces sometimes settle their differences through the combat of champions subject to a “winner-take-all” agreement.²¹⁵ Representation of the *whole* (the army) by the *part* (the champion) avoided greater bloodshed. In an even more civilized version, the opposing forces sent emissaries to avoid fighting via a diplomacy in which reason replaced physical combat. The constituent model of mandamus mimicked this model in the legal sphere. In cases like *Hall* or *Metz*, a single member of the public adjudicated the concerns of many. This model was an advance over the inefficient and disruptive effects of a multiplicity of private suits. The role of the courts was to coordinate and vindicate the greater interests of the *whole*,²¹⁶ by employing the

conflict. As a result, we humans evolved the social institution of verbal argument. We have arguments all the time in order to get what we want, and sometimes these “degenerate” into physical violence.

Id. at 61-62. For a poetic variant of this conventional metaphor, see E. Costello, *You'll Never Be a Man*, in TRUST (Columbia Records 1981) (“You need protection from the physical part of conversation/though the fist is mightier than the lip it adds the aggravation”).

213. G. LAKOFF & M. JOHNSON, *supra* note 63, at 65. (“Whether we are in a scientific, academic, or legal setting, aspiring to the ideal of rational argument, or whether we are just trying to get our way in our own household by haggling, the way we conceive of, carry out, and describe our arguments is grounded in the ARGUMENT IS WAR metaphor.”) (capitalization in original).

214. Chayes, *supra* note 205, at 1282.

215. See, for example, the biblical report of the fight between David and Goliath, an ancient instance of this practice. 1 *Samuel* 17:1-9.

216. See J. VINING, *supra* note 27, at 52-53.

By experience and attitude, as well as by virtue of their special procedures, courts have always been in a position to look continuously at the whole. As other institutions that also shared the priestly tradition have disappeared, the importance of this aspect of the notion of what it is to be a judge has grown. No society pursuing a multitude of public values of different weight through a multitude of largely independent agencies has ever tried to do without such central coordination. . . . The

part-whole schema of mandamus.

The *rational argument is war* metaphor also accounts for the radical prototype effect in our thinking about justiciability. Warfare is a natural source domain for the *source-path-goal* metaphor. Whatever the purpose of the fight, it involves *advancing* on the enemy's position and trying to take it. Structuring rational argument metaphorically as we understand battle, we employ a *source-path-goal* schema in our conceptualization of argument. Adjudication involves rational argument and is one kind of human purposive endeavors. It is, therefore, naturally conceptualized in terms of a *source-path-goal* schema. Adjudicatory models premised on a *part-whole* schema, like mandamus, are ultimately crowded out of our concept of justiciable controversies.

As such, adjudication is a radial concept. All of its submodels share the core *source-path-goal* schemata of arguments and purposes. The causal and remedial *source-path-goal* metaphors of the private rights model and the *part-whole* and *link* metaphors of the public rights models radiate from this core. The private rights model seems, therefore, to be more central to the concept of adjudication—a coherence prototype effect. Thus, the remedial *source-path-goal* metaphor of the private rights model is seen as the primary case, or prototype, of adjudication. In comparison, the public rights model doesn't quite seem to fit; it seems "of a peculiar and eccentric nature."²¹⁷

As a variant of this prototypical structure, public rights litigation was an intermediate category between private law disputes, on the one hand, and politics, on the other. This was reflected in the substantive, procedural, and jurisdictional aspects of public rights law. Substantively, the public rights law occupied an intermediate status between the realm of inviolable vested rights and political discretion. It concerned affairs of the *whole*²¹⁸ such as public roads,²¹⁹ navigable riv-

process of perceiving, announcing, reconciling, and choosing between the values at stake in particular situations—the judicial process— . . . is an integral part of the government. And there is nothing mystical about the function. It consists simply in seeing all the considerations, the implicit as well as the fully articulated, . . . and in seeing all the decision makers making use of public force as subject to constraints originating outside as well as within themselves.

Id. at 52-53 (emphasis and footnotes deleted).

217. 3 W. BLACKSTONE, COMMENTARIES *115-16.

218. See *Munn v. Illinois*, 94 U.S. 113, 126 (1877) (grain warehouse is subject to regulation because "[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large"). In colonial times, judicial regulation of public rights matters was much more extensive than has been supposed. For example, the colonial courts of Virginia not only licensed all innkeepers, but also set all prices. H. WILLIAMS, LEGENDS OF LOUDOUN: AN ACCOUNT OF THE HISTORY AND HOMES OF A BORDER COUNTY OF VIRGINIA'S NORTHERN NECK 104-06 (1938). Massachusetts courts also licensed all innkeepers until the beginning of the nineteenth century. Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 288-91 (1976). Despite this accepted colonial practice, the twentieth century Supreme Court held that rate setting was not a "case or controversy" within the jurisdiction of the federal courts. *Keller v. Potomac Elec. Co.*, 261 U.S. 428, 444 (1923).

219. See, e.g., *In re Wellington*, 33 Mass. (16 Pick.) 87 (1834).

ers,²²⁰ railroads,²²¹ morals legislation,²²² and the performance of public officers.²²³ But it included only those matters that could be governed by legal reason and the constraints of the "right and remedy" formulation. Mandamus thus excluded from its purview public matters that involved discretion,²²⁴ leaving such matters to the political process.²²⁵ Moreover, public rights matters were more vulnerable than were private suits to the intervention of politics: Legitimate concerted actions of the *whole* (subsequent legislation, for example) could defeat the public right asserted by the litigant, even during the course of the lawsuit.²²⁶

Procedurally, the models of access for raising claims of public right allowed individuals to command the attention of the law, as in the private rights model. But, as in the political sphere, these models required no personalized injury peculiar to the plaintiff. Jurisdictionally, the authority to consider matters of public right was understood neither as inherently judicial nor as nonjusticiable. Rather, the question of justiciability was left to the discretion of Congress, as in mandamus cases like *Kendall* and *Hall*.²²⁷

The public rights concept filled an important social and legal need in the eighteenth and early nineteenth centuries. During this period, the Anglo-American governmental structures had yet to develop the large scale, bureaucratic organizations that characterize our modern governments. Thus, in England, most criminal prosecutions were brought by the victims themselves, in their own name and in the name

220. See, e.g., *County Commr's v. People ex rel. Metz*, 11 Ill. 202 (1849); *Pennsylvania v. Wheeling & Belmont Bridge Co.* 54 U.S. (13 How.) 518 (1851).

221. *Union Pac. R.R. v. Hall*, 91 U.S. 343 (1875).

222. See, e.g., *Beadleston v. Sprague*, 6 Johns. 101 (N.Y. 1810) (informer's suit).

223. See, e.g., Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45 (informer's statute).

224. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 87, 105, 107 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political . . . can never be made in this court."); *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 352 (1868) ("there exists no power in the courts, by any of its processes, to act upon the officer . . . [where] the law reposes this discretion in him for that occasion, and not in the courts.").

225. The dictum in *Marbury*, referring to this limit on the reach of mandamus to compel discretionary public acts, formed the basis of the later political question doctrine.

226. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855) (public nuisance suit failed because of Act of Congress) (*The Wheeling Case III*); *Hodges v. Snyder*, 261 U.S. 600, 603-04 (1923) (taxpayer suit against consolidation of school districts failed because of subsequent legislation); cf. *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 64, 68-69 (1801) (public nature of suit invoked to justify application of subsequent treaty to reverse judgment that was correct when rendered).

This intermediate legal status was also reflected in informer actions: The executive often had the power to remit the statutory penalty claimed by the informer at any time prior to judgment in the informer's suit. See *The Laura*, 114 U.S. 411, 414-17 (1885).

227. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). *Murray's Lessee* is discussed at length below. See notes 233-236 *infra* and accompanying text.

of the Crown.²²⁸ Similarly, local governmental action was often the bailiwick of a quasi-judicial board of commissioners, as in England,²²⁹ or the local circuit court, as in the Colonies.²³⁰ The public rights model provided a vehicle for direct participation by the citizenry that was not available in any other manner.

Part of the explanation of the demise of the public rights model lies in its declining social and political utility in the mid-nineteenth century. As public agencies such as district and county attorneys were established, the need decreased for private attorneys general. This was reflected in the 1840s and '50s by those courts which held that only the public officers could bring public rights suits.²³¹ The increased desuetude of the public rights model resulting from the gradual expansion of these public agencies, coupled with the cognitive eclipse of the model as a result of the extreme prototype effects described above, led to the almost total loss of the public rights model from modern legal awareness.

The intermediate legal status of the public rights model explains three common anachronisms in current legal scholarship that are a function both of our reading of nineteenth century material through the lens of twentieth century concepts²³² and of the phenomenon of prototype effects. The first anachronism is the now conventional reading of *Murray's Lessee v. Hoboken Land Improvement Co.*²³³ as a discussion of the power of Congress to assign certain matters—designated “public rights”—to article I tribunals.²³⁴

228. 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 419, 493-94 (1883); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 621 (5th ed. 1942); 15 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 160 (1965) (private enforcement of criminal law until 1859); Hay, *Property, Authority and the Criminal Law*, in D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON, & C. WINSLOW, ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND 40-41 (1975).

229. See De Smith, *supra* note 34, at 337-38; note 124 *supra*.

230. See note 218 *supra*.

231. See cases cited in note 164 *supra*.

232. “Real historical understanding is not achieved by the subordination of the past to the present, but rather by our making the past our present and attempting to see life with the eyes of another century than our own.” H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 16 (1963). See also Gordon, *Historicism in Legal Scholarship*, YALE L.J. 1017, 1021, 1045-50 (1981).

233. 59 U.S. (18 How.) 272 (1855). [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, *involving public rights*, which may be presented *in such form that the judicial power is capable of acting on them*, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. *Id.* at 284 (emphasis added). In light of the preceding historical material, the reader will note that this famous passage is *not* a reference to article I Tribunals, but rather an invocation of the syllogism of the forms to assert that public rights matters are justiciable at Congress' discretion.

234. This reading is common to the modern Supreme Court opinions in this area, such as *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 3258 (1986), *Northern Pipeline Construction Corp. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plural-

When viewed in light of the new historical evidence presented above, however, it becomes clear that *Murray's Lessee* explicates instead the intermediate status of the public rights model. On the page before the passage that is cited as referring to article I Tribunals, Justice Curtis explained that:

[t]hough, generally, both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both. An instance of extrajudicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents.²³⁵

Murray's Lessee distinguishes between personalized private injuries and matters affecting the *whole* (such as public nuisance and public dues). The passage in *Murray's Lessee* concerning Congress' discretionary power to assign matters affecting the *whole* to the courts is in its historical context an expression, congruent with the Court's acceptance of congressionally authorized mandamus actions in *Kendall* and *Hall*, of the intermediate jurisdictional status of the public rights model.²³⁶

ity opinion), *Crowell v. Benson*, 285 U.S. 22, 48-50 (1932), and *Ex parte Bakelite*, 279 U.S. 438, 451 (1929). Examples of recent scholarship that perpetuate this misreading include Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 951-54 (1988), and Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor* 35 BUFF. L. REV. 765, 789-99 (1986).

235. *Murray's Lessee*, 59 U.S. (18 How.) at 283.

236. A further indication that the modern reading of *Murray's Lessee* is mistaken is that courts typically take the case out of context. In *Murray's Lessee*, the question was the constitutionality under the due process clause of a summary, extrajudicial procedure for the recovery by the United States of money due from a customs collector. *Murray's Lessee*, 59 U.S. (18 How.) at 275-77. Traditionally, the issuance of this summary distraint warrant has been characterized as analogous to a judicial action by an article I legislative court. But, as the passage cited above (see text accompanying note 235 *supra*) indicates, *Murray's Lessee* viewed the summary distraint warrant not as a judicial act by an article I court, but rather as an extrajudicial, governmental self help remedy. In this context, the famous passage in *Murray's Lessee* (see note 234 *supra*) is a frank statement that Congress has the power to authorize extrajudicial self help remedies in public rights cases.

Moreover, the modern Justices who, since *Ex parte Bakelite* have read *Murray's Lessee* as a case about the power of Congress to create article I courts have always been unable to define *Murray's Lessee's* use of the term "public rights." For example, in *Northern Pipeline*, Justice Brennan admitted that "[t]he distinction between public rights and private rights has not been definitively explained in our precedents." 458 U.S. at 69. Because the original nineteenth century concept of public rights had been lost, Justice Brennan was forced to employ (anachronistically) modern concepts to recharacterize the unfamiliar: "[A] matter of public rights must at a minimum arise 'between the government and others.'" *Id.* (quoting *Bakelite*, 279 U.S. at 451). Justice Brennan further misidentified the concept of public rights with that of sovereign immunity. *Id.* at 67. Exactly these same misconceptions plague modern commentators who attempt to define the meaning of the term "public rights" as used in *Murray's Lessee*. See Fallon, note 234 *supra*; Young, note 234 *supra*.

As we have seen, the nineteenth century concept of public rights had nothing to do with these notions. This new historical information provides a larger doctrinal context that requires a revision of our understanding of this important nineteenth century precedent.

The second anachronism is the attribution of the private rights model of constitutional adjudication to *Marbury v. Madison*.²³⁷ *Marbury* was a mandamus case and, thus, a manifestation of the public rights model. But this case arose in the context of a claim of private right, which perhaps makes it the most celebrated but misunderstood illustration of the intermediate legal position of public rights law. Much of the legal discussion in *Marbury* concerned the power of the courts to require compliance with the law on the part of executive officers and the scope of mandamus as an instrument for that purpose.²³⁸ The significance of the Court's ruling in its own time was its assertion of mandamus power over senior officers of the government.²³⁹ Its novelty lay in suggesting that Congress could only vest that power in the lower courts²⁴⁰ and not in the Supreme Court, which was the closest American equivalent to King's Bench.

Marbury's assertion of the power of judicial review followed naturally from the affirmation of the public rights model of mandamus power over executive officials. *Marbury's* apparent focus on individual injury as a condition precedent to the court's adjudication²⁴¹ was a settled part of the law of mandamus in cases of private right, as we saw in *Metz*, and not a *sine qua non* of all constitutional cases.²⁴² The modern perspective on *Marbury* as an instance of the prototypical private rights model, rather than an instance of the intermediate public rights model, is a radical prototype effect.

The intermediate legal status of the public rights model and the phenomenon of prototype effects also help explain a third historical misconception common to most legal scholarship in this area. Tradi-

237. *Marbury*, 5 U.S. (1 Cranch) 87 (1803). For versions of the traditional analysis that trace the private rights model for constitutional adjudication to *Marbury*, see Monaghan, *supra* note 29, at 1365-68; Chayes, *supra* note 205, at 1285.

238. Marshall inquired whether Mr. Marbury had a right to his commission, whether the laws afforded him a remedy, and, if so, whether it "is . . . a *mandamus* issuing from this court[.]" 5 U.S. at 97-98. After ascertaining Marbury's legal right to his commission, Marshall then discussed the relationship between the principles of *ubi jus, ibi remedium* and what we commonly call "the rule of law." *Id.* at 102-05. The answer to the final question quoted above turned, in part, on "[t]he nature of the writ." *Id.* at 106. Marshall then discussed the scope of mandamus to command actions by executive officers. *Id.* at 106-09.

239. "The decision was criticized for its dictum that the executive *could* be called to account by judicial process . . ." R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 43 (1960) (emphasis in original). "Indeed this was regarded at the time as the more critical issue . . ." Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 11. "Jefferson insisted until the end of his life that most of the opinion was 'merely an *obiter* dissertation of the Chief Justice.'" G. GUNTHER, *supra*, note 21, at 12 (quoting a letter from Jefferson to Justice William Johnson dated June 12, 1823). This comment suggests that the irksome aspect of the *Marbury* opinion was not the direct holding concerning judicial review, but rather the dicta concerning mandamus. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 22 (1978) ("In the context of the time, . . . *Marbury* represented no novel seizure of power; indeed, the records of the Constitutional Convention itself suggest to at least some scholars that the Framers . . . took th[e] power [of judicial review] for granted.").

240. See *Marbury*, 5 U.S. at 109-12.

241. See 5 U.S. at 105, 107.

242. See note 159 *supra* and accompanying text.

tional analyses describe the issues raised by nineteenth century citizen-government relations as concerning intrusions upon citizens' autonomy—a sphere marked by the common law protections of person and property. In this view, the private rights model was sufficient to mediate and accommodate these concerns, but not the twentieth century concerns about governmental denial of expected entitlements.²⁴³ Modern tensions in standing law have been attributed, incorrectly, to these ostensible shifts in the focus of citizen-government relations from concerns about autonomy to issues of entitlement.²⁴⁴

But the problems of the nineteenth century were not so purely "Lockean."²⁴⁵ They also concerned entitlements no less central to the citizen-government relationship than welfare benefits or access to government contracts are today. In a geographically and commercially expanding nineteenth century America, the building of roads and the maintenance of navigable waterways were matters of public concern. *Metz* and *Hall* were public rights cases about problems arising from these entitlements. The public rights model could have provided a nineteenth century paradigm for modern litigation about entitlements. It didn't, in part because it had been eclipsed by the private law prototype and in part because of the systematic attempt to dismember the public rights model from 1900 onward.

IV. THE RISE OF STANDING

Metaphor creates a new reality from which the original appears to be unreal.²⁴⁶

A lot happened to "standing" between the time of John Marshall and Felix Frankfurter. The term started out as a nonspecific metaphor, gained currency in equity, and only later became a constitutional doctrine. It will require Holmesian (Sherlock, not Oliver Wendell) deduction to reconstruct that story, and it will prove anything but elementary.

This section is divided into five parts. The first traces the usages of the term "standing" from Justice Marshall to Justice Brandeis. We will see the ontological effect of the metaphor in equity, as it exerted pressure on judges and lawyers to see what had been questions of substance and of remedy as a jurisdictional question of access to a court of equity.

The second subsection traces the history of the concept of *jus tertii*. Originally conceived as a requirement of the Supreme Court's jurisdictional statute, it became a tenet of individualism that eviscerated the

243. Albert, *supra* note 12, at 434; Stewart, *supra* note 5, at 1717-25; Chayes, *supra* note 28, at 9-10. The classic treatment of this phenomenon is Reich, *The New Property*, 73 YALE L.J. 733 (1964).

244. See, e.g., Stewart, *supra* note 5, at 1721-22 (due process and standing); Chayes, *supra* note 28, at 10.

245. Chayes, *supra* note 28, at 10.

246. W. STEVENS, *Adagia*, in *OPUS POSTHUMOUS*, 157, 169 (1957).

representational models premised on *link* schemata such as the *part-whole* metaphor for society. Its primary elaboration came in equity, with its emphasis on the individual's irreparable injury as the *sine qua non* for the exercise of the court's power.

The third subsection turns to the viability of another version of the representational model during this period. It briefly traces the doctrinal battle over the capacity of a state (as the *whole*) to vindicate in the federal courts the interests of its citizens (its *parts*). We will see the Court still vacillating between the private and the public rights models in this area as late as the 1970s.

The fourth subsection takes up the equity versions of the constituent model: shareholder derivative suits and taxpayer actions. We will see Justice Brandeis' largely unsuccessful efforts to bar their use. We will see, too, his near capitulation in 1937. From those ashes we will see Justice Frankfurter single-handedly raise the phoenix of standing. The final subsection sketches the historical context which suggests the motivation of these determined efforts.

A. *Substance, Remedy, and the Ontology of "Standing"*

The term "standing" was in use in Justice Marshall's time; it was first used as a metaphor to describe the legal relationship of parties. In *Lidderdale's Executors v. Executor of Robinson*,²⁴⁷ a case involving the priority of creditors, the Court held that sureties "succeed to the legal standing of their principal. . . ."²⁴⁸ In *Galloway v. Finley*,²⁴⁹ an equity action for the rescission of a contract to purchase land, the Court held that a buyer who learned that the seller had bad title "could not be permitted to avail himself of it whilst standing in the relation of a purchaser, to defeat the agreement. . . ."²⁵⁰

The Court eventually used the term "standing" to describe a party's status in the litigation. This usage took two forms, both unrelated to the modern standing doctrine. The Court used the metaphor most

247. 25 U.S. (12 Wheat.) 594 (1827).

248. *Id.* at 596.

249. 37 U.S. (12 Pet.) 264 (1838).

250. *Id.* at 296. Justice Story used the "standing" metaphor in a similar way in a patent case, *Evans v. Eaton*, 20 U.S. 161, 7 Wheat. 356 (1822), concerning whether a user of a potentially infringing device manufactured by the defendant (arguably an interested party) was competent as a witness. Story described the witness as "standing in the same predicament with the party sued . . ." *Evans*, 20 U.S. at 192, 7 Wheat. at 425. Story expressed his conclusion that the witness was competent to testify using terms that sound like modern standing doctrine.

But in this respect, Frederick stands in the same situation as every other person in the community. If the patent is declared void, the invention may be used by the whole community It, therefore, rests in remote contingencies, whether Frederick will, under any circumstances, have an interest in the event of this suit, and the law adjudges the party incompetent, only when he has a certain, and not a contingent interest.

Id. at 192, 7 Wheat. at 425-26.

commonly to indicate that a party had no claim on the merits, as it did in a series of cases concerning land claims in the Louisiana Purchase by those with preexisting Spanish title.²⁵¹ Congress had required that title be confirmed by a federal commission. Many of the original settlers failed to obtain such confirmation, and the Court held against them expressing its holding in the language of "standing." In *Les Bois v. Bramell*, for example, the court rejected plaintiff's unconfirmed Spanish title because "her claim had no standing in a court of equity or of law" ²⁵²

The Court used the term "standing" to refer to the claimant, not the claim, in its rejection of the claim on the merits in *Ritchie v. Franklin County*.²⁵³ Mr. Ritchie brought an equity action as a taxpayer to establish that bonds issued by the county court pursuant to state statutory authority were illegal under the state constitution. He sued the county court and the holders of the bonds. The case came to the Court on plaintiff's exceptions to the answer. The Court upheld the validity of the bonds,²⁵⁴ and concluded that "as the defendants claim to be innocent holders, . . . the complainant has no standing in a court of equity."²⁵⁵

Although in both *Les Bois* and *Ritchie* the Court used the term "standing" to indicate a loss of the suit on the merits, the two cases differ substantially when analyzed according to the modern doctrine of the same name. The private rights model characterized *Les Bois*; the plaintiff had clearly suffered particularized injury redressable by a common law court. By contrast, the constituent public rights model applied to *Ritchie*; Mr. Ritchie had suffered no demonstrable injury and he shared his grievances with all other taxpayers of the county. In neither case did the Court engage in an analysis that remotely resembled modern article III standing. In each case, the Court's explicit consideration of "standing" was an inquiry into the merits.²⁵⁶

251. See, e.g., *De la Croix v. Chamberlain*, 25 U.S. 378 (12 Wheat.) 599 (1827); *Menard's Heirs v. Massey*, 49 U.S. (8 How.) 302 (1850).

252. *Les Bois*, 45 U.S. (4 How.) 502, 517 (1846). See also *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477 (1850) (argument by counsel, citing *De la Croix*, that "such paper can give the party no standing in the court . . ."); *Menard's Heirs*, 49 U.S. at 316 ("No standing, therefore, in an ordinary judicial tribunal has ever been allowed to these claims, until Congress has confirmed them and vested the legal title in the claimant."). Three years later, the Court used the term "standing in court" in the same sense in *Guitard v. Stoddard*, 57 U.S. (16 How.) 524, 540-41 (1853).

253. 89 U.S. (22 Wall.) 67 (1874).

254. If adjudicated today, the Court might have held that Mr. Ritchie's status as a taxpayer didn't confer standing. See *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952) (state courts may confer broader taxpayer standing, but case dismissed by United States Supreme Court as presenting no case or controversy because it was not a "good-faith pocketbook action"). The more serious article III problem in *Ritchie* was that the case did not appear to present a federal question nor to involve diversity of citizenship.

255. *Ritchie*, 89 U.S. at 77.

256. In a contemporaneous nonequity case consolidating the Elgee Cotton Cases, 89 U.S. (22 Wall.) 180 (1874), the Court used the term "standing" in a similar manner. Under the Captured and Abandoned Property Act, one could sue in the court of claims to recover for

The Court also used the term "standing" to describe those parties identified by article III as supporting party-based subject matter jurisdiction. In *Livingston v. Story*, the Court dismissed a diversity case because the plaintiff had not properly pled the parties' citizenship for purposes of diversity jurisdiction. Justice Baldwin argued in dissent that "like all others material to the plaintiff's standing in court, [the plaintiff] was bound to prove it when called on by an answer, which did not admit, or put it in issue by a denial."²⁵⁷ In *Georgia v. Stanton*,²⁵⁸ the Court used the metaphor to characterize the decision in *Cherokee Nation v. Georgia*²⁵⁹ "that the Cherokee Nation could not be regarded as a foreign nation within the Judiciary Act; and, that, therefore, they had no standing in court."²⁶⁰

The term "standing" had a third nineteenth century usage that first appeared in equity cases concerning public nuisance. In *Georgetown v. Alexandria Canal Co.*,²⁶¹ the city of Georgetown sought an injunction in federal court to stop the construction of an aqueduct over the Potomac River that threatened to obstruct both the channel and the harbor. The Court held that the case was not proper for a court of equity. It expressed this in the language of a familiar battle metaphor: "[T]he plaintiff cannot maintain a stand in a court of equity"²⁶²

Doctrinally, *Georgetown* had nothing to do with article III; the case was solely and explicitly an artifact of the historic jurisdictional fight between law and equity. The Court first discussed the exercise of criminal jurisdiction over public nuisances by the law courts.²⁶³ It then traced the tenuous exercise of equity jurisdiction over public nuisances, which "had lain dormant for a century and a half . . . from Charles I.

property seized by Union troops during the Civil War only if one could show: ownership, a present right to the proceeds, and loyalty during the war. Act of Mar. 12, 1863, 12 Stat. 820, § 3. The plaintiffs in *The Elgee Cotton Cases* claimed that, under various contracts, they were entitled to the proceeds of cotton that had been seized in Mississippi during the Vicksburg campaign. The Court rejected their claim: "It is the owner alone who has any standing in the Court of Claims under the Captured and Abandoned Property Act" 89 U.S. at 185.

Here, the metaphor of "standing" is invoked not to say that the plaintiffs could not sue because they had suffered no injury but to convey that the plaintiffs had no capacity to sue because, on the merits, they had no rights. "[T]he rights defined are the only ones which can be enforced in any judicial proceeding. The language of the act makes it plain that no one is allowed to sue in the Court of Claims for the proceeds . . . unless he can prove [ownership] to the satisfaction of the court . . ." *Id.* at 186. At the outset of the opinion, the Court noted that "in the view which we take of the merits of the controversy it is unnecessary to do more than examine the contracts themselves . . ." *Id.* at 185 (emphasis added). This was, therefore, a ruling on the merits, rather than about standing in the modern sense.

257. 36 U.S. (11 Peters) 351, 414 (1837) (Baldwin, J., dissenting).

258. 73 U.S. (6 Wall.) 50 (1867).

259. 30 U.S. (5 Pet.) 1 (1831).

260. *Stanton*, 73 U.S. at 74.

261. 37 U.S. (12 Pet.) 91 (1838).

262. *Id.* at 99.

263. *Id.* at 97 ("the ordinary and regular proceeding at law is by indictment or information . . .").

down to the year 1795.”²⁶⁴ The compromise in this jurisdictional battle between law and equity was a doctrine that required special, private injury as a prerequisite for an injunction against a public nuisance.²⁶⁵ The Court accordingly held that the city was not a proper plaintiff.

The significance of *Georgetown* in the development of standing is not doctrinal but cognitive. Toward the end of its opinion, the Court admonished that:

The appellants seem to have proceeded on the idea, that it appertained to them, as the corporate authority in Georgetown, to take care of and protect the interests of the citizens. . . . But . . . the persons who, by name, bring the suit, and constitute the parties on the record, [must] have themselves an interest in the subject-matter²⁶⁶

Though this passage appears in a case that was solely about equity doctrines, its language foreshadows that of the later constitutional doctrine of standing. For, *Georgetown* and its progeny rejected for equity the kind of representational model premised on a *part-whole* schema that characterized *Hayburn's Case* and *mandamus*.²⁶⁷ The invocation of the representational model by the city was consistent with the notion of a municipal *corporation*; the term is itself a *part-whole* metaphor for the human body.²⁶⁸ The Court, however, rejected just this assertion by the appellants of the right to sue as “the *corporate* authority in Georgetown.” This rejection of the representational model premised on a *part-whole* schema was not final, of course; the Court vacillated on this point both in *Hall*²⁶⁹ and in later equity cases. The most notable of

264. *Id.* at 98. The Court observed that “[t]his jurisdiction seems to have been acted on with great caution and hesitancy.” *Id.*

265. *Id.* at 98-99. *Georgetown's* account of equity law does not, of course, include other developments such as the relator practice and the resurgence of equity later in the nineteenth century. Thus, in *Union Pac. R.R. Co. v. Hall*, the Court pointed out that equity did allow a private suit to abate a public nuisance where the harm was common to all and particularly injurious to the plaintiff. 91 U.S. 343, 355 (1875).

266. 37 U.S. at 99-100.

267. See *Heffner v. Commonwealth ex. rel. Kline*, 28 Pa. 108, 113-14 (1857); *Sanger v. County of Comm'rs* 25 Me. 291, 296 (1845); *Cleary v. Deliesseline*, 12 S.C.L. (1 McCord) 14 (1820); *State v. Deliesseline*, 12 S.C.L. (2 McCord) 21 (1821) for statement of the minority rule that only state officers such as the attorney general or district attorney could seek a writ of *mandamus* in a public rights case.

268. The word “corporate” comes from the Latin *corporatus* meaning “formed into a body.”

269. *Hall* cited *Wheeling Bridge II* as an American illustration of equity's general power to enjoin a public nuisance without the necessity of a claim of private right. 91 U.S. at 355. *Wheeling Bridge II* itself was ambivalent on this score. Although it discussed and explicitly relied on *Georgetown*, it also cited Bacon's Abridgement for the proposition that “[a]ny individual may abate a public nuisance.” 54 U.S. (13 How.) at 566; see also *Murray's Lessee*, 59 U.S. (18 How.) 272, 283 (1855). Ultimately, it relied on Pennsylvania's special injury of the decrease in toll revenues on the canals that fed into the Ohio, which would have resulted if the nuisance had not been abated. *Id.* at 561-62. The Court in *Hall* reasoned that “[t]he injury . . . was no more peculiar to Pennsylvania than is the injury to Hall.” 91 U.S. at 355. Regardless of whether the Court in *Hall* read *Wheeling Bridge II* correctly, *Wheeling Bridge*, like *Georgetown*, dealt with these questions solely as a matter of the jurisdictional divide between law and equity. *Wheeling Bridge II*, 54 U.S. at 562-66. *Wheeling Bridge II*, however, used neither the term “standing” nor a variant.

these was *In re Debs*.²⁷⁰

When, in *Debs*, the Court considered the “standing” of the federal government to obtain an injunction to stop the Pullman strike of 1894, it did not consider an article III, “case or controversy” question of standing. Rather, it asked whether the government had acted within its delegated authority and whether, “[i]f authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty.”²⁷¹ The Court concluded that the appeal by the government to a court of equity was appropriate on two grounds. First, the Court invoked a private rights model for the government’s position: “It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill.”²⁷² But the Court did not rest there; it applied the public rights model directly—invoking the government’s obligation “to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare,”—as a “sufficient” ground to confer upon the government “a standing in court.”²⁷³

In these nineteenth century “standing” cases, the central inquiry was whether the litigant asserted the kind of interest or right for which equity would provide a remedy. In *Ritchie*, the litigant had asserted a claim that equity would not enforce against an innocent purchaser. Similarly, in *Debs*, the Court considered what kind of rights, both public and private, were enforceable by equity.²⁷⁴ Despite the use, by the Court in *Georgetown*, of a variant of “standing” in connection with its insistence on a private rights model, the *Debs* Court reaffirmed the public rights model in upholding the “standing” of the federal government.

The significance of *Debs* to modern standing doctrine was purely linguistic. To appreciate this, it is necessary to understand how wide was the gap between the original understanding of “standing”—with its grounding in substantive considerations of equitable rights and remedies—and the later imposed requirement of “injury-in-fact.” This gap lasted well past *Frothingham*; it wasn’t until much later that the term “standing” was understood as expressing a purely procedural concept.

The Chicago Junction Case,²⁷⁵ decided a year after *Frothingham*, illustrates the gap between the original substantive meaning of “standing” and its later procedural usage. There, competitor railroads brought a

270. 158 U.S. 564 (1895).

271. *Id.* at 577 (emphasis added).

272. *Id.* at 583.

273. *Id.* at 584.

274. See, e.g., J. POMEROY & S. SYMONS, 1 EQUITY JURISPRUDENCE § 91, §§ 101-02 (5th ed. 1941). See note 280 *infra*.

275. *Baltimore & O.R.R. v. United States*, 264 U.S. 258 (1924).

suit in equity to set aside a sale approved by the Interstate Commerce Commission. The defendants claimed that the plaintiffs had "not the legal interest necessary to entitle them to challenge the order."²⁷⁶ Writing for the Court, Justice Brandeis first observed that the plaintiffs had "a vital interest. . . . The diversion of traffic has already subjected the plaintiffs to irreparable injury . . . exceed[ing] \$10,000,000."²⁷⁷ That assertion did not address the relevant question because what the litigant needed for "standing" was not literal injury, but a redressable right or *legal* injury. The Court found that right not in "the incident of more effective competition," but rather in the statutory "injury inflicted by denying to the plaintiffs equality of treatment."²⁷⁸

Justice Sutherland dissented on the ground that the railroads had no "remediable interest." He phrased this argument in terms of "standing."²⁷⁹ But he did not invoke an article III doctrine; he relied on general principles.²⁸⁰ "What constitutes a legal or equitable right, interference with which may give rise to an action? may be tested; and the determination of that question must still rest upon general principles of jurisprudence."²⁸¹

276. *Id.* at 266.

277. *Id.*

278. *Id.* at 267.

279. *Id.* at 271.

280. For a standing as party plaintiff it is necessary, not only that plaintiff have a legal entity or existence, and that he be possessed of legal capacity to sue, but also that this person have, in the cause of action asserted, a remedial interest which the law of the forum can recognize and enforce.

47 C.J.S. § 30 (1929) (footnotes omitted); Langdell, *Classification of Rights and Wrongs II*, 13 HARV. L. REV. 659 (1900).

The cases in which equity assumes jurisdiction over controversies between litigants may be divided into two great classes In the first class of cases, the ground upon which equity takes jurisdiction is that the plaintiff either can obtain no relief at all at law, or none which is adequate; and, therefore, so far as regards this class of cases, equity consists merely in a different mode of giving relief from that employed by courts of common law, *i.e.*, in a different mode of protecting and enforcing legal rights

The other class of cases . . . may be divided into those in which the plaintiff sets up no legal right whatever, and those in which the only legal right he sets up is a defence to some legal claim which the defendant makes against him. In cases belonging to the first subdivision, equity interferes upon the ground that the substantive law (and not merely the remedial law) is inadequate to the purposes of justice. In cases belonging to the second subdivision, equity interferes upon the ground that justice requires that the plaintiff should be permitted to take the initiative in the litigation, and procure a decision of the controversy in a suit brought by himself, instead of being compelled to wait the pleasure of the defendant in suing him at law, and then to set up his defence. In one important particular, however, cases belonging to these two subdivisions are alike, namely, in the necessity in which they impose upon equity of creating a new right in the plaintiff's favor; *for no action or suit can be maintained in any court without some right upon which to found it.*

Id. at 672 (emphasis added).

281. *Baltimore and O.R.R. Co. v. United States*, 264 U.S. 258, 272 (1924). (Sutherland, J., dissenting).

A private injury for which the law affords no remedy cannot be converted into a remediable injury, merely because it results from an act of which the public might complain. In other words, the law will afford redress to a litigant only for injuries

As late as *Ashwander*,²⁸² Justice Brandeis shared Justice Sutherland's doctrinal premises. In his famous concurrence in *Ashwander*, Justice Brandeis opined that the plaintiffs did not have standing, stating that "[t]he obstacle is not procedural. It inheres in the substantive law, in well settled rules of equity, and in the practice in cases involving the constitutionality of legislation."²⁸³ Justice Brandeis derived none of these three obstacles to "standing" from article III.²⁸⁴ Even his invocation of the constitutional practice was prefaced with the observation that the rules developed by the Court were "for its own governance in the cases confessedly within its jurisdiction . . ."²⁸⁵

It is this understanding of "standing" as substantive that illuminates the significance of cases like *Debs*: *Debs* illustrates the ontological effect of the metaphor. In the nineteenth century, the phrase "a standing in court"²⁸⁶ was used to refer to the party's ability to obtain equitable remedies from the courts. This phrase suggested that standing was a jurisdictional question, as in *Livingston* or *Cherokee Nation*. That interpretation was consonant with both the historical view of equity as a separate jurisdiction (as it had been before the merger of law and equity) and the notion that jurisdiction in equity was founded on the availability of certain remedies.

But the discussion of concepts of rights and entitlement to equitable remedies in jurisdictional terminology was understood by the most eminent legal scholars of the day as an inaccuracy needing correction. John Pomeroy decried the phenomenon in 1892: "[T]he 'equity juris-

which invade his own legal rights; and since the injuries here complained of are not of that character and do not result from the violation of any obligation owing to the complainants, it follows that they are without legal standing to sue.

Id. at 272-73 (emphasis added). Justice Sutherland rejected the majority's characterization of the legal interest on the ground that the bill relied only on the theory of harm to the plaintiffs' interests as competitors, not on a theory of inequality of treatment. *Id.* at 273-74.

282. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

283. *Id.* at 341 (Brandeis, J., concurring). In the very first drafts of this concurring opinion Justice Brandeis stated that

[t]he plaintiffs have no standing to require the Court to decide the Constitutional question. This objection is not procedural. The plaintiffs have complied with the formal requirements of a stockholders' suit prescribed by Equity Rule 27. Their lack of standing to require a decision of the Constitutional question is due to the absence, on the findings, of a substantive right to interfere with the internal management of the corporation.

THE LOUIS DEMBITZ BRANDEIS PAPERS, Box 96, Folders 1-7 (Library of Congress microfilm series, Part II: United States Supreme Court October Terms 1932-1938, Reel 16, # 0447).

284. Discussing the first obstacle, the substantive law, Justice Brandeis observed that "[t]he fact that the bill calls for an enquiry into the legality of the transaction does not overcome the obstacle that ordinarily stockholders have no standing to interfere with the management." *Ashwander*, 297 U.S. at 343. Discussing the second obstacle, the equity practice, Justice Brandeis began: "Even where property rights of stockholders are alleged to be violated by the management, stockholders seeking an injunction must bear the burden of showing danger of irreparable injury, as do others who seek that equitable relief." *Id.* at 344-45.

285. *Id.* at 346.

286. See, e.g., *Ritchie v. Franklin County*, 89 U.S. (22 Wall.) 67, 77 (1875); *Florida v. Anderson*, 91 U.S. 667, 675 (1876).

diction' is constantly confounded with the right of the plaintiff to maintain his suit"²⁸⁷ In 1926, in *State Grange v. Benton*, Justice Holmes admonished that: "Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked. In a strict sense the Court in this case had jurisdiction."²⁸⁸ At the very time of *Frothingham* and *Fairchild*, the Supreme Court was trying to disentangle "standing" from notions of jurisdiction. In 1926, the Court wrote: "Whether a plaintiff seeking such [equitable] relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction."²⁸⁹

Nevertheless, the ontological effect of the metaphor was overpowering: "A standing in court" *sounds* like a question of jurisdiction because *standing up* is a prerequisite to being heard in court. Justice Holmes, Pomeroy, and the Supreme Court did battle with the metaphor, but lost. "Standing" became a question of jurisdiction in the more fundamental sense of justiciability under article III.

B. *Jus Tertii and the Elaboration of the Individualist Model*

The analytic antecedents of the modern doctrine of standing can be traced to the cases that we now see as presenting problems of *jus tertii*: when a litigant seeks to invoke rights "belonging" to a third party.²⁹⁰ The connection between the *jus tertii* cases and their modern doctrinal descendent lies in their common conceptualization by means of the individualistic metaphor of "standing." If a litigant can assert only his or her own "personal" rights, then that person cannot assert the rights of another (*jus tertii*) and that person cannot assert the rights of the group (standing) unless he or she actually has suffered personal injury and the rights asserted are only coincidentally those of the group.

Viewed through this lens, both *jus tertii* and modern standing cases concern situations in which the court dismisses the litigant's claim because he or she is the wrong person to assert it. But these two types of cases relied on different doctrines. The *jus tertii* cases were not premised on article III minima derived from the "case or controversy" requirement as is the modern understanding of standing. As Justice Brandeis explained in *Ashwander*, *jus tertii* was a rule the Court applied in

287. J. POMEROY & S. SYMONS, 1 EQUITY JURISPRUDENCE § 131 (5th ed. 1941) (annotating Pomeroy's original works). Pomeroy's concern was that it was "productive of much confusion in the discussion of equitable doctrines." *Id.*

288. 272 U.S. 525, 528 (1926) (Holmes, J.). In *Benton*, the Court rejected a challenge to the adoption of Daylight Savings Time brought by parties who "do not even allege any direct interest" and by another who raised "matters that do not concern her." *Id.* at 528.

289. *General Inv. Co. v. New York Cent. R.R.*, 271 U.S. 228, 230-31 (1926) (citations omitted).

290. *See, e.g., Singleton v. Wulff*, 428 U.S. 106 (1976); *Tileston v. Ullman*, 318 U.S. 44 (1943).

"cases confessedly within its jurisdiction . . ."291 None of the *jus tertii* plaintiffs lacked the requisite relationship to the court now delineated by the modern doctrine of standing. Each plaintiff had a sufficient interest to make the dispute a "case." Each had suffered an injury-in-fact; each was affected in a particularized way by the private or public actions about which he or she complained; and, had the courts adjudicated the claim, each predicament would have been redressed by the relief sought.

Equity doctrine provided the link that allowed *jus tertii* cases to become transformed into the modern standing doctrine with its focus on injury and direct causation. To document this link, I will demonstrate that the *jus tertii* doctrine itself evolved from two separate lines of cases.

The first line of cases evolved from an 1809 decision by Chief Justice Marshall in *Owings v. Norwood's Lessee*.292 Mr. Owings, the defendant in an ejectment action, had come into possession of the property after an attachment and unexecuted judgment of condemnation had been obtained by a creditor of the mortgagee.293 Mr. Owings' defense to the plaintiff's claim of title was that superior title had passed to the mortgagee, an English merchant named Mr. Scarth. The Maryland courts held that Mr. Scarth's interest had been confiscated by the state in 1780. Mr. Owings argued that the confiscation in fact occurred in 1794 and, therefore, was invalid under the provisions of the treaty of peace with England. The Court held that it had no jurisdiction because "[t]he 25th section of the judiciary act must be restrained by the constitution, the words of which are, 'all cases arising under treaties.' The plaintiff in error does not contend that his right grows out of the treaty."294

The next day, plaintiff's counsel addressed the Court, stating his understanding of the basis of the Court's decision. He suggested that the Court had reached its decision by interpreting its power to review state court judgments "where the party himself did not claim title under a treaty." Chief Justice Marshall responded that plaintiff's counsel "had misunderstood the opinion of the court, in that respect. It was not that this court had no jurisdiction if the treaty were drawn in ques-

291. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936).

292. 9 U.S. (5 Cranch) 344 (1809). *Owings* is, in fact, miscited as the first example of the *jus tertii* doctrine, as I explain in the text below. Compare *Owings*, 9 U.S. at 348, with *Tyler v. Judges of the Court of Registration*, 179 U.S. 395, 408 (1900). *Tyler*, however, provided a critical link in the chain of development of the modern doctrine of standing. See text accompanying notes 329-342 *infra*.

293. *Owings*, 9 U.S. at 344.

294. *Id.* at 347-48. At first blush, this reasoning appears inconsistent with Justice Marshall's later holding concerning the "arising under" jurisdiction in *Osborn* that "it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction . . ." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824). As explained below, however, the inconsistency is more apparent than real.

tion *incidentally*.”²⁹⁵ Rather, Mr. Owings could not invoke the Court’s appellate jurisdiction because his was not a case presenting a federal question.²⁹⁶ Mr. Owings claimed no title under the Englishman Scarth. Nothing in the case concerned the rights or treatment of an English national, the subject to which the treaty’s provisions were addressed. The invocation of Mr. Scarth’s title was relevant only as a matter of state property law to defeat the plaintiff’s ejectment claim.²⁹⁷ That question could be invoked by Mr. Owings in the Maryland courts.²⁹⁸ But, the purposes of the treaty protections—that is, the federal interests²⁹⁹—were absent; the case was wholly dependent on state law.³⁰⁰

In its own time, however, *Owings* was understood as construing section 25 of the Judiciary Act of 1789 as limiting the Supreme Court’s appellate jurisdiction to cases in which the plaintiff-in-error claimed or set up a title of his or her own derived from the Constitution, a treaty, or a law of the United States.³⁰¹ This was, in part, because Chief Justice Marshall’s opinion appeared to be concerned with the definition and ownership of rights.³⁰² It is not surprising that this notion of *jus tertii* was understood as statutory rather than constitutional. For the contemporaneous informer, relator and mandamus cases taught that article III did not necessarily bar a litigant from raising another’s rights. If

295. *Owings*, 9 U.S. at 348 (emphasis added).

296. See G. HASKINS & H. JOHNSON, 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 511 n.43 (1981).

297. The same issue arose in *Henderson v. Tennessee*, 51 U.S. (10 How.) 311 (1850). There the Court explained that:

[I]n the language of ejectment law, an outstanding title means a title in a third person, under which the tenant in possession does not claim. . . . The right to make this defence is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the State, which provide that the defendant in ejectment may set up title in a stranger in bar of the action.

Id. at 323.

298. *Owings*, 9 U.S. at 348.

299. Chief Justice Marshall observed that:

[A]ll persons who have real claims under a treaty should have their cause decided by the national tribunals. It was to avoid the apprehension as well as the danger of state prejudices. . . . But if the person’s title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty.

Owings, 9 U.S. at 348.

300. Cf. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950) (“language in the contract may have a scope independent of the proper construction of § 7(c)” of the Natural Gas Act); *Evans v. Abney*, 396 U.S. 435 (1970) (applying independent and adequate state ground rule).

301. G. HASKINS & H. JOHNSON, *supra* note 296, at 553, 625 (1981); see *Montgomery v. Hernandez*, 25 U.S. (12 Wheat.) 129, 132 (1827); *Henderson v. Tennessee*, 51 U.S. (10 How.) 311, 323 (1850); *Hale v. Gaines*, 63 U.S. (22 How.) 144, 160 (1859); *Long v. Converse*, 91 U.S. 105, 113-14 (1875); *Giles v. Little*, 134 U.S. 645, 650 (1890).

302. The words of the constitution are, ‘cases arising under treaties.’ Each treaty stipulates something respecting the citizens of two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.

Owings, 9 U.S. at 348 (emphasis in original).

there was a rule of law that did so, it would have to have been the statute. The Court continued to interpret its jurisdictional statute as the source of the principle of *jus tertii* well into the twentieth century.³⁰³

The generalized notion of *jus tertii* that we are familiar with today developed instead from an entirely different source: state mandamus cases as interpreted by Dean Thomas Cooley.³⁰⁴ Precisely because mandamus practice allowed strangers to litigate constitutional claims of governmental excess, those queasy about the exercise of the strong medicine of judicial review questioned whether any public spirited citizen should be able to invoke it.

This notion of *jus tertii* was derived from the distinction between unconstitutional statutes as void or merely voidable.³⁰⁵ In *Marbury's* conceptual system, unconstitutional statutes were conceived of as void because beyond the legislative power in the first place.³⁰⁶ *Marbury's* conception was soon questioned in the state courts, where the practice of judicial review was recognized, but not embraced so unqualifiedly. In *re Wellington*,³⁰⁷ the Massachusetts court propounded its own, premature Brandeisian catalogue of devices for avoiding the invalidation of state statutes on constitutional grounds.³⁰⁸ Amongst these was the recognition that

when such an act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected.³⁰⁹

Wellington was a classic public rights case. Joshua Wellington and his co-plaintiffs sought, by means of mandamus, to compel county commissioners "to consider and determine whether it be of common convenience and necessity," that a road be built across a corner of Cambridge

303. See *Coleman v. Miller*, 307 U.S. 433, 437-38 (1939); *Smith v. Indiana*, 191 U.S. 138, 148-49 (1903); *Lampasas v. Bell*, 180 U.S. 276, 283-84 (1901); *Ludeling v. Chaffe*, 143 U.S. 301, 305 (1892). The Court did not use the term "standing" in these cases. The appellees in *Smith*, however, phrased their argument in that way: "Plaintiff in error has no standing in this court, and has no right to invoke the power of this court . . ." *Smith*, 191 U.S. at 146.

304. See notes 315-317 *infra* and accompanying text.

305. As such, these state mandamus cases relate more to modern notions of overbreadth than to *jus tertii*. Compare *Broderick v. Oklahoma*, 413 U.S. 601 (1973), with *Singleton v. Wulff*, 428 U.S. 106 (1976). Of course, overbreadth like *jus tertii* can be conceptualized in terms of "standing"—again, the court dismisses the litigant's claim because he or she is the wrong person to assert it.

306. *Marbury v. Madison*, 5 U.S. (1 Cranch) 87, 111 ("an act of the legislature, repugnant to the constitution, is void").

307. *In re Wellington*, 33 Mass. (16 Pick.) 87 (1834).

308. *Id.* at 95-97. The "devices" included the exercise of "great caution" in approaching the question; an examination of "every possible aspect"; deliberation as lengthy and patient as necessary to "throw any new light on the subject"; a commitment not to void a statute on constitutional grounds unless the matter was "beyond reasonable doubt"; and a presumption that the circumstances necessary to support the constitutionality of the legislation in fact exist. *Id.*

309. *Id.* at 96.

common.³¹⁰ On the merits, the petitioners argued that the state statute establishing the commons was unconstitutional because it failed adequately to provide for compensation to the original property owners, all of whom were third parties. The court recited the limitation noted above, but ruled against the third party claim on the merits.³¹¹

Only at the close of the opinion did the court consider "whether the petitioners in the present case stand in such a relation to the cause and the subject matter, as to warrant them in applying to this Court for a writ of mandamus."³¹² It suggested that "it may perhaps be urged with some force, that petitioners so situated are parties and *as such* have an interest in the final and correct determination of the cause . . ."³¹³ Ultimately, the court concluded that it need not reach the "standing" question because it disposed of the case on the merits of petitioners' third party claim.³¹⁴

But Dean Thomas Cooley adopted *Wellington's* notion that statutes were only unconstitutional as applied to specific people. He discussed it in his influential treatise on constitutional limitations on state governments,³¹⁵ a major source of late nineteenth century legal views on individualism.³¹⁶ Cooley interpreted *Wellington* as a case about the individualistic basis of rights that stated a general rule of *jus tertii*: "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."³¹⁷

Some state courts applied Cooley's analysis³¹⁸, but the Supreme Court was initially less receptive.³¹⁹ Thus, although the Court asked

310. *Id.* at 93.

311. *Id.* at 97-105.

312. *Id.* at 105. Here the Court uses the metaphor of "standing" to refer to the relationship between the litigant and the adjudicative process.

313. *Id.* at 106 (emphasis added). The court confessed to experiencing some befuddlement about the intermediate nature of the case, which it characterized as a "somewhat anomalous proceeding." *Id.* at 105-06. It considered the formal constraints imposed by the mandamus petition—that the petition gave adequate notice "to all parties interested" and that the jurisdiction of the commissioners was strictly limited by the terms of the petition, *see* text accompanying note 208 *supra*,—and concluded that these were sufficient to permit the suit. *Id.*

314. *Id.* at 106.

315. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868). Cooley's book was called "the most influential treatise ever published on American constitutional law." E. CORWIN, LIBERTY AGAINST GOVERNMENT 116 (1948). Justice Brandeis relied on this book in his concurring opinion in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345 (1936).

316. B. TWISS, LAWYERS AND THE CONSTITUTION 18, 22 (1942). *See also* Seagle, *Thomas McIntyre Cooley*, 4 ENCYCLOPEDIA OF SOCIAL SCIENCE 357 (1930).

317. T. COOLEY, *supra* note 315, at *163 (3d ed. 1874).

318. *See, e.g.*, *Clark v. Kansas City*, 176 U.S. 114, 118 (1900) (quoting opinion Kansas Supreme Court).

319. The Supreme Court of the United States, however, was not yet prepared in 1868, nor for some years afterward, to yield itself to the leadership of Cooley and those who, including an important section of the American Bar, shared his views. This was because a controlling majority of the Court felt that the duty immediately

the rhetorical question in *Supervisors v. Stanley*,³²⁰—"What legal interest has he in a question which only affects others?"³²¹—it did not decide the case by invoking Cooley's (or *Owings'*, for that matter) concept of *jus tertii*. Rather, the Court concluded that the New York statute "was voidable but not void."³²² It found that the provisions of the New York statute were severable,³²³ and could be applied in cases in which no conflict with the federal statute existed.³²⁴

The watershed came in three cases at the turn of the century. In the first, *Clark v. Kansas City*,³²⁵ the Court cited Cooley and *Stanley* as illustrations of the proposition that "a court will not listen to an objection made to the Constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it."³²⁶ In *Clark*, a railroad challenged a state statute exempting agricultural land from municipal annexation. It argued that the statute discriminated between the owners of agricultural and other types of land, as well as among owners of various classes of agricultural land, in violation of the equal protection clause.³²⁷ Because the railroad owned no agricultural land, the Court only considered the alleged discrimination between owners of agricultural and nonagricultural land, but would not consider discrimination among owners of various classes of agricultural land. The Court applied the *source-path-goal* metaphor of the private rights model; because the railroad had suffered no legal injury—that is, no *source* for the remedial request the railroad—had no cause of

before it was to prevent "the federal equilibrium" from being completely undermined by the Reconstruction program of the Radical Republicans.

E. CORWIN, *supra* note 315, at 118. See also Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39.

320. 105 U.S. 305 (1881). In *Stanley*, plaintiffs were shareholders in a national bank whose shares were taxed by New York, as then permitted by federal statute. They argued that "the statute of New York, under which the shares were assessed, was void, because it did not permit the shareholder to make deduction of the amount of his debts from the valuation of his shares . . ." *Id.* at 305.

321. The full passage is as follows:

What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. . . . What legal interest has he in a question which only affects others? Why should he invoke the protection of the act of Congress in a case where he has no rights to protect? Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs?

Id. at 311.

322. *Id.* at 315.

323. *Id.* at 312.

324. *Id.* at 315-16. Four years later, the Court said that it "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool, N.Y. & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

325. 176 U.S. 114 (1900).

326. *Id.* at 118.

327. *Id.* at 117-18.

action.³²⁸

The second case, *Tyler v. Judges of the Court of Registration*,³²⁹ is the most significant of the three: It is one of two opinions authored by Justice Brown that form the basis of the modern standing doctrine;³³⁰ it was the first opinion to combine the statutory and generalized versions of *jus tertii*;³³¹ and, most importantly, it was a prerogative writ case, thus challenging the viability of the representational model on its home turf.

Tyler was a challenge to the Massachusetts Land Registration Act of 1898,³³² which provided for an in rem proceeding through which an owner could settle title as against all potential claimants. Mr. Tyler was the owner of a lot adjoining one that was about to be registered; he was concerned that the registration, specifying the boundaries of the lot, would prejudice a dispute over the boundary between that land and his. He sought a writ of prohibition to stop the registration court from proceeding. He argued that the registration statute was unconstitutional because it failed to provide notice to absent third parties who might have an interest in the land to be registered. The Court declined review because Mr. Tyler clearly had notice, and therefore did not have "the requisite interest to draw in question the constitutionality of this act. . . ."³³³ Mr. Tyler could not invoke the concerns of others, who had to complain for themselves.³³⁴

The four dissenters were astonished by the Court's ruling.³³⁵ And

328. The Court observed that: "The discrimination occurs only in a particular use of the lands, and it would seem obvious that such use must be shown to make a cause of action—a right infringed and to be redressed. . . . Not a law alone but a law and its incidence are necessary to a justiciable right or injury" *Id.* at 118. The use of the *source-path-goal* schema in the reasoning in this passage appears first in the argument that there must be a *source* ("such use") for the court to entertain the railroad's quest for its sought after *goal* (that is, a "cause of [the court's] action"). It appears again in the Court's definition of cause of action. "Right" derives from the Latin *rectus* and "redress" from the Latin *directus*: both mean straight and thus are further instances of the *source-path-goal* structure of the notion of a private cause of action. See Winter, *supra* note 66.

329. 179 U.S. 405 (1900).

330. Members of the Court relied upon the two cases, *Tyler* and *Davis & Farnum Mfg. Co. v. City of Los Angeles*, 189 U.S. 207 (1903), in their later opinions developing the underpinnings of modern standing. See *Fairchild v. Hughes*, 258 U.S. 126, 130 (1922) (Brandeis, J., citing *Tyler*); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring citing *Tyler*); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam, citing *Tyler*); *Coleman v. Miller*, 307 U.S. 433, 466 (1939) (Frankfurter, J., concurring, citing *Tyler*); *Barrows v. Jackson*, 346 U.S. 249, 265 (1953) (Vinson, C.J., dissenting on standing grounds, citing *Tyler*); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154 & n.3 (1951) (Frankfurter, J., concurring, citing *Davis*); *United States v. Richardson*, 418 U.S. 166, 193 (1974) (Powell, J., concurring, citing *Tyler*); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) (Burger, C.J., citing *Tyler*).

331. Justice Brown also combined the two concepts in dicta in *Red River Valley Bank v. Craig*, 181 U.S. 548, 558 (1901) (citing *Lampasas v. Bell*, 180 U.S. 276, 283 (1901); *Clark v. Kansas City*, 176 U.S. 114, 118 (1900); *Supervisors v. Stanley*, 105 U.S. 305 (1881)).

332. Massachusetts Land Registration Act, 1898 Mass. Acts, ch. 562.

333. *Tyler*, 179 U.S. at 410.

334. *Id.*

335. Every element requisite to the maintenance of our jurisdiction exists, and . . . we cannot decline to exercise it because of any supposed error on the part of the

they had good reason to be: Massachusetts Supreme Court Chief Justice Holmes had authored the opinion below and had not questioned Mr. Tyler's capacity to bring the action.³³⁶ Furthermore, in Massachusetts in 1900, as at the time of the Framers, a writ of prohibition of the type sought in *Tyler* was available at the behest of a stranger, let alone a petitioner with an injury of his or her own.³³⁷

But Justice Brown and the majority opined:

The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defence set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.³³⁸

The Court failed to explain in doctrinal terms *why* Mr. Tyler's action did not provide a proper "instance[] where, by . . . the settled practice . . . , the plaintiff is permitted to sue for the benefit of another." The Court also ignored the fact that Mr. Tyler *had* alleged an injury peculiar to himself: an adjudication by the registration court of the boundaries of the adjoining property that would, at least de facto, alter his rights. Finally, the opinion invoked the law of nuisance as its paradigm, an analogy underlining the degree to which the notion of "standing" was bounded by the relevant substantive law and, thus, undermining the Courts generalized assertion that a plaintiff could not sue on behalf of others.

What Justice Brown's opinion did instead was neatly to sever the plaintiff's connection to the absent third parties by rejecting the sufficiency of the *part-whole* metaphor for society: Mr. Tyler needed to make a personalized legal claim "as distinguished from *the great body* of his fellow citizens."³³⁹ Doctrinally, the opinion invoked *Owings* and its progeny³⁴⁰—as well as aspects of justiciability such as mootness, ripeness, and the ban on advisory opinions.³⁴¹ It did not raise the question

state court in respect to entertaining the suit. . . . The state court ruled that the petition was sufficient to raise the Federal question; that petitioner was competent to raise it; and that he was entitled to preventive relief if his contention was well founded.

Id. at 413-14 (Fuller, J., joined by Harlan, Brewer, & Shiras, JJ., dissenting).

336. *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N.E. 812 (1900).

337. See cases cited *supra* note 167.

338. *Tyler*, 179 U.S. at 406.

339. *Id.*

340. *Id.* at 407-08. See notes 292-302 and accompanying text for a discussion of *Owings*.

341. Justice Brown noted that "the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Tyler*, 179 U.S. at 409 (quoting *California v. San Pablo & Tulare R.R.*, 149 U.S. 308, 314 (1893)). In Justice Brown's view, the abstractness of Mr. Tyler's case turned on an assessment of the contingencies: If the registration statute were later held unconstitutional "the proceedings against him

we now view as central to standing: the degree of injury a litigant must suffer to establish his or her entitlement to use the judicial process. To the contrary, Justice Brown acknowledged that Mr. Tyler was free to intervene in the registration process and pursue *his* claim in that case all the way to the United States Supreme Court.³⁴²

Thus, *Tyler* was not a case of article III standing in the modern sense. But, it was an important step toward the modern doctrine because it specifically rejected application of the representational model with the writ of prohibition. The final link, transforming a doctrine preventing injured parties from invoking third party rights into a doctrine requiring direct injury, came from familiar doctrines of equity.³⁴³ Two years after *Tyler*, in *Davis & Farnum Manufacturing Co. v. City of Los Angeles*,³⁴⁴ Justice Brown employed the metaphor of "standing" and invoked the *jus tertii* reasoning of *Tyler* by analogy.

In *Davis*, a subcontractor on a gas tank construction project sought to enjoin Los Angeles from enforcing municipal ordinances banning the project. The subcontractor had an obvious economic interest in the project, and employees of the subcontractor were being prosecuted for violating the ordinance. The subcontractor sought to enjoin the pending state criminal proceedings on constitutional grounds, claiming that later enacted ordinances impaired the obligation of a preexisting contract to build the gas works.³⁴⁵ In his opinion for the Court, Justice Brown dismissed the subcontractor's interest as too indirect: "[T]his is not a bill by . . . the owner of the land and of the proposed gas works . . . nor by the contractor, with which she had made a contract to erect these works; but by a subcontractor . . ." ³⁴⁶

The Court held that the subcontractor did not "stand . . . in [a] position . . . to take advantage of the unconstitutionality of [the] law" because "it has an action against the Gas and Fuel Company, which is presumed at least to be able to respond in damages for all such as plaintiff may have suffered by the interruption of the contract. . . ." ³⁴⁷

[Mr. Tyler] would simply go for naught." *Tyler*, 179 U.S. at 410. Alternatively, if Mr. Tyler participated in the registration statute proceedings and "that court shall eventually uphold his contention with respect to the boundary, he will have no ground for complaint." *Id.* Only if Mr. Tyler lost below would the case be proper for the Court's review. *Id.*

342. *Id.*

343. One might have assumed that the direct injury requirement was rooted in an *afortun* logic of "standing": If an injured party could not sue when the alleged illegality did not affect her, then certainly she should not be able to sue when she had suffered no injury at all.

344. 189 U.S. 207 (1903). Professor Vining identified *Davis* as the first case to contain the term "standing," albeit in a headnote. J. VINING, *supra* note 27, at 55.

345. The Court first noted that equity would not enjoin criminal proceedings. It then inquired whether the case fell within the exception for unconstitutional state laws that threaten irreparable harm to property, *Davis*, 189 U.S. at 217-18, considering *Davis*'s impairment of contract claim.

346. *Id.* at 218.

347. *Id.* at 219. That the Court assumed that the city had not impaired the subcontractor's contract at all also explains the unavailability of equitable relief. "Whether the Gas and

Thus *Davis* was not a case of "standing" in which the Court viewed the plaintiff as having no personal interest in the outcome of the dispute.

Conceptually, *Davis* held that the subcontractor could not use a *part-whole* schema or a *link* schema to invoke the "personal" claim of the general contractor. The subcontractor's complaint, after all, was that the municipal ordinance affected everyone in the chain extending from the land owner, to the general contractor, through it (as an intermediate *link*), to its own employees. The Court said that the subcontractor could not invoke the joint interest of the whole chain. The subcontractor would have to deal with the other *link*, the general contractor, on its own.

Doctrinally, the lower federal courts interpreted *Davis* as concerning the scope of the equity jurisdiction of the federal courts.³⁴⁸ Two other equity cases, frequently cited in modern standing opinions, illustrate this equitable, rather than constitutional, origin of the link between jurisdiction and adequacy of one's personal interest: *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*³⁴⁹ and *Truax v. Raich*.³⁵⁰

In *McCabe*, five black persons sued to enjoin compliance by five railroads with the terms of a post-*Plessy v. Ferguson*³⁵¹ Oklahoma statute. The statute explicitly required that railroad provide separate but equal facilities. But it allowed one-race sleeping, dining, and chair cars without providing such "luxury" accommodations to the other race. The district court upheld the statute. The Court questioned that part of the statute which deviated from the separate-but-equal doctrine, rejecting the state Attorney General's argument that the railroads experienced insufficient demand for services to justify all-black sleeping, dining, and chair cars.³⁵² "It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a *personal* one."³⁵³

The Court nevertheless affirmed. Citing *Davis* and *Tyler*, the Court

Fuel Company in such action could defend upon the ground that the municipality had forbidden the prosecution of the work might depend somewhat upon the terms of the contract. . . ." *Id.* The Court saw only a contract issue: If the contract contained a *force majeure* clause, then there was no contract to be impaired because both parties would have accepted the risk of such an ordinance. If the contract did not contain such a clause, then there was still an unimpaired, enforceable contract.

348. *Venner v. Great N. Ry. Co.*, 153 F. 408, 411 (C.C.S.D. N.Y. 1907); *Poor v. Iowa Cent. Ry. Co.*, 155 F. 226, 230 (C.C.S.D. Iowa 1907); *see also Gage v. Riverside Trust Co.*, 156 F. 1002, 1006 (C.C.S.D. Cal. 1906).

349. 235 U.S. 151 (1914). *McCabe* is cited in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-22 (1974), *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962) (per curiam), and *Barrows v. Jackson*, 346 U.S. 249 (1953).

350. 239 U.S. 33 (1915). *Truax* is cited on the issue of standing in *Roe v. Wade*, 410 U.S. 113, 124 (1973), *Abington School District v. Schempp*, 374 U.S. 203, 266 n.30 (1963) (Brennan, J., concurring), *Barrows*, 346 U.S. at 258, and *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154 (1951) (Frankfurter, J., concurring).

351. 163 U.S. 537 (1896).

352. *McCabe*, 235 U.S. at 161.

353. *Id.* (emphasis added).

held that plaintiffs were not entitled to equitable relief. It reasoned that, in order to justify such relief, the plaintiffs must demonstrate personal injury,³⁵⁴ and there must be no adequate remedy at law.³⁵⁵ The concluding passage of the opinion reveals that the Court was considering traditional rules of equity, not constitutional or prudential rules of "standing":

Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodation equal to those afforded to others on a like journey, he will not have an adequate remedy at law. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks.³⁵⁶

In *Truax*, decided a year after *McCabe*, the Court revealed the flip side of an equitable, nonconstitutional analysis that depended on the directness of the plaintiff's interest. Mr. Raich, who was from Austria, was a cook in Mr. Truax's restaurant. Arizona passed a statute requiring that at least 80 percent of a business' employees be Americans. Mr. Truax informed Mr. Raich of his intention to discharge Raich because of the statute. Mr. Raich subsequently brought an action in equity to declare the statute unconstitutional and enjoin its enforcement.³⁵⁷ The state argued that the employer was subject to criminal prosecution, not Mr. Raich, and that therefore Raich could not sue to present the employer's complaint.³⁵⁸ The Court rejected the argument, premised on *McCabe*, that "the complainant cannot sue save to redress his own grievance . . ." ³⁵⁹ It noted that "the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution . . . It is, therefore, idle to call the injury indirect or remote."³⁶⁰ The Court added that Mr. Raich had no adequate remedy at law, concluding, "that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief

354. "The complainant cannot succeed because someone else may be hurt." *Id.* at 162.

355. *Id.* In *Mitchell v. United States*, 313 U.S. 80 (1941), the Hughes Court reversed a ruling of the Interstate Commerce Commission (ICC) on substantially similar facts. Applying the modern conception of standing, the Court held that Congressman Mitchell had standing. 313 U.S. at 92-93. On the merits, the Court held that Mitchell was entitled to an order from the ICC forbidding discrimination in the future because "the incident was . . . representative of an alleged practice that was expected to continue." *Id.* at 96 (quoting *Mitchell v. Chicago*, 229 I.C.C. 703, 704 (1938)). The irony is that *McCabe* was written by Associate Justice Hughes, and *Mitchell* was authored by Chief Justice Hughes.

356. *Id.* at 164. The Court later relied on this passage in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-22 (1974). The *McCabe* reasoning is similar to that which precluded Adolph Lyons from enjoining the chokehold practice. See text accompanying notes 14-18 *supra*.

357. *Truax v. Raich*, 239 U.S. 33, 39 (1915).

358. *Truax*, 239 U.S. at 37, 38.

359. *Id.* (citing *McCabe*, 235 U.S. at 162).

360. *Id.* at 39.

may be had."³⁶¹

Taken together, *McCabe* and *Truax* illustrate the equitable source of the modern doctrines of injury-in-fact and of prudential avoidance of constitutional decisions. These cases concerned traditional rules of equity about the limits of its jurisdiction: Equity acted only when necessary; equity grew out of the discretion of the chancellor to determine which interests were sufficiently important to justify the invocation of a coercive, in personam, remedial power rooted in a concern for justice.³⁶² These doctrines, and not article III specifications about the sufficiency of the litigant's interest, dominated the discourse when the Court subsequently dealt with the question of citizen and taxpayer "standing."

The significance of cases like *Tyler*, *Davis*, *McCabe*, and *Truax* to the development of constitutional standing, however, was not doctrinal. Rather, these cases were important because they rejected the underlying representational model of the previous century in favor of a model that was strictly individualist. Only Mr. Raich's claim could be maintained because his was not dependent on a representational schema. Mr. Raich's claim was consistent with the causal *source-path-goal* metaphor. The Court noted that the purpose of the act was *directed at* aliens such as Mr. Raich and that the path was neither circuitous nor attenuated.³⁶³ On the other hand, Mr. Tyler's *link* to other members of the community no longer sufficed to justify his invocation of the concerns of other *parts* of "the great body of his fellow citizens."³⁶⁴ The fact that Mr. McCabe was challenging the actions of a public carrier on behalf of all black passengers no longer sufficed as in *Hall*; the fact that the subcontractor in *Davis* was an intermediate *link* in the chain affected by the municipal ordinance was no longer relevant. The Court disapproved the representational submodels premised on *link* and *part-whole* schemata and these links between individuals were severed. Yet, the public rights submodels with simpler *part-whole* schemata, that is, the representational model in which the *whole* acted for the *parts*, and the constituent model in which one *part* acted for the *entity* itself remained intact until the next decade.

C. States' Rights, Private Rights, and Public Rights

The Court invoked the private rights model in the 1860s to block the attempts by southern states to challenge the Reconstruction program. Professor Monaghan cited this invocation as the clearest demonstration of the limitation of article III jurisdiction to "concrete 'private

361. *Id.*

362. See Langdell, *supra* note 280, at 672.

363. *Truax*, 239 U.S. at 39-40 ("[T]he act undertakes to operate *directly* upon the employment of aliens" (emphasis added)). *Id.* at 38.

364. *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406 (1900) (emphasis added).

rights.’”³⁶⁵ However, Monaghan’s analysis is distorted by hindsight. In the 1860s, the Court did not apply the private rights model as an alternative to the intermediate public rights model, but rather as an alternative to viewing certain matters as nonjusticiable “political questions.” Indeed, the Court vacillated for decades on the issue of whether states could invoke the public rights model on behalf of their citizens.

In *Georgia v. Stanton*,³⁶⁶ the state filed an original bill in equity, asking the Court to restrain the execution of the original Reconstruction Acts setting up military governments in the southern states. The Attorney General argued against jurisdiction on the grounds, *inter alia*, that the case presented a political question, was premature, and that the alleged harm was speculative.³⁶⁷ The state argued that equity jurisdiction was proper: “Much has been said about all the evil alleged in the bill being contingent and future The fact is quite otherwise. A bill *quia timet* is one of the very heads of equity jurisdiction.”³⁶⁸ Georgia took the position that the case was justiciable because it fell within the familiar forms.³⁶⁹

The Court conceded that it had a “case” before it that appeared, in form, to fall under equity jurisdiction, but agreed with the Attorney General that the case was political and nonjusticiable: “[I]n order to entitle the party to the [equitable] remedy . . . the rights in danger . . . must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.”³⁷⁰

Florida v. Anderson,³⁷¹ decided seven years later, reads like an assertion of the private rights model. The majority opinion even expresses the jurisdictional question in terms of “a standing in court.”³⁷² *Anderson* was an original bill in equity instituted by the Florida Attorney General on behalf of the state and the trustees of its internal improvement trust fund. The suit sought to protect a statutory lien on some railroad property by setting aside a prior judgment foreclosing on the property

365. See Monaghan, *supra* note 29, at 1367-68.

366. 73 U.S. (6 Wall.) 50 (1868).

367. *Id.* at 54-62. The Attorney General also argued that there were no proper party defendants since the case was really against the federal government and not the named federal officers, and thus not within the specific grant of jurisdiction under article III. *Id.* at 53-54. But see *Ex parte Young*, 209 U.S. 123 (1908) (state attorney general held proper party defendant in suit brought to enjoin enforcement of state law).

368. *Stanton*, 73 U.S. at 63.

369. The Attorney General of Georgia argued that:

It is untrue that questions of a political nature, according to the vulgar acceptance of that phrase, are unsuited to judicial cognizance. Of course no court can, judicially, investigate or determine any question unless parties, between whom it has cognizance, are regularly before it; unless the disputable facts, if any, be susceptible of a judicial trial, and unless the relief sought be judicial in its form and nature. . . .

Id. at 67.

370. *Id.* at 76.

371. 91 U.S. 667 (1876).

372. *Id.* at 675-76.

and by invalidating the subsequent sale of the railroad.³⁷³ The defendants challenged the Court's jurisdiction on the ground that only the trustees were proper party plaintiffs, and that the trustees could not invoke the original jurisdiction of the Court. The Court held that the state was the real party in interest and, thus, could invoke the Court's original jurisdiction.³⁷⁴

In *Anderson*, as in *Stanton*, the Court defined its equity jurisdiction in terms of the private rights model's focus on property rights.³⁷⁵ In *Anderson*, the issue was whether the state's interest was sufficiently direct to invoke the extraordinary equity power to set aside judgments and invalidate sales. It was solely in this sense that the Court asked whether the state had "a direct interest in the . . . controversy . . . as to give it a standing in court."³⁷⁶ The use of the term "standing" did not address the constitutional impermissibility of asserting public rights in the absence of private injury. The Court, which endorsed the public rights model in *Hall* the same Term that it decided *Anderson*, is unlikely to have intended to reject in *Anderson* what it had just approved in *Hall*.³⁷⁷

Indeed, *Anderson* appears to have had no direct impact on the later development of the doctrine of standing. The only time the Court cited *Anderson* was in the companion case to *Frothingham, Massachusetts v. Mellon*.³⁷⁸ In its discussion of the political question doctrine, the Court cited *Anderson* as an example of the kinds of justiciable questions that a state may raise.³⁷⁹ The Court did not cite *Anderson* as an example of an

373. *Id.* at 671.

374. The first question which naturally presents itself is, whether the State of Florida has such an interest in the subject-matter of the suit, and in the controversy respecting the same, as to give it a standing in court. It is suggested that the trustees of the internal-improvement fund are the only parties legally interested, and that they have no right to bring an original bill in this court. To this it may be answered, in the first place, that the State has a direct interest in the subject-matter (the railroad in question) by reason of holding (as it does) the four millions of bonds which are a statutory lien upon the road. In the next place, the interest of the State in the internal-improvement fund is sufficiently direct to give it a standing in court, whenever the interests of that fund are brought before a court for inquiry.

Id. at 675-76.

375. *Anderson*, like *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), involved a question of "standing" in the context of the Court's original jurisdiction under article III. The "real-party-in-interest issue" was a problem familiar to the lower courts in the diversity context, but not one that invoked the "standing" label. In *Anderson*, the Court relied on cases in which the circuit court exercised jurisdiction where there was diversity as between the real parties, but not when one of the nominal parties' citizenship was considered. 91 U.S. at 676-77 (citing *Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172 (1870)). The term "standing" does not appear in this discussion of diversity cases.

376. *Id.* at 675.

377. *Union Pac. R.R. v. Hall*, 91 U.S. 343 (1876).

378. 262 U.S. 447, 482 (1923).

379. *Id.* at 481-83. The Court noted several cases brought by states in which it had declined jurisdiction. It also listed others, such as *Anderson*, in which it had maintained jurisdiction, because they concerned proprietary rights. Without elaboration, it observed simply that "[t]he foregoing [cases], for present purposes, sufficiently indicate the jurisdictional line of demarcation." *Id.* at 482. It then turned to the question of Massachusetts' claim: "What, then, is the nature of the right of the State here asserted . . . ?" *Id.*

article III limitation to the private rights model in its consideration of the sufficiency of the plaintiff's interest in *Frothingham*.

Subsequent to *Anderson*, the Court invoked the public rights model in a similar federal context in *Debs*.³⁸⁰ For the next half century, the Court vacillated over the permissibility of state invocation of the public rights model. The first Justice Harlan argued frequently for the private rights model as a "case or controversy" limitation on suits brought by the states;³⁸¹ Justice Holmes, by contrast, argued that the states could appear to vindicate "quasi-sovereign interests."³⁸²

The public rights model of state litigation was ascendent for a time. The Court recognized the state's interest "as the representative of the consuming public" in 1923 in *Pennsylvania v. West Virginia*,³⁸³ and "as agent and protector of her people" in 1945 in *Georgia v. Pennsylvania Railroad*.³⁸⁴ In 1971, the second Justice Harlan reaffirmed the justiciability of a public nuisance case brought by the State of Ohio.³⁸⁵ Five years later, however, the Court reversed course yet again. In *Pennsylvania v. New Jersey*,³⁸⁶ a case involving interstate taxation, the Court rejected a *parens patriae* suit by Pennsylvania as "nothing more than a

In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States . . . [I]t is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.

Id. at 483.

380. *In re Debs*, 15 U.S. 564 (1895). See also *Sanitary District v. United States*, 266 U.S. 405, 425-26 (1925) (United States "has a standing in this suit . . . to remove obstruction to interstate and foreign commerce, the main ground") (Holmes, J.). *Id.* at 425.

381. See, e.g., *Oklahoma v. Atchison, Topeka & Santa Fe R.R.*, 220 U.S. 277, 287-89 (1911) (opinion for the Court per Harlan, J.); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 239-40 (1907) (Harlan, J., concurring); *Louisiana v. Texas*, 176 U.S. 1, 24-25 (1900) (Harlan, J., concurring). On the other hand, Justice Harlan had dissented in *Tyler* on the ground that the third party claim had been properly raised and considered in the state courts. See notes 335-336 *supra* and accompanying text.

382. See *Tennessee Copper*, 206 U.S. at 237 (opinion for the Court per Holmes, J.) (emphasis deleted). See also *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (opinion for the Court per Shiras, J.).

383. 262 U.S. 553, 591 (1923). In this case, Justice Holmes dissented on the merits. *Id.* at 600-03. Justice McReynolds dissented on the ground that the case was not justiciable because it was not ripe, *id.* at 603-04, and because the defense of "interstate commerce is not committed to any state as *parens patriae*." *Id.* at 604. Justice Brandeis was alone among the dissenters in arguing that the cases did not present a "case or controversy." *Id.* at 610.

384. 324 U.S. 439, 443 (1945). This battle is chronicled in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 270-75, which attempts to account for the issue without reference to the public rights model: "[C]onsider . . . whether the function of the original jurisdiction as a substitute for diplomacy and war justifies a more liberal standard of justiciability in actions between states than in actions by a state against individuals." *Id.* at 271. But see *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), discussed *infra* note 385.

385. In *Wyandotte Chemicals*, the Court affirmed its jurisdiction but held that the case could not appropriately be handled as an original matter in the Supreme Court. Previously, Justice Harlan had interpreted article III not to bar public rights litigation brought by private attorneys general. Instead, he opposed such suits on policy grounds. See *Flast v. Cohen*, 392 U.S. 83, 121-23 (1968) (Harlan, J., dissenting).

386. 426 U.S. 660 (1976).

collectivity of private suits"³⁸⁷

In the first quarter of the century, the disagreement on the Court about the public rights model of state litigation was related to the continued viability of the constituent submodel of the public rights model. Justice Brandeis' solitary dissent in *Pennsylvania v. West Virginia* identified the traditional syllogism of the forms with the private rights model: "They are not proceedings 'instituted according to the regular course of judicial procedure' to protect some right of property or personal right."³⁸⁸ In doing so, however, he not only failed to carry any other votes with him, but also failed to produce any authority. The statement quoted by Brandeis was not attributed to any source; earlier drafts attributed it to *Marbury v. Madison*³⁸⁹ until the Justice's law clerk pointed out that *Marbury* contained no such statement.³⁹⁰

Justice Brandeis' attack on the public rights model had yet to be formulated into a coherent strategy premised on a recognizable doctrine of justiciability.³⁹¹ But there was no doubt about the prospective nature of his concern nor that he saw it as a matter for justiciability doctrine. As he expressed it to his confidant Felix Frankfurter:

The most terrible thing the Court did was assumption of jurisdiction in West Virginia Natural Gas case. Van D[evanter] by general phrases glides over total absence of jurisdictional basis in Record. I don't care much about natural gas—it will soon be all gone—but the decision is very important as to hydroelectric.³⁹²

And the hydroelectric issue did come in *Ashwander v. Tennessee Valley Authority*,³⁹³ brought to the Court by means of the stockholder derivative instance of the constituent model.

387. *Id.* at 666.

388. 262 U.S. 591, 610 (1923) (Brandeis, J., dissenting). Although Justice Brandeis used the syllogism of the forms in his 1926 opinion for the Court in *Tutun v. United States*, 270 U.S. 568, 576-77 (1926), he did not limit, in that case, the cognizable forms to private rights cases. Rather, the *Tutun* opinion stressed that it was only the form and not the subject matter that controlled. *Id.* See note 116 *supra*.

389. 5 U.S. (1 Cranch) 187 (1803).

390. THE LOUIS DEMBITZ BRANDEIS PAPERS, Box 18, Folders 2-9 (Library of Congress microfilm series, Part I: United States Supreme Court, October Terms, 1916-1931, Reel 15, # 0075).

391. In a handwritten note to Justice Brandeis, his law clerk said: "Your 'first' is lacking in unity. You express 2 distinct objections: (1) moot case—no real issue; no threat of legal wrong; (2) 'political' question—not fit for any court to consider." THE LOUIS DEMBITZ BRANDEIS PAPERS, Box 18, Folders 2-9 (Library of Congress microfilm series, Part I: United States Supreme Court, October Terms 1916-1931, Reel 15, # 0075).

392. THE FELIX FRANKFURTER PAPERS, Box 114, Folder 10 at 8 (Library of Congress photocopy of typescript of Box 114, Folders 7 and 8; holograph notes of FF conversations with LDB, Chatham, Mass., 1922-26); THE LOUIS DEMBITZ BRANDEIS PAPERS (Library of Congress microfilm series, Part II: United States Supreme Court, October Terms 1932-1938, Reel 33, # 0450).

393. 297 U.S. 288 (1936).

D. *Constituent Standing*

Equity developed its own version of the constituent model premised on the *part-whole* schema: the shareholder derivative suit. There too, the courts spoke in terms of "jurisdiction" and, as in *Ashwander*, "standing." The question was whether equity could be invoked at the request of a constituent *part* to prevent illegal action harmful to the entity as a *whole*. It was *derivative* because the constituents' claim was premised on a *source-path-goal* schema that applied to the entity. The claims sought to address the injury of the corporation. This doctrine served as the model for the taxpayer actions of the late nineteenth and early twentieth centuries.

The first shareholder suit to reach the Supreme Court was *Dodge v. Woolsey*,³⁹⁴ a challenge to a state tax on a corporation. The Court invoked the *part-whole* metaphor, noting "that courts of equity, in both [England and the United States], have a jurisdiction over corporations, at the instance of one or more of their *members*."³⁹⁵ The Court also justified this jurisdiction with a familiar doctrine having a communitarian ring: "breach of trust."³⁹⁶ The Court subsequently upheld shareholder standing in *Pollock v. Farmers' Loan & Trust*,³⁹⁷ *Smith v. Kansas City Title & Trust*,³⁹⁸ and *Ashwander v. Tennessee Valley Authority*.³⁹⁹

The Court's doctrinal concern, when first considering taxpayer and citizen suits, was with the availability of the equity power. This was clear in *Crampton v. Zabriskie*,⁴⁰⁰ a case brought by municipal taxpayers.

394. 59 U.S. (18 How.) 331 (1856).

395. *Id.* at 341 (emphasis added).

396. *Id.*

397. 157 U.S. 429 (1895). The Court noted that equity jurisdiction in shareholder cases "has been frequently sustained." *Id.* at 553.

398. 255 U.S. 180 (1921). The Court held that: "The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by misapplication of the funds of the corporation, give jurisdiction under the principles of *Pollock v. Farmers' Loan & Trust Company* and *Brushaber v. Union Pacific Railroad Company*." *Id.* at 201-02. *Smith* was an important "well-pleaded complaint rule" case on the scope of federal question jurisdiction. But the references to *Pollock*, to *Brushaber*, 240 U.S. 1 (1916), to the interests of the stockholder, and to his "right" to an injunction also established the availability of federal equity jurisdiction.

399. 297 U.S. 288, 319-20 (1936) ("The right of stockholders to seek equitable relief has been recognized . . .") (citing *Pollock*, *Brushaber*, and *Smith*).

In *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916), the Court explained its use of the shareholder equity version of the constituent model in language that echoed the prototype effect of the private rights model in Blackstone's description of the prerogative writs. Blackstone had characterized those writs as having "a peculiar and eccentric nature." 3 W. BLACKSTONE, COMMENTARIES *115-16. In *Brushaber*, the Court noted familiar doctrines of equity and "the peculiar relation of the corporation to the stockholders." *Brushaber*, 240 U.S. at 9.

The Court also cited the "absence of all means of redress" that is, the absence of an adequate remedy at law, and the possibility of a "multiplicity of suits" as reasons to allow shareholders equitable relief. *Id.* at 10. Both factors are classic bases for the exercise of equity jurisdiction. See 1 J. POMEROY & S. SYMONDS, EQUITY JURISPRUDENCE §§ 216-222, 243-275 (5th ed. 1941).

400. 101 U.S. 601 (1880).

In *Crampton*, the Court held that there was "no serious question" about "the right of resident tax-payers" to use an equity court to prevent the county from creating debts for which the plaintiffs "in common with other property-holders of the county" would eventually be liable.⁴⁰¹ In *Crampton*, the Court recognized the analogy to the *part-whole* schema of the shareholder suit: "[T]here would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers."⁴⁰²

Five times before *Frothingham*, the Court passed over the putatively jurisdictional issue of "standing" in taxpayer suits. In *Bradfield v. Roberts*,⁴⁰³ *Wilson v. Shaw*,⁴⁰⁴ and *Millard v. Roberts*,⁴⁰⁵ taxpayer suits to enjoin federal actions were rejected on the merits. And, in *Hawke v. Smith*,⁴⁰⁶ and *Leser v. Garnett*,⁴⁰⁷ citizen taxpayer suits to enjoin allegedly unconstitutional state actions also were decided on the merits.

The briefs in these cases underscore the degree to which the questions of "standing" and the constituent model were seen as nonconstitutional and a function solely of the rules of equity jurisprudence. For example, the federal government's brief in *Bradfield* conceded that the Court would probably want to reach the merits and noted that: "[t]he Government has no strenuous objection to interpose."⁴⁰⁸

In *Wilson*, the plaintiff responded to the argument that "a private citizen has not the necessary interest in the subject-matter of the controversy" by noting that "[t]he objections urged here are the same, which from the beginning have been brought against the jurisdiction of equity in all cases of this character."⁴⁰⁹ He relied on the shareholder constituent model as support: "Private citizens under such circumstances occupy exactly the position of stockholders in private corpora-

401. *Id.* at 609.

402. *Id.*

403. 175 U.S. 291, 295 (1899). In *Bradfield*, the plaintiff sought to enjoin, as a violation of the establishment clause, federal payments pursuant to a contract with a District of Columbia hospital run by Catholic nuns.

404. 204 U.S. 24, 31 (1907). In *Wilson*, the plaintiff sought to enjoin as unconstitutional payments for the completion of the Panama Canal.

405. 202 U.S. 429, 438 (1906). In *Millard*, the plaintiff challenged District of Columbia expenditures for private railroad improvements.

406. 253 U.S. 221, 227 (1920). In *Hawke*, the plaintiff sought to enjoin the printing of federal ballots for the referendum on the ratification of the eighteenth amendment. The Court later relied on *Hawke* to reject the argument that citizen/taxpayer suits are forbidden by article III. See *Coleman v. Miller*, 307 U.S. 433, 439 (1939).

407. 258 U.S. 130, 137 (1922). In *Leser*, plaintiffs who were Maryland voters sought to strike the names of certain women from the list of qualified voters, challenging the nineteenth amendment. See *Coleman*, 307 U.S. at 439, for the Court's subsequent reliance on *Leser* to reject the argument that citizen/taxpayer suits are forbidden by article III.

408. Brief for the United States at 7, *Bradfield v. Roberts*, 175 U.S. 291 (1899) (No. 76). The government did cite as objections that the "complainant sues as citizen and taxpayer, yet *in forma pauperis*" and that, in order to enjoin a public law, the plaintiff should be threatened with real, particularized personal injury that is imminent. *Id.* at 7-8 (citing *Grant v. Cooke*, 7 D.C. (2 MacKay) 165, 203-4 (1871)).

409. Brief for Appellant at 6, *Wilson v. Shaw*, 204 U.S. 24 (1907) (No. 43).

tions”⁴¹⁰ The federal government replied by invoking equity’s individualist model, citing treatises on equity in support of its proposition that a plaintiff must show “some direct and personal injury to himself above that suffered by others.”⁴¹¹ The Court declined to rule on the sufficiency of Mr. Wilson’s interest in maintaining the suit, instead ruling against him on the basis of familiar equity doctrines. It observed that the plaintiff’s interest was insufficient to justify the issuance of an injunction to stop work on the Panama Canal, given the balance of hardships.⁴¹²

Thus, when the attack came on the constituent model at the federal level, it did not come in terms of standing as we now view it. Rather, it was articulated in much the same way as in Justice Brandeis’ opinion in *Pennsylvania v. West Virginia*, the natural gas case in which he attacked another version of the *part-whole* public rights model.⁴¹³

Fairchild was a constitutional challenge to the adoption of the nineteenth amendment, which granted women the vote. Once again, Justice Brandeis invoked the syllogism of the forms.

Plaintiff’s alleged interest in the question submitted is not such as to afford a basis for this proceeding. . . . In form it is a bill in equity; but it is not a case, within the meaning of § 2 of article 3 of the Constitution . . . for no claim of plaintiff is “brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.”⁴¹⁴

Justice Brandeis’ attack on the constituent model followed, but it was terse and conclusory: “Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute [a suit] in the Federal

410. *Id.*

411. Brief for the United States at 2, *Wilson v. Shaw*, 204 U.S. 24 (1907) (No. 43) (citing 1 BEACH, MODERN EQUITY JURISDICTION §§ 642-643; 1 HIGH ON INJUNCTION § 9).

412. For the courts to interfere and at the instance of a citizen, who does not disclose the amount of his interest, stay the work of construction by stopping the payment of money from the Treasury of the United States therefor, would be an exercise of judicial power which, to say the least, is novel and extraordinary.

Clearly there is no merit in plaintiff’s contentions. That, generally speaking, a citizen may be protected against wrongful acts of the Government affecting him or his property may be conceded. That his remedy is by injunction does not follow. A suit for an injunction is an equitable proceeding, and the interests of the defendant are to be considered as well as those of the plaintiff. Ordinarily it will not be granted when there is adequate protection at law. In the case at bar it is clear not only that the plaintiff is not entitled to an injunction, but also that he presents no ground for any relief.

Wilson, 204 U.S. at 31.

413. 262 U.S. 553 (1923). See notes 388-392 *supra* and accompanying text.

414. *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (quoting *In re Pacific Ry. Comm.*, 32 F. 241, 255 (C.C.N.D. Cal. 1887) and *Muskrat v. United States*, 219 U.S. 346, 357 (1911)). Justice Brandeis also used this formulation in his opinion for the Court in *Tutun v. United States*, 270 U.S. 568, 576-77 (1926). See note 116 *supra* and accompanying text.

courts"⁴¹⁵ He cited *Tyler* as an analogy in support of this last proposition.⁴¹⁶

A reading of the briefs from the federal government in *Fairchild*, and its companion case, *Leser v. Garnett*,⁴¹⁷ strongly suggests that Justice Brandeis' opinion in *Fairchild* was not yet a constitutional restraint on the constituent model. The federal government's brief in *Fairchild* argued that the action was not a "case" in law or equity under article III because of the absence of a "practical conflict of interest."⁴¹⁸ No cases were cited as authority for this proposition; the brief relied on the refusal of the Court to provide an advisory opinion when requested to do so by President Washington.⁴¹⁹ In contrast, the government's amicus brief in *Leser* acknowledged without explanation that the state judgment on review did "present a concrete 'case' within the meaning of the Judiciary Article"⁴²⁰ As we have seen, Justice Brandeis' opinion in *Fairchild* did not adopt fully the "practical conflict" position, but rather folded it into the traditional syllogism of the forms. Justice Brandeis also authored the Court's opinion in *Leser*, which was announced the same day as *Fairchild*. In *Leser*, Justice Brandeis argued that the suit could be brought: "The laws of Maryland authorize such a suit by a qualified voter"⁴²¹ That case was decided on the merits despite the absence of a "practical conflict", and upheld the validity of the nineteenth amendment. Thus was the government's attempt to invoke a novel article III "case or controversy" bar temporarily rebuffed and the public rights model and the traditional syllogism of the forms maintained.

*Frothingham*⁴²² followed. The *Frothingham* Court began its analysis with a discussion of nonconstitutional doctrines of equity, proceeded to reason from the constituent model in a way that shows clear prototype effects, then rejected the intermediate status of the public rights model, and finally raised constitutional considerations that helped lead to a

415. *Fairchild*, 258 U.S. at 129-30.

416. *Id.* (citing *Tyler v. Judges of the Court of Registration*, 179 U.S. 405 (1900)). The cite to *Tyler* was *cf.* In the final opinion, Justice Brandeis also cited *Giles v. Harris*, 189 U.S. 475 (1902).

417. 258 U.S. 130, 137 (1922).

418. Brief for Appellees at 5-8, *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (No. 148).

419. *Id.* at 7. In contrast, the government's position as originally expressed in its Motion to Affirm or Dismiss argued that the case presented "[o]nly a moot question." Motion to Affirm or Dismiss at 3, *Fairchild v. Hughes*, 258 U.S. 126 (1922) (No. 148). The "mootness" was tied to the plaintiff's lack of a demonstrated "interest," but was not further explained. In this, the government's original position showed the same embryonic form and lack of theoretical coherence as had Justice Brandeis' very first efforts in *Pennsylvania v. West Virginia*. See note 391 *supra*.

420. Brief for the United States as Amicus Curiae at 2, *Leser v. Garnett*, 258 U.S. 130 (1922) (No. 553).

421. *Leser*, 258 U.S. at 136. *Leser* probably explains the later confusion over whether federal standing requirements are applicable to state court actions raising federal questions. See note 453 *infra* and accompanying text.

422. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

modern conception of standing. Yet, the Court closed not with a doctrine of standing, but with an invocation of the syllogism of the forms.

The Court first considered whether the federal taxpayer could invoke the equity power.⁴²³ The Court used familiar equity doctrines to distinguish the municipal taxpayer standing cases in a manner that displayed a partial reduction-to-prototype effect. It reasoned not that the more "direct" interest of the municipal taxpayer affected the article III calculus of "case or controversy," but that the discretionary availability of the equity power properly considered questions of immediacy and the degree of threatened harm. "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate . . ."⁴²⁴ The Court acknowledged, therefore, the continuing viability of the constituent model for that level of government: "The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon *the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.*"⁴²⁵ The federal taxpayer's connection to the body politic, in contrast, seemed too far removed from the corporate prototype of equity's constituent model. The *Frothingham* Court characterized the federal taxpayer's constituent interest as "minute," "indeterminable," and "so remote, fluctuating and uncertain, *that no basis is afforded for an appeal to the preventive powers of a court of equity.*"⁴²⁶

Frothingham makes historical sense as a case about the availability of an equitable remedy. On a doctrinal level, it was the invocation of equitable discretion to deny a remedy on the basis of the directness of the plaintiff's injury. The Court started with the constituent model available in equity and used prototype reasoning to exclude taxpayer actions as too great an extrapolation. The opinion was not entirely consonant with the public rights model known to the Framers, for it saw the corporation, and not the society, as the prototype of a *part-whole* organization. But the opinion maintained a certain doctrinal consistency. The English writs of mandamus, prohibition, and certiorari were available to a stranger without a direct interest.⁴²⁷ In those cases, however, the court retained discretion to adjust or withhold the remedy in order to prevent abuse and to achieve just results.⁴²⁸ The courts' discretion derived from the fact that, although these writs were devices of the King's Bench, and thus remedies "at law," they also were instru-

423. The issue was "[t]he right of a taxpayer to enjoin the execution of a federal appropriations act." *Frothingham*, 262 U.S. at 486 (emphasis added).

424. 262 U.S. at 486.

425. *Id.* at 487 (emphasis added).

426. *Id.* (emphasis added). *Accord* *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478 (1938) (citing *Frothingham* for the proposition that "the interest of a taxpayer in the moneys of the federal treasury furnishes no basis for an appeal to the preventive powers of a court of equity").

427. See notes 134-135 *supra* and accompanying text.

428. See, e.g., *Union Pac. R.R. v. Hall*, 91 U.S. 343, 356 (1876).

ments of the sovereign's power and therefore implicated the prerogative of royal discretion typical of equity.⁴²⁹

Frothingham's reliance on separation of powers notions can be understood as the invocation of structural concerns to guide the discretionary use of the court's equitable power.⁴³⁰ Indeed, Justice Brandeis' unheeded argument thirteen years later in *Ashwander* was premised on exactly this blend of equitable discretion and prerogative writ practice.⁴³¹

In *Frothingham*, as in *Fairchild*, the Court was struggling with the constituent model. *Frothingham* did not recognize an intermediate status for the public rights model. Instead, it insisted on an individualist model: The question of additional taxation was "essentially a matter of public and not of individual concern."⁴³² But the Court stayed decidedly within the tradition in its notion of justiciability, still reasoning in a quite old-fashioned way about the scope of the judicial power, as had Justice Brandeis. To the 1923 Court, no less than to the Court of a hundred years earlier, a legal question had to "assume such a form that

429. "Although the remedy by mandamus is at law, its allowance is controlled by equitable principles . . . and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right." *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359-60 (1933) (Stone, J.).

430. *Frothingham* conditioned its invocation of the separation of powers notion as follows: "The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. *We are not now speaking of the ministerial duties of officials.*" *Frothingham*, 262 U.S. at 488 (emphasis added). The Court supported this last statement with a cite to *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347 (1869), which held that neither mandamus nor an injunction would lie to control discretionary executive action. The *Gaines* Court in turn relied on *Marbury v. Madison*, 5 U.S. (1 Cranch) 87, 105 (1803), and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866). Although the Court was thus adverting to questions of justiciability (in the political question sense, see *Marbury*, 5 U.S. 105, 107-08), the questions did not concern the plaintiff's ability to invoke the judicial power in the sense of "standing":

[H]owever the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while . . . the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.

Gaines, 74 U.S. at 352.

431. "Even where by the substantive law stockholders have a standing to challenge the validity of legislation under which management . . . is acting, courts should, in the exercise of their discretion, refuse an injunction unless the alleged invalidity is clear." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 354 (1936) (Brandeis, J., concurring). In closing, Justice Brandeis also invoked the prerogative writ parallel:

"Where the matter is not beyond peradventure clear we have invariably refused the writ [of mandamus], even though the question was one of law as to the extent of the statutory power of an administrative officer or body." A fortiori this rule should have been applied here where the power challenged is that of Congress under the Constitution.

Id. at 356 (quoting *United States ex rel. Chicago G.W.R. v. ICC*, 294 U.S. 50, 63 (1935)) (bracketed material added by Justice Brandeis).

432. *Frothingham*, 262 U.S. at 487.

the judicial power is capable of acting on it."⁴³³ Because the *Frothingham* Court concluded that the case did not present a proper bill in equity, it held that the case did not assume a recognizable form; because the Court did not recognize the intermediate nature of the nineteenth century public rights model, it did not see before it one of those things to which the judicial power extended. The Court held that:

The party who invokes the [equity] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official Here the parties plaintiff have no such case. Looking through the forms of words to the substance of their complaint, it is merely that officials of the executive . . . will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy⁴³⁴

What *Frothingham* had accomplished through its equity reasoning was to recreate the private rights model as the only available form. To invoke the equity power, the plaintiff had to establish the causal *source-path-goal* schema—that is, the plaintiff had to establish “that he has sustained or is immediately in danger of sustaining some direct injury.” Direct injury was thus essential to make a proper bill in equity, and a proper bill was necessary to make a “case.” Drop the syllogism of the forms, however, and you have the modern doctrine of standing: Direct injury (as in the causal *source-path-goal* schema) becomes necessary to a constitutional “case.”

Neither *Frothingham* nor *Fairchild* became cases of “standing” until later.⁴³⁵ Rather, the Court continued to talk of “standing” solely in the context of equity as it had before. In fact, only a few years after *Frothingham* and *Fairchild*, the Court reaffirmed that “standing is a question going to the merits, and . . . determination [of standing] is an exercise of jurisdiction.”⁴³⁶

In the meantime, Justice Brandeis continued to argue—usually alone—the broader implications of his *Fairchild* opinion for the constituent model. In 1923, the same year as *Frothingham*, he failed to convince his colleagues that the original bills in *Pennsylvania v. West Virginia* “present[ed] neither a ‘case’ nor a ‘controversy’ within the meaning of the Federal Constitution,” but were instead “instituted frankly to secure from this Court a general declaration that the West Virginia Act

433. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824).

434. *Frothingham*, 262 U.S. at 488-89.

435. The first application of the term “standing” in the context of taxpayer suits came in the lower court decisions following *Frothingham*. *Wheless v. Mellon*, 10 F.2d 893 (D.C. Cir. 1926); *Elliott v. White*, 23 F.2d 997 (D.C. Cir. 1928); *O’Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934). The cases include no discussion of the terminology; they are little more than quotations of *Frothingham* with the characterization of “standing” attached.

436. *General Inv. Co. v. New York Cent. R.R.*, 271 U.S. 228, 230-31 (1926) (citations omitted).

. . . is unconstitutional."⁴³⁷ Thirteen years later in *Ashwander*, he tried to destroy equity's constituent model at its source. His memorandum to his colleagues argued that:

Stockholders may, within the recognized limits, invoke the aid of the courts to enjoin illegal acts which threaten their own property rights. But they are no more entitled to a judicial remedy to restrain action which . . . do not imperil their property, merely because the action is alleged to be illegal. They are not guardians of the public. The function of guarding the public interest against acts *ultra vires* or otherwise illegal rests with the public officials. The belief that the company action is unconstitutional gives the stockholder no greater right than that possessed by any other citizen.⁴³⁸

Ultimately, Justice Brandeis dropped this position and argued that the primary obstacles to the shareholders' suit were nonconstitutional. The final version of his argument—which garnered the support of Justices Cardozo, Roberts, and Stone—characterized *Tyler*, *Fairchild*, and *Frothingham* merely as examples of the canon of judicial self-restraint that “[t]he Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.”⁴³⁹ In a historically overlooked portion of the opinion, Justice Brandeis concentrated much of his fire on the impropriety of the shareholder derivative version of the constituent model, trying to limit or disapprove the holdings of *Pollock*, *Brushaber*, and *Smith*.⁴⁴⁰

In 1937, in a per curiam opinion denying the motion challenging Judge Black's appointment, the Court interpreted *Tyler*, *Fairchild*, and *Frothingham* as limiting the availability of the “judicial power” to one who “has sustained, or is immediately in danger of sustaining a direct

437. *Pennsylvania v. West Virginia*, 262 U.S. 553, 610 (1923). See notes 383 & 388 *supra* and accompanying text.

438. THE LOUIS DEMBITZ BRANDEIS PAPERS, Box 96, Folders 1-7 (Library of Congress microfilm series, Part II: United States Supreme Court, October Terms, 1932-1938, Reel 16, # 0447). The quoted passage comes from a three page memorandum that appears to be the second draft. The original two page draft contains a similar passage in which the second and third sentences are reversed. In the original, the third sentence read: “They are no more entitled to a judicial remedy to restrain illegal acts of the corporation which do not imperil their property, than is any stranger.” *Id.*

439. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring). In joining this concurrence, Justice Cardozo noted prophetically that: “It will be a treasure house of instruction for many a day.” THE LOUIS DEMBITZ BRANDEIS PAPERS, Box 96, Folders 1-7 (Library of Congress microfilm series, Part II: United States Supreme Court, October Terms, 1932-1938, Reel 16, # 0447).

440. *Ashwander*, 297 U.S. at 349-53. Before joining the part of the opinion that attempted to invalidate the shareholder derivative version of the constituent model, Justice Cardozo argued that Justice Brandeis had gone too far in characterizing the prior shareholder derivative suits as unsupported, and suggested that *Ashwander* was distinguishable on its facts from *Pollock*. Letter of January 29, 1936, from Benjamin N. Cardozo to Louis D. Brandeis, THE LOUIS DEMBITZ BRANDEIS PAPERS, Box 96, Folders 1-7 (Library of Congress microfilm series, Part II: United States Supreme Court, October Terms, 1932-1938, Reel 16, # 0447). Brandeis nevertheless concluded his discussion with the observation that: “If, or in so far as, any of the cases discussed may be deemed authority for sustaining this bill, they should now be disapproved.” 297 U.S. at 352.

injury"⁴⁴¹ But, the degree to which this constitutionalized interpretation was not yet a conventional understanding of these cases is underscored by the Court's conclusory rhetoric, referring to this as an "established principle."⁴⁴² It was another year before Justice Frankfurter linked the term "standing" with article III in his concurring opinion in *Coleman v. Miller*.⁴⁴³ And, even then, it came very much by surprise to the participants and the Court.

In *Coleman*, Kansas legislators challenged the means by which their state had voted to ratify a pending amendment to the Constitution.⁴⁴⁴ The legislators filed a petition for a writ of mandamus in the state courts. The state court upheld its jurisdiction over the mandamus petition, but denied relief. The *Coleman* Court rejected "the contention that petitioners lack an adequate interest to invoke our jurisdiction" ⁴⁴⁵ The majority held that the Kansas legislators had "standing" in the sense of *Owings v. Norwood*⁴⁴⁶ because they had alleged an infringement of their right to vote and thus "come directly within the provisions of the statute governing our appellate jurisdiction."⁴⁴⁷ The Court cited *Leser* for the proposition that it had jurisdiction, noting the contrast to *Fairchild*, which had been decided the same day.⁴⁴⁸

The *Coleman* majority also rejected decisively the notion, put forward by Justice Frankfurter, that jurisdiction only extended to cases that fit the private rights model, that is, cases of "private damage."⁴⁴⁹ The Court cited *Frothingham* to illustrate that the question of a taxpayer's interest raised not a threshold problem of justiciability, but rather was only a matter of degree.⁴⁵⁰ The Court, nevertheless, held the case nonjusticiable as presenting a political question.⁴⁵¹

The majority's discussion of these questions reflected the argument in the federal government's amicus brief, signed by Solicitor General Robert Jackson and by Special Assistant Paul Freund. The brief noted that the sufficiency of the plaintiffs' interests under *Fairchild* was a problem that only arises in a federal action.⁴⁵² The government, therefore, accepted that the decision of the state courts below to entertain the suit

441. *Ex parte Levitt*, 302 U.S. 633, 634 (1937).

442. *Id.*

443. 307 U.S. 433, 460 (1939) (concurring opinion joined by Justices Roberts, Black, and Douglas).

444. A companion case from Kentucky was also before the Court. *Chandler v. Wise*, 307 U.S. 474 (1939) (dismissed as moot).

445. *Coleman*, 307 U.S. at 438.

446. 9 U.S. (5 Cranch) 344 (1809). See notes 291-301 *supra* and accompanying text.

447. *Coleman*, 307 U.S. at 438. The Court's opinion in *Coleman* clearly considered "standing" from the perspective of *Owings* and its progeny.

448. 307 U.S. at 438-41.

449. *Id.* at 445.

450. *Id.*

451. *Id.* at 454.

452. Brief for the United States Amicus Curiae at 34, *Coleman v. Miller*, 307 U.S. 433 (1938) (Nos. 7, 14).

“does not present a Federal question.”⁴⁵³ The only question of jurisdiction, according to Jackson and Freund, was whether the Court could consider the case under its jurisdictional statute. Since the legislators had set up a right or title of their own—“the privilege of carrying out their functions as public officers”⁴⁵⁴—the brief concluded that “[s]tatutory jurisdiction in this Court, then, clearly exists.”⁴⁵⁵

Having disposed of the *Fairchild* and *Owings* questions, the brief then turned to what it viewed as a question of an entirely different order: “[T]he essential question is not strictly jurisdictional but relates rather to . . . standing”⁴⁵⁶ The brief concluded that standing was present in the Kansas case because the petitioners were legislators who claimed an infringement of their right to vote.⁴⁵⁷

Although the government’s position and its understanding of the foundations of the standing concept were accepted in the majority opinion, Justice Frankfurter had an entirely different view. At oral argument, Justice Frankfurter asked Mr. Coleman’s lawyer to reconcile the case with *Fairchild*. The petitioners subsequently submitted a memorandum brief on jurisdiction that reveals how startling the question really was:

Mr. Justice Frankfurter on the bench asked me to reconcile this case with *Fairchild v. Hughes*. We regret our inability to do so in oral argument, but the case of *Leser v. Garnett*, decided the same day and reported in the same volume with *Fairchild v. Hughes*, is such a complete answer that it seems as though I must have misunderstood the purport of the question.⁴⁵⁸

.....

[T]he state is a party to the litigation and all of the people of the state are interested. . . . So far as the right of the parties to maintain the suit in the state court is concerned, it is definitely settled and that brings us squarely within the rule of *Leser v. Garnett*. This is so evident that it seems I must have misunderstood the real purport of the question.⁴⁵⁹

453. *Id.* at 34-35. Subsequently, in *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), Justice Jackson wrote for the Court that it would “not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But . . . our own jurisdiction is cast in terms of ‘case or controversy.’” *Id.* at 434. Paul Freund suggested, in response, that standing to raise a federal question in state court should be governed by federal law. Freund, *Discussion in SUPREME COURT AND SUPREME LAW* 31, 35 (E. Cahn ed. 1954). Freund’s position makes sense if standing is a threshold question concerning the judicial process delineated by article III. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 181. But neither Freund’s nor Justice Jackson’s later positions square with the argument, based on *Leser v. Garnett*, that they presented in 1938 in *Coleman*.

454. Brief for the United States Amicus Curiae at 35, *Coleman* (Nos. 7, 14).

455. *Id.*

456. *Id.*

457. *Id.* at 44. The brief acknowledged standing in the Kentucky case because the state officers were seeking to support state action that had been declared unconstitutional. *Id.*

458. Memorandum Brief on Jurisdiction at 1, *Coleman v. Miller*, 307 U.S. 433 (1938) (No. 796).

459. *Id.* at 2-3.

It is understandable that counsel missed the import of Justice Frankfurter's question and relied on the public rights model of mandamus by insisting that "all of the people of the state are interested." And, I think, it is safe to assume that Justice Frankfurter's question was calculated. For, in his concurring opinion, Justice Frankfurter opined, in contrast to that which the parties argued, that courts could only consider "cases and controversies."⁴⁶⁰ Invoking *Fairchild*, he argued that "[i]n the familiar language of jurisdiction, these Kansas legislators must have standing in this Court."⁴⁶¹ "'Private damage' is the clue . . . and determines [the] scope . . . of [such] cases in this Court"⁴⁶²

Thirteen years later, in *Joint Anti-Fascist Committee v. McGrath*,⁴⁶³ Justice Frankfurter took *Coleman* a step further and made the first attempt to synthesize this private rights model, the constitutional phrase, and the various "standing" cases of the previous half-century into a single coherent doctrine concerning the sufficiency of the litigant's interest required by article III and related prudential considerations.⁴⁶⁴ It was not until *Doremus v. Board of Education*⁴⁶⁵ that a full Court dealt with standing in exclusively constitutional terms,⁴⁶⁶ and not until *Baker v. Carr*⁴⁶⁷ and *Flast v. Cohen*⁴⁶⁸ that the Court fully discussed the new doctrine.

For over a hundred years, the metaphor of "standing" was shorthand for the question of whether a plaintiff had asserted claims that a court of equity would enforce. *Frothingham* articulated a familiar doctrine of equity concerning direct and irreparable injury, rejected the application of the constituent model as a matter of degree, and then applied a traditional notion of justiciability that focused on observance of the forms. But *Frothingham* arose in the context of a larger dispute about the viability of the representational and constituent models. In the end, Justice Brandeis all but gave up the fight. Then, someone else provided a label to comprehend both the private rights model and those cases that talked about the sufficiency of the plaintiff's personal

460. *Coleman*, 307 U.S. at 460-61.

461. *Id.* at 464.

462. *Id.* at 469 (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J.), and *Ashby v. White*, 2 Ld.Raym. 938 (1703)). *Herndon* and *Ashby* involved suits challenging denial of citizens' ordinary rights to vote, rather than suits involving parliamentary or legislative practices.

463. 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring). The plurality opinion by Justice Burton, joined only by Justice Douglas, dealt with standing in the classic terms of substantive rights. It found standing "clear" because "[t]he touchstone to justiciability is injury to a legally protected right" and the organizational right to be free of defamation "is such a right." *Id.* at 140-41.

464. *Id.* at 149-57.

465. 342 U.S. 429 (1952).

466. Even so, the Court related its "case or controversy" concept of standing to the ban on advisory opinions. *Doremus*, 342 U.S. at 434. In this, *Doremus* is similar to the Solicitor General's embryonic argument in *Fairchild*. See text accompanying notes 417-419 *supra*.

467. 369 U.S. 186 (1962).

468. 392 U.S. 83 (1968).

interest in terms of "jurisdiction." That label, of course, was one that fit metaphorically: "standing." A meaning transplant was effected, and the modern doctrine of standing was born.

E. *Ideology and the Motivation of Standing*

There are several possible historical explanations for the successful convergence of the private rights model and the "standing" metaphor into modern constitutional standing doctrine. Five factors seem to have contributed to this convergence.

First, the passage of the federal question jurisdiction statute and the extension of the removal jurisdiction in 1875⁴⁶⁹ affected significantly the workload of the federal courts. From the trial courts to the Supreme Court, "they unloosed a flood of litigation utterly beyond the existing capacity of the courts to handle."⁴⁷⁰ Between 1870 and 1890, the number of cases on the Supreme Court docket grew almost 300 percent.⁴⁷¹ During the same period, the number of nonbankruptcy cases in the lower federal courts more than doubled.⁴⁷² For the next fifty years, Congress struggled with the problem of an unmanageably large caseload in the federal courts both by jurisdictional tinkering and by wholesale court reorganization.⁴⁷³

It should come as little surprise that the courts were not passive during this onslaught. Several of the classic exclusionary doctrines of federal jurisdiction developed in this period, including both the well-pleaded complaint rule⁴⁷⁴ and the independent and adequate state ground rule.⁴⁷⁵ Moreover, the growth in the federal workload and the search for limits coincided with the systemization of the law of equity,⁴⁷⁶ from which standing law grew. Starting as a question of *entree*

469. Judiciary Act of March 3, 1875, §§ 1-2, 18 Stat. 470-73 (codified as amended at 28 U.S.C. § 1331 (1982)).

470. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 39.

471. *Id.*; F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 60-61 (1928).

472. F. FRANKFURTER & J. LANDIS, *supra* note 471, at 60 (from 23,905 in 1873 to 54,194 in 1890).

473. During this fifty-year period, Congress successively increased the jurisdictional amount, expanded and changed the role of the circuit courts, and decreased the Court's obligatory appeal jurisdiction (creating the larger discretionary jurisdiction by writ of certiorari). P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 40-41; F. FRANKFURTER & J. LANDIS, *supra* note 471, at 60-61.

474. *See, e.g.*, *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *Metcalf v. Watertown*, 128 U.S. 586 (1888).

475. *Compare* *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875), *with* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

476. It was during this period that John Pomeroy, Christopher Langdell, and Wesley Hohfeld were developing the field of equity and its relationship to "law." Pomeroy wrote his treatise on equity jurisprudence in 1881; his son produced revised editions in 1892, 1905, and 1918. J. POMEROY & S. SYMONS, *EQUITY JURISPRUDENCE* ix (5th ed. 1941). Langdell wrote a series of ten articles in the *Harvard Law Review* between 1887 and 1900, which first appeared under the misnomer *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55 (1887); 1 HARV. L. REV. 111 (1887); 1 HARV. L. REV. 355 (1888); 2 HARV. L. REV. 241 (1889); 3 HARV. L. REV. 237

to equity jurisdiction, "standing" could, in a time of severe docket pressures, naturally evolve into a doctrine about entrée into the federal court system itself.

Second, during the late nineteenth and early twentieth centuries, the modern administrative state began to take root. The Interstate Commerce Commission was formed in 1887, the Federal Trade Commission in 1913, and the Federal Power Commission in 1920. Administrative law, of course, created the potential for more adjudication, with its strain on court workload. Administrative agencies also created a vastly larger machinery of government, increasing the interaction between government and the citizenry and the potential for the invocation of the public rights model. This increasing interaction was a potential source of strain for the previous equilibrium of public and private rights in the legal and social system. In each of their respective areas, the administrative regimes created new webs of legal requirements and potential entitlements in previously unregulated corners of society. With the extension of government regulation to vast new domains, the public rights model and application of the classic model of rights and correlative remedies to redress all injuries presented inordinate new problems.

Third, at precisely this time an old but previously marginal legal concept stepped to the fore in a dramatic way. "From . . . 1880 to 1920, *damnum absque injuria* [that is, damage without cognizable injury] emerged as the central issue of theoretical concern" to those attempting to synthesize and explain the law.⁴⁷⁷ Perhaps not coincidentally, this concept served to defuse the pressures of the administrative state.

The theoretical incorporation of *damnum absque injuria* revolved around three major areas of inquiry. They were: (1) the emergence of the concept of legally protected interests; (2) focus on economic competition as an alternative model . . . ; and (3) the problem of uncorroborated liberties generally. . . . To the extent that others have the legal liberty to act or not to act, the damage they inflict on us violates "no [legal] rights" of ours, and we have no claim on the legal system to protect us from such harms or to provide us with remedies.⁴⁷⁸

The potential problems of the administrative state could thus be forestalled by the extension of a traditional doctrine: *damnum absque injuria* counselled that "[l]egally protected interests are not granted absolute protection, as the concept of protected rights had misleadingly im-

(1890); 4 HARV. L. REV. 99 (1890); 5 HARV. L. REV. 101 (1891); 10 HARV. L. REV. 71 (1896); Langdell, *Classification of Rights and Wrongs*, 13 HARV. L. REV. 537 (1900); Langdell, *Classification of Rights and Wrongs II*, 13 HARV. L. REV. 659 (1900). In 1913, Hohfeld published his lecture notes on the relationship between equity and law. Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537 (1913).

477. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1025.

478. *Id.* at 1026 (bracketed material in original).

plied."⁴⁷⁹ The administrative state could be domesticated; extensive new regulations and interests could be created without necessarily creating new legal entitlements.

These three notions raised by the incorporation of *damnum absque injuria* into the legal mainstream are reflected with clarity in the non-constitutional precursors of standing, especially in the equity and early administrative law cases: the legal interest test,⁴⁸⁰ the denial of competitor "standing,"⁴⁸¹ and the repeated denial of injunctive relief to litigants who had suffered actual harm.⁴⁸² While not yet a theory of "standing," *damnum absque injuria* provided a basis for, and a model that justified, a later constitutional doctrine that recognized the validity of a complaint but refused to provide a judicial forum.

Fourth, the rise of liberalism in the nineteenth century led to the primacy of the private rights model and to modern standing law in two ways. A basic tenet of liberalism is the primacy of the individual as the focus of the political and moral world.⁴⁸³ "Standing" is a conceptualization of the individual as the primary rights-holder, to the exclusion of his or her place in a larger community of interdependent legal and social interests.⁴⁸⁴ Liberalism is further premised on the freedom of each individual to choose his or her own, equally viable ends.⁴⁸⁵ Accordingly, it focuses upon a regime that achieves agreement on process rather than end goals.⁴⁸⁶ Liberalism intensified the preexisting proceduralism of the law; where the writ system had treated procedure and substance as closely interrelated, standing law turned from the legal interest test to focus instead on a definition of process separate from the substantive merits of the reason for which it is invoked. This concept of neutral, process-oriented criteria, entirely separated from the merits, constitutes the second major component of the "standing" metaphor, as we have seen.⁴⁸⁷

Fifth, the thrust of the enlargement of the federal court workload

479. *Id.* at 1050.

480. *See, e.g.,* Interstate Commerce Comm'n v. Duffenbaugh, 222 U.S. 42 (1911); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137 (1939).

481. *See, e.g.,* Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143 (1923); Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249 (1930).

482. *See, e.g.,* Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900). Justice Sutherland's dissent in *The Chicago Junction Case*, Baltimore & O.R.R. v. United States, 264 U.S. 258, 272-74 (1924), expresses the notion of *damnum absque injuria* in arguing against competitor standing. *See* note 280 *supra*.

483. *See* R. UNGER, KNOWLEDGE AND POLITICS (1975); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 783 (1983).

484. *See* J. VINING, *supra* note 27, at 2.

485. *See, e.g.,* J. RAWLS, A THEORY OF JUSTICE 26-27 (1971); R. NOZICK, ANARCHY, STATE, AND UTOPIA 33 (1974); I. KANT, PERPETUAL PEACE (L.W. Beck ed. 1957).

486. "[P]ure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed." J. RAWLS, *supra* note 485, at 86.

487. *See* text accompanying notes 84-85 *supra*.

and the *weltanschauung* of liberalism interacted in a specific, synergistic way. It occurred during the time of substantive due process and the exercise of expansive federal judicial power in the economic sphere to invalidate progressive legislation.⁴⁸⁸ It is thus no accident that many of the early taxpayer standing cases involved attacks on federal legislation addressed to an activist conservative Court.⁴⁸⁹ The first few were rejected on their merits. But soon the primary stance of the liberal judicial resistance was the development of doctrines of procedural limitation.⁴⁹⁰ In this formative period, Justice Brandeis reported to his confidant Felix Frankfurter his famous remark to Justice Holmes: "I tell him, 'the most important thing we do is not doing.'"⁴⁹¹ *Frothingham* was a product of the liberal judicial resistance to substantive due process, as Justice Douglas explicitly acknowledged in his separate opinion in *Flast v. Cohen*.⁴⁹²

While my analysis suggests that the development of standing was a calculated effort, this account is consistent with a theory that stresses the unconscious, ontological effects of the relevant metaphors and cognitive models. It is the concept of *motivation* that explains the relationship between conscious intent and these unconscious, ontological effects. People use cognitive models and metaphors to express and accomplish their purposes. In reimagining the world, we make use of the existing conceptual system.

[T]he theory we have given makes a prediction: the generated images will be among the conventional images of the culture, they will make

488. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

489. See, e.g., *Wilson v. Shaw*, 204 U.S. 24 (1907) (challenging the construction of the Panama canal); *Fairchild v. Hughes*, 258 U.S. 126 (1922) and *Leser v. Garnett*, 258 U.S. 130 (1922) (challenging the adoption of the nineteenth amendment); *Frothingham v. Mellon*, 262 U.S. 447 (1923) (challenging a federal entitlement program); *Coleman v. Miller*, 307 U.S. 433 (1939) (challenging the Child Labor Amendment).

490. The Brandeis concurrence in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 241 (1936) is the quintessential exposition of this view. But this process was at work earlier in *Fairchild and Pennsylvania v. West Virginia*, as we have seen.

491. THE FELIX FRANKFURTER PAPERS, Box 114, Folder 10 at 15 (Library of Congress photocopy of typescript of Box 114, Folders 7 and 8; holograph notes of FF conversations with LDB, Chatham, Mass., 1922-26); THE LOUIS DEMBITZ BRANDEIS PAPERS, (Library of Congress microfilm series, Part II: United States Supreme Court, October Terms, 1932-1938, Reel 33, No. 0450).

Throughout the period of the 1920s and 30s, Justice Brandeis was in constant touch with Frankfurter concerning the issues before the Court. Justice Brandeis supplied Frankfurter with ideas and inside information that Frankfurter recycled as topics for student papers in his seminar entitled "Jurisdiction and Procedure of Federal Courts" and in his own scholarly writing, including the series of articles from 1925 through 1938 that ran under the title "The Business of the Supreme Court." See B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 76-78, 84-89 (1982) (Several of the Frankfurter articles that were part of this series are cited and discussed in note 26 *supra*); See also Urovsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299.

492. 392 U.S. 83, 107 (1968) (Douglas, J., dissenting) ("*Frothingham*, decided in 1923, was in the heyday of substantive due process. . . . A contrary result in *Frothingham* in that setting might well have accentuated an ominous trend to judicial supremacy."). See W.O. DOUGLAS, WE THE JUDGES 53 (1956) ("Justice Louis D. Brandeis used to say that what the Court did not do was often more important than what it did do.").

use of cultural knowledge, and there will be one or more metaphors already in the conceptual system that link the image and the knowledge to the meaning. . . . In short, the principles we have proposed to characterize the nature of motivation . . . constrain what such images can be like.⁴⁹³

[T]he fact that extensions from the center of categories are neither predictable nor arbitrary, but instead are motivated, demonstrates the ecological character of the human mind. . . . [T]he term "ecological" [expresses] the sense of a system with an overall structure, where effects cannot be localized—that is, where something in one part of the system affects things elsewhere in the system. Motivation depends on overall characteristics of the conceptual system, not just local characteristics of the category at hand.⁴⁹⁴

In trying to develop doctrines of jurisdictional limitation, Justices like Brandeis and Frankfurter naturally reached for the cognitive tools at hand. They naturally focused on those models and metaphors that fit their purposes. And they naturally chose the private rights model and the "standing" metaphor, which had become conventional in legal culture.

The liberals were interested in protecting the legislative sphere from judicial interference. Their goal was to assure that the state and federal governments would be free to experiment with progressive legislation.⁴⁹⁵ The private rights model was not just an available proto-

493. G. LAKOFF, *supra* note 64, at 450.

494. *Id.* at 113.

495. On the eve of the New Deal, Justice Brandeis wrote:

"There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. The Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (footnote omitted). In the omitted footnote, Brandeis cited F. FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 49-51 (1930).

Frankfurter's vision of judicial restraint was the same as that of Brandeis.

Frankfurter thought of himself as a member of a select legal fraternity whose members understood the true gospel. He often wrote of "the experience that I have had down here [on the Supreme Court], which so decisively confirms the philosophy in which Mr. Justice Holmes, Judge Learned Hand, Mr. Justice Brandeis and I were bred, to wit: James B. Thayer's outlook on the reviewing power of this Court." Thayer's self-restraint, Frankfurter was convinced, provided the only assumption upon which a liberal and democratic jurisprudence could be based.

H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 129 (1981). *But see id.* at 129-30 ("Frankfurter was committing a giant oversimplification Although both Holmes and Brandeis endorsed Thayer, they did so for different reasons and to a different extent. . . . Frankfurter's pre-Court ideology was, in fact, much closer to Brandeis's than to Holmes's. . . . Yet . . . 'his tenure on the Court was marked by a self-conscious attempt to make Holmes the model for the proper Justice.'").

type, it was an ascendant prototype that would serve their purposes well. By excluding the public rights model with its *part-whole* schema, the liberals could preclude any dissatisfied private citizen from invoking the Constitution in the courts to challenge the progressive programs enacted by the polity.

Moreover, the *source-path-goal* schema of the private rights model could make a distinct and important contribution to the liberals' aims. The broad social and economic experiments of the New Deal, like the hydroelectric program at issue in *Ashwander*, would have varied and unpredictable effects throughout society. The causal *source-path-goal* schema limits litigation to direct victims. It therefore serves to insulate from judicial scrutiny governmental actions with many, diffuse, and indirect effects. It was just this insulation that was required for the success of the social and economic programs that were the center of Brandeis' and Frankfurter's concern.⁴⁹⁶

In adopting these cognitive tools, the effect on the liberal Justices was ecological: This explains Brandeis' position, in *Willing v. Chicago Auditorium Association*,⁴⁹⁷ that a declaratory judgment was not a proper bill in equity and, thus, was beyond the federal judicial power. His program of judicial restraint entailed a limitation of the federal courts to suits that fit the *source-path-goal* schema of the private rights model. The declaratory judgment action did not fit comfortably with that schema. By definition, there is no injury at the time a declaratory judgment plaintiff seeks the court's intervention. The suit, therefore, has no *source*.

As we have seen, Justice Brandeis never fully articulated these concepts. The Court had already begun, in cases like *Tyler, Davis, and Massachusetts State Grange v. Benton*,⁴⁹⁸ to apply equitable, preconstitutional doctrines of directness of injury and of standing, to reject citizen claims in neutral, process-oriented terms. In *Fairchild*, Justice Brandeis connected these notions to the traditional article III syllogism of the forms. *Ashwander* was a partial retreat, recasting the same cases back into their equitable forms as discretionary doctrines. Then, Frankfurter grasped the cognitive tools and fashioned an article III doctrine called "standing" that made a constitutional prerequisite of the prototypical private rights model. Standing law was, thus, the ultimate constitutional legacy of the program of judicial conservatism that was the liberals' response to the substantive due process era.

496. This insulating effect is also what makes troublesome the application of standing doctrine in cases in which the government's action is threatening to constitutional values.

497. 277 U.S. 274 (1928). The Court later approved the declaratory judgment in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). An opinion by Justice Frankfurter later restricted *Aetna's* scope by a narrow construction of the interplay between the Declaratory Judgment Act and the federal question jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 669-72 (1950).

498. 272 U.S. 525, 528 (1926). See notes 285-286 *supra* and accompanying text.

V. THE OBFUSCATORY POWER OF METAPHOR

Language is a guide to "social reality." . . . [I]t powerfully conditions all our thinking about social problems and processes. Human beings . . . are very much at the mercy of the particular language which has become the medium of expression for their society.⁴⁹⁹

As we have seen above, the original conceptualizations of adjudication encompassed both a public and a private rights model and contained no constitutional concept of standing. Disparate concepts of rights and remedies often expressed by the metaphor of "standing" were replaced by a single, conceptual ordering of the adjudicatory universe requiring injury, consistent with the private rights model. In *Coleman v. Miller*,⁵⁰⁰ Justice Frankfurter nimbly invoked two parallel cognitive processes to combine the prototypical private rights model with the "standing" metaphor to converge on a single epistemically coherent result: a constitutional doctrine of standing.

Part of the explanation for the success of this convergence relates to the interaction of political power and metaphor: "[W]hether in national politics or in everyday interaction, people in power get to impose their metaphors."⁵⁰¹ If Brandeis and Frankfurter laid the road from *Fairchild v. Hughes*⁵⁰² to *Coleman* and *Joint Anti-Fascist Refugee Committee v. McGrath*,⁵⁰³ the road certainly was neither smooth nor clear. When New Deal liberalism found its way onto the Court, it needed a mechanism by which to implement and establish this part of its judicial program as the orthodoxy that it is today. The repeated use of the "standing" metaphor, which has an ontological effect, provided that mechanism:

New metaphors, like conventional metaphors, can have the power to define reality. They do this through a coherent network of entailments that highlight some features of reality and hide others. The acceptance of the metaphor, which leads us to focus *only* on those aspects of our experience that it highlights, forces us to view the entailments of the metaphor as being *true*

Though questions of truth do arise for new metaphors, the more important questions are those of appropriate action. In most cases, what is at issue is not the truth or falsity of a metaphor but the perceptions and inferences that follow from it and the actions that are sanctioned by it.⁵⁰⁴

The important question for us, then, is whether the new metaphorically structured reality that emerged in *Coleman* and *McGrath* works. For

499. E. SAPIR, *The Status of Linguistics as a Science*, in *CULTURE, LANGUAGE, AND PERSONALITY* 65, 68-69 (D. Mandelbaum ed. 1963).

500. 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

501. G. LAKOFF & M. JOHNSON, *supra* note 63, at 157.

502. 258 U.S. 126 (1922).

503. 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring).

504. G. LAKOFF & M. JOHNSON, *supra* note 63, at 157-58 (emphasis in original).

it is one thing to chart the historical development of a new constitutional principle and quite another to argue that no new constitutional principles are permissible because they are not within the original intent of the Framers. It is one thing to recognize the power of history in legal thought, as I do: "Just as in a scriptural religion, the most elaborate and established theological system can be challenged by the call *ad fontes* ('back to the sources'). . . ." ⁵⁰⁵ It is quite another to rest on that argument, which I do not. ⁵⁰⁶

A new principle, conceptualization, or metaphor works if the "perceptions and inferences that follow from it and are sanctioned by it" lead to "appropriate actions."⁵⁰⁷ I believe that the concept of standing does not work, but rather is obfuscatory. In saying that standing does not work, I mean something different than the typical claim that standing law is confusing and seems incoherent.⁵⁰⁸ I mean, rather, that standing has disordering effects on our legal analysis which produce bad decisions on the merits. These disordering effects stem from the cognitive structure of this particular metaphoric conceptualization.

In Section II, we saw that the "standing" metaphor has specific entailments that are expressed in standing doctrine. "Standing" is a metaphor of individualism. The metaphor suggests, moreover, that the individual must have a particular kind of relationship to the adjudicatory process—a formal threshold, like *standing up* to be heard. Standing doctrine defines an individual's relationship to the adjudicatory process by a private rights model structured according to two *source-path-goal* metaphors: one causal, the other remedial.⁵⁰⁹ These metaphors and their underlying schemata exert powerful influences on standing analysis.

To focus on "standing" is to do more than ask the doctrine's specific threshold questions. When we as lawyers focus our attention on those questions, we necessarily suppress aspects of the case that are unavoidably related to the very issues before us. This is the ontological effect of the metaphor. Similarly, the use of the *source-path-goal* schemata of the private rights model does more than just organize our analysis of the issues in terms of the elements of the schema. After all, standing law is a self-conscious effort to limit adjudication to cases that fit the prototype. It therefore structures our analysis in a way that produces clear reduction-to-prototype effects. Thus, in organizing the raw facts of a case, the legal system focuses on and treats only those aspects

505. Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1433 (1986). I have previously explored the parallels between religion and judicial review that account for "not [only] the 'correctness' or legitimating power of the religious metaphor, but also its curious persistence." Winter, *supra* note 19, at 694; *see generally id.* at 692-99.

506. Winter, *supra* note 19, at 699-700.

507. G. LAKOFF & M. JOHNSON, *supra* note 63, at 158.

508. *See* notes 4-5 *supra* and accompanying text.

509. *See* notes 85-94 *supra* and accompanying text.

that fit the best examples of the doctrinal elements. For instance, in *Simon v. Eastern Kentucky Welfare Rights Organization*,⁵¹⁰ the Court understood the plaintiff to complain about a physical injury when, in fact, the briefs and the pleadings were raising a much larger interest.⁵¹¹

The practical result of these ontological and reduction-to-prototype effects is that standing law talks about one thing without talking about the thing to which it is inextricably attached⁵¹² and, thus, often gets it wrong. Alternatively, it talks about one thing by talking about another and in the process garbles both. To demonstrate this, I will discuss four well known standing cases—*Schlesinger v. Reservists Committee to Stop the War*,⁵¹³ *Flast v. Cohen*,⁵¹⁴ *Valley Forge Christian College v. Americans United for Separation of Church and State*,⁵¹⁵ and *Simon v. Eastern Kentucky Welfare Rights Organization*.⁵¹⁶ Each of these public rights cases would better fit a constituent model than a private rights one. Distortions occur when these cases are treated in terms of the schemata of the private rights model—much like forcing a square peg into a round hole. This section illustrates the confusion between standing and issues central to the merits that is the inevitable, distorted result.⁵¹⁷

A. *Standing: The Who and the What*

The dogma of standing doctrine that it is a question of access apart from the merits of the controversy,⁵¹⁸ is a product of the metaphor's primary ontological effect. This distinction makes sense in terms of the metaphor itself: The question is not what you have to say, but whether you can be heard to say it (that is, are you "standing"?). That latter issue depends on whether you are in a position to state your claim (do you have "*locus standii*"?). The effect is ontological, and not just an application of appropriate analytic tools, because the effect is at odds with common sense experience. That is, how can we know whether you should be heard until we allow you to speak? If what you have to say is powerful and important, why shouldn't we hear what you have to say? Once you have spoken, it is entirely likely that we might decide that we

510. 426 U.S. 26 (1976).

511. See notes 565-570 *infra* and accompanying text. In cases such as *Simon*, the legal system errs because it fails to perceive the metaphoric dimensions of a term and instead applies the term in a literalist sense.

512. The reference here is to the famous dictum by Thomas Reed Powell.

513. 418 U.S. 208 (1974).

514. 392 U.S. 83 (1968).

515. 454 U.S. 464 (1982).

516. 426 U.S. 26 (1976).

517. Another disordering consequence of the metaphor's ontological effect is the pressure to see all issues in individualist terms. In several recent cases, however, the Court has departed from the substance of the individualist view in fictitious and distorting ways because it continues to employ that view's rhetoric. See notes 601-675 *infra* and accompanying text.

518. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Flast v. Cohen*, 392 U.S. 83, 99 (1968); see also *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) ("The 'legal interest' test goes to the merits. The question of standing is different.").

wanted and needed to hear your statement after all.⁵¹⁹

Our legal training taught us that the law has its own logic which is different from common sense. Thus, as lawyers, we can feel comfortable with the notion that separating standing from the merits makes analytic sense in some circumstances. There are cases in which it seems appropriate to distinguish the question whether the defendant has violated the applicable law from whether the plaintiff is the appropriate person to compel the defendant to stop. But when we look at these propositions in concrete settings, we find that their coherence is more apparent than real. What seems to work passably well in a private rights context is in fact unnecessary. It is distorting when applied to a public rights context. I will use two variants on a "competitor-standing" example to clarify what I mean.

Suppose I hold a patent for a new, more efficient, manufacturing process for high-tech widgets. Provender Enterprises uses my process to manufacture widgets without first obtaining a license from me. Its competitor, Widget Wonder, sues to enjoin Provender from violating my patent. It should not matter that, on the merits, Provender is in violation of my patent (nor, for that matter, that Widget Wonder is in fact suffering economic loss from the competition). It is for me to decide whether I am hurt or offended by Provender's action. If I happen to decide that my continuing relationship with Provender is more important than the technicalities of a license, Widget Wonder is (in our system) stuck with my assessment of the relative economic benefits.

But, the reason that Widget Wonder cannot sue even though it has suffered real economic loss has little to do with an inherent problem of "standing." Widget Wonder can present a justiciable case. It will, however, lose on the merits because as a matter of policy our legal system does not afford it a remedy. The patent laws were intended to provide short-term monopolies to inventors, not to protect unrelated competitors such as Widget Wonder.

In the private rights context, the concept of standing is entirely unnecessary. In our legal system, we ordinarily handle the same concerns with other concepts. For example, we consider whether to recognize an interest that Widget Wonder has in the enforcement of the patent laws (that is, does it have a right?).⁵²⁰ If we were to decide that Widget Wonder has a right, then we consider whether it matters that I chose

519. Of course, we may be concerned about the potential effects on absent third parties of judgments obtained by public rights litigants. There are, however, alternative strategies to imposed silence. By delineating the area of discussion and then allowing others to participate, we can, as a practical matter, reduce or remove the adverse consequences of ill-considered action. See *In re Wellington*, 33 Mass. (16 Pick.) 87, 106 (1834); *Union Pac. R.R. v. Hall*, 91 U.S. 343, 355-56 (1876); Tushnet, *supra* note 14, at 1716-17 (citing Chayes, *supra* note 90, at 1311-12). In short, issues about these practical effects reflect *instrumentalist* concerns, and there are tools available other than standing law to regulate these problems. See note 713 *infra* and text accompanying notes 776-780 *infra*.

520. We might ask, alternatively, whether I have a privilege not to enforce my patent

not to enforce, rather than to license (that is, is a remedy appropriate?). Ordinarily, these concepts adequately distinguish between the acceptability of the defendant's conduct and the entitlement of the particular plaintiff to relief.

The rigid separation of standing from the merits changes from unnecessary to unhelpful as we shift to the public rights context. Suppose Widget Wonder believes that the patent office illegally issued the original patent. It would like to compete with Provender, but is afraid that I might sue to enforce the patent. It could raise the issue as a defense, or seek a declaratory judgment against me.⁵²¹ But, because Widget Wonder has a continuing stake in a fast-changing field of technology and is concerned that this error resulted from systemic problems in the patent bureaucracy, it seeks instead a declaratory judgment against the patent office.

Modern standing law would grapple with this problem by asking a series of questions about the relationship of Widget Wonder to the adjudicatory process: Did it suffer injury-in-fact? Was that injury caused by the patent office? Would it be redressed by the order sought? Is the injury like that of a traditional private-rights plaintiff, or one in common with the public at large?

These questions are separate from the "merits" of the patent office's conduct; they are threshold questions. But, in a variety of ways, they draw our attention away from the underlying issues. For example, standing law tells us to look for direct, concrete injury and then to limit the suit to a question about the patent office's responsibility for *that* injury. But if we do, we will miss altogether Widget Wonder's central concerns. We will miss as well the *public* issues raised by the case. Those issues concern the patent laws' broader role in promoting technological innovation and economic competition, a social interest that is stifled by rewarding noncontributing technologies with monopolies. Those issues also concern the variety and effectiveness of the alternative mechanisms for enforcing those social interests.⁵²² The focus on actual injury instead is a reduction-to-prototype effect that obscures these larger concerns.

As with the private patent case, these public issues can be cast as questions of rights and remedies. Or they can be considered as

and, concomitantly, the ability to privilege Provender to use it. If I do, then—in Hohfeldian terms—Widget Wonder has no-right. See Hohfeld, *supra* note 61, at 32-33.

521. Under current doctrine, Widget Wonder could only sue me as the patent holder if I had threatened enforcement or if, for some other reason, Widget Wonder had "a reasonable apprehension of liability." See, e.g., *American Needle & Novelty Co. v. Schuessler Knitting Mills*, 379 F.2d 376, 379 (7th Cir. 1967). Otherwise, Widget Wonder might face ripeness problems.

522. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (competitor is in the best position, and possibly the only person, to act as "private attorney general" to enforce in the licensing process the public interest requirement of the Communications Act); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 158.

straightforward matters of policy. In either event, we may decide that Widget Wonder is not the best party to raise these questions or that there are other, better mechanisms available to treat them. But to bury these questions by dealing instead with a question of "standing"—with the plaintiff's generalized relationship to the judicial process—risks missing what is most important about the case and the choices that the case poses. It risks as well some bad choices because of a failure to focus on the critical questions. Standing doctrine asks about the litigant's stake even as we resolutely refuse to consider "the stakes." Of course it is obfuscatory.

B. *Ontology Redux: A Modern Standing in Court*

In *Schlesinger v. Reservists Committee to Stop the War*,⁵²³ the plaintiffs sought to force members of Congress out of the Armed Forces Reserve on the ground that their membership violated the Constitution's incompatibility clause.⁵²⁴ The district court had solved the concrete injury conundrum by arguing that the incompatibility clause was designed to forestall the potential for injury, like a conflict-of-interest statute.⁵²⁵ The Court rejected that analysis because there was no injury-in-fact.⁵²⁶ In the Court's view, the lower courts had no business evaluating the meaning and effect of the incompatibility clause to determine standing: "Standing was thus found by premature evaluation of the merits of respondents' complaint."⁵²⁷

The Court's reasoning does not withstand analysis; it can only be accounted for in terms of the cognitive phenomena of standing's ontological and reduction-to-prototype effects. Let us examine first the ontological effect of "standing" in the Court's reasoning. What was accomplished by this fetishistic fastidiousness about "premature evaluation" of the merits? No obvious process values were at stake: The problem was not the poverty of the record or the lack of participation by the adverse parties. Nor did the lower court first decide that the congressmen had violated the Constitution and then reason backwards in an unprincipled fashion to find standing. Rather, the court understood "the primary if not the sole purpose of the bar against Congress-

523. 418 U.S. 208 (1974).

524. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art. I, § 6, cl. 2.

525. *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833, 840 (D.D.C. 1971). Interesting to us, although of no relevance to the Court, is the fact that the plaintiffs sought, along with other action, "an order in the nature of mandamus directed to petitioners [the Secretary of Defense and the three Service Secretaries] requiring them to strike from the rolls of the Reserves all Members of Congress . . ." *Schlesinger*, 418 U.S. at 211.

526. *Schlesinger*, 418 U.S. at 224.

527. *Id.* at 225.

men holding executive office" to be directed at "maintaining independence among the branches of government. . . ." ⁵²⁸ Accordingly, the court concluded that "the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the constitutional provision involved." ⁵²⁹

If the district court was correct that the incompatibility clause created both an affirmative duty on the respondents and a correlative right in the citizen-plaintiffs, then the plaintiffs were "in the position of a traditional Hohfeldian plaintiff" ⁵³⁰ no less than if they had sued upon the hypothetical conflict-of-interest statute (or if I sued Provender as the holder of the patent). If the court found that the plaintiffs' claim had merit, then denial of standing would be preposterous. If the court found that the plaintiffs' claim had no merit, it could still dispose of the case on a motion to dismiss. ⁵³¹ "Premature evaluation" in this context is a consequence of the ontological effect of the entailment of the "standing" metaphor that suggests a formal, nonsubstantive threshold. Its consequence, however, is to obscure the merits and determine them obliquely.

The Court's rejection of the lower court's conflict-of-interest analogy illustrates the reduction-to-prototype effect of the injury prong of standing analysis. The Court saw only "injury in the abstract," ⁵³² and treated as speculative any claim that citizens might actually have been harmed. But the district court's analysis understood that harm is often unpredictable or diffuse. An actual injury does not occur every time a driver runs a red light. But we enact traffic laws both because we know that sometimes there is an injury and because we want to be able to rely on the signal and cross the street in safety. We could instead have a rule that running a red light is only a wrong if someone is hurt, or we could always wait for the pedestrian's survivors to bring a private suit. But we don't; we make disobedience of traffic signals a crime because our capacity to conceptualize and project from everyday experience allows us to plan and to avoid inconvenience and future injury.

We enact conflict-of-interest provisions (or put them in the Consti-

528. *Reservists Comm. v. Laird*, 323 F. Supp. at 841.

529. *Id.*

530. *United States v. Richardson*, 418 U.S. 166, 203 (1974) (Stewart, J., dissenting); see generally Hohfeld, *supra* note 61. Justice Stewart uses the term to denominate the right/duty structure of the plaintiffs' claim, not the injury, causation, and redressability structure (the underlying *source-path-goal* schema) of the private rights model.

Justice Stewart nevertheless concurred in *Schlesinger* because he distinguished, for purposes of standing, between affirmative and negative duties. *Schlesinger*, 418 U.S. at 228-29. In the case of negative duties, the *Flast v. Cohen*, 392 U.S. 83, 102 (1968), "nexus" criteria might, for example, control. *Richardson*, 418 U.S. at 205 (Stewart, J., dissenting). See text accompanying notes 539-541 *infra*. Justice Powell is correct that this distinction makes no sense in terms of current doctrine. *Richardson*, 418 U.S. at 186-87 (Powell, J., concurring). But Justice Stewart's conceptual reasoning about standing is otherwise sound, even though he was caught up both by the ontological effect of the metaphor and the desire to establish some limits.

531. FED. R. CIV. P. 12(b)(6).

532. *Schlesinger*, 418 U.S. at 217.

tution) for similar reasons: We consider the issue important and know that the harms will often be too subtle to perceive directly. Plainly, the Court confirmed the latter point; it wanted prototypical injury of some sort.

A footnote to the Court's discussion of the district court's argument demonstrates the degree to which this reduction-to-prototype effect distorted the Court's reasoning. The Court acknowledged that Congress could enact a conflict-of-interest statute "directed at avoiding circumstances of potential, not actual, impropriety. . .," and that if it did, "the requisite injury for standing would be found in an invasion of that right."⁵³³ But what the Court did and did not conclude from that observation reveals the distorting effects of its reduction-to-prototype analysis. The Court never asked the obvious question: If Congress could enact a statute creating such a right, and if that statute would justify standing, then couldn't the Framers have already done so when they wrote the incompatibility clause? The Court did not ask this obvious question because it was clearly caught in the cognitive *trompe l'oeil* of the reduction-to-prototype effect: It posited that even if Congress were to pass such a conflict-of-interest statute, article III would still require "concrete harm" before a citizen could complain to a court about an actual conflict-of-interest.⁵³⁴ In short, the Court concluded (apparently without realizing it) that Congress had the power only to enact a statute recognizing the enforceability of fiduciary obligations. A true conflict-of-interest statute would be constitutionally unenforceable by members of the public because, by definition, prototypical injury would not yet have occurred.⁵³⁵

A possible response to my argument that *Schlesinger* illustrates the ontological and reduction-to-prototype distortions of standing doctrine would be to say that *Schlesinger* simply overemphasizes the separation between standing and the merits. *Flast*, after all, observed that "in ruling on standing, it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."⁵³⁶ But that would not provide a meaningful answer to my critique. *Flast*, after all, is one of the primary sources of the doctrine that standing is separate from the merits: "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal

533. *Id.* at 224 n.14 (citation omitted).

534. *Id.*

535. Imagine how the Framers might have handled this problem when they sat in the first Congress. They could have authorized a suit by writ of mandamus to enforce the incompatibility clause. Or an informer's statute could have made enforceable a true conflict-of-interest statute at the behest of any member of the public. But, if a simple informer's bounty of five dollars would have made the issue "justiciable," what possible article III, process value would be lost without it?

536. *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

court and not on the issues he wishes to have adjudicated."⁵³⁷ In essence, *Flast* says that "we don't look at the merits, but we will look at it just a little bit."⁵³⁸ Moreover, the *Flast* position simply digs a deeper analytic hole: There is little in standing law that is more intractably problematic than the *Flast* double nexus test. The test is a wonderful example of how difficult it can be for the Court to talk about the things it needs to and still stay within the "standing" metaphor: The contradiction in *Flast* arises because the Court wants and needs to focus on the merits of the plaintiff's claim and still treat standing as an entirely threshold question. It bridges these two incompatible positions by abstracting the essential elements of the claim as neutral, process oriented "nexuses."

In *Flast*, a taxpayer challenged, on establishment clause grounds, a federal statute providing funds to support the teaching of secular subjects in religious schools. The Court upheld the taxpayer's standing. It both identified the plaintiff's "personal stake"⁵³⁹ and distinguished *Frothingham* by focusing on "the nexus between the status asserted by the litigant and the claim [s]he presents . . ."⁵⁴⁰ Like Ms. Frothingham, Ms. Flast challenged a taxing and spending program. But, unlike Ms. Frothingham, who invoked the tenth amendment, Ms. Flast sued on the basis of a specific constitutional limitation on the taxing and spending power. Thus, the Court concluded, Ms. Flast and her co-plaintiffs had "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements."⁵⁴¹

This analysis fails, as *Flast*'s critics have argued, because the double nexuses "are not in any sense a measurement of any plaintiff's interest in the outcome of any suit."⁵⁴² Indeed, that critique is unanswerable if the double nexus test is supposed to address how the litigant's status relates to any generalizable conception of judicial process. But by

537. *Flast*, 392 U.S. at 99.

538. In his concurring opinion in *United States v. Richardson*, for example, Justice Powell characterized this shift in position regarding the relevance of the merits to the standing inquiry as "abrupt." 418 U.S. 166, 180-81 (1974). Yet, in his opinion for the Court in *Warth v. Seldin*, Justice Powell made just the same maneuver as that which he criticized in *Flast*: "Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, . . . it often turns on the nature and source of the claim asserted." 422 U.S. 499, 500 (1975) (citation omitted). One can see this as well in *Association of Data Processing Serv. Orgs. v. Camp*, where the Court first rejected the "legal interest" test because it went to the merits, and then adopted the "zone-of-interest" test, which is only a more pragmatic, Realist's version of the same thing. 397 U.S. 150, 153-54 (1970). In each case the Court is really asking questions about the merits: Whom does this statute protect? Who has rights and what are they?

539. *Flast*, 392 U.S. at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

540. *Flast*, 392 U.S. at 102.

541. *Id.*

542. *Id.* at 122 (Harlan, J., dissenting). Accord *Richardson*, 418 U.S. at 182 (Powell, J., concurring) ("[I]t is impossible to see how an inquiry about the existence of 'concrete adverseness' is furthered by the application of the *Flast* test."); H. FINK & M. TUSHNET, *supra* note 14, at 297 ("The subsequent history [of *Flast*] illustrates how a rule that is divorced from its rationale can be readily undermined or discarded.").

abandoning this threshold entailment of the “standing” metaphor, as the Court could not, we can make some sense of the *Flast* nexuses in case-specific and litigant-specific terms.

Ms. *Flast*’s nexus as taxpayer to her challenge of an exercise of the taxing and spending power was not significant because it gave her some greater financial or personal stake in the outcome. Rather, the nexus was significant because she was asking for nothing more than she was due under the law: On the merits, she had a first amendment right regardless of the amount at stake. Ms. *Flast* was arguing that the establishment clause protected her from a society in which tax monies would be used for impermissible, religious purposes.⁵⁴³ The amount (or lack) of injury to her pocketbook was beside the point; the exaction of even “three pence” was enough to establish that the government could “force h[er] to conform to any other establishment.”⁵⁴⁴ The first amendment exists to forestall the more direct injury. In other words, the *Flast* nexus that purported to answer the threshold question really addressed the merits of the plaintiff’s claim.⁵⁴⁵ The Court could only consider her stake by considering “the stakes.”⁵⁴⁶

543. In support of this point, the majority invoked the legislative history of the establishment clause: “[O]ne of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.” *Flast*, 392 U.S. at 103.

544. *Id.* (quoting J. MADISON, *Memorial and Remonstrance Against Religious Assessments* in 2 WRITINGS OF JAMES MADISON 183, 186 (G. Hunt ed. 1901)).

545. *See id.* at 114 (Stewart, J., concurring) (“Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution.”). Justice Fortas also recognized that the Court’s ruling spoke only to establishment clause cases and not to taxpayer standing generally. *Id.* at 115.

546. Justice Harlan’s position perhaps most informs this point. He understood the Court’s opinion as trying to answer the personal stake in substantive terms:

As I understand it, the Court’s position is that it is unnecessary to decide in what circumstances public actions should be permitted, for it is possible to identify situations in which taxpayers who contest the constitutionality of federal expenditures assert ‘personal’ rights and interests, identical in principle to those asserted by Hohfeldian plaintiffs. This position, if supportable, would of course avoid many of the difficulties of this case. . . .

Id. at 121. Justice Harlan borrowed the term “Hohfeldian” from Jaffe, *supra* note 5, and used it to identify “‘personal’ rights and interests.” *Flast*, 392 U.S. at 119 n.5, 121.

Hohfeld wrote about the right/duty duality of the common law, not the degree-of-private-interest question that is the concern of modern standing law. *See* Hohfeld, *supra* note 61. In the sense of the traditional public rights model, however, these public interest plaintiffs were perfectly Hohfeldian: They asserted public rights that entailed correlative duties on the defendant; the difference was that these duties ran to the public rather than just to the specific plaintiff.

Despite his insights, Justice Harlan was subject to the “standing” metaphor’s ontological and reduction-to-prototype effects. He rejected the Court’s use of criteria for taxpayer “standing” that did not establish the plaintiff’s degree of interest in the outcome of the suit. *Flast*, 392 U.S. at 121-24. Justice Harlan, however, did not believe that article III limits the judicial power to cases brought only by “Hohfeldian” plaintiffs with actual injury to personal rights. As we have seen, he cited informers’ actions as examples of “non-Hohfeldian” suits that were nevertheless “cases and controversies.” *Id.* at 120 (citing *Marvin v. Trout*, 199 U.S. 212, 225 (1905), and *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943)). In his

If *Flast* reveals the garbled effect standing has on the doctrinal discourse, then *Valley Forge Christian College v. Americans United for Separation of Church and State*⁵⁴⁷ demonstrates the costs—indeed, the mortal constitutional danger—of such disordered modes of thought. In *Valley Forge*, an establishment clause challenge to the donation of surplus government property to a sectarian college, the Court applied the double nexus test of *Flast* to reject the plaintiffs' standing. The Court reasoned that, unlike the *Flast* plaintiffs, the plaintiffs in *Valley Forge* had not challenged an exercise of the congressional taxing and spending power on the basis of a specific limitation on that power. Rather, the plaintiffs challenged an executive action by the Department of Health, Education and Welfare ("HEW"), authorized by a statute passed pursuant to the property clause of the Constitution.⁵⁴⁸

The Court's literal treatment of the *Flast* nexus test was just as much a fiction in *Valley Forge* as in *Flast*. The double nexus test could no more demonstrate that the *Valley Forge* plaintiffs lacked a sufficient interest in the subject matter than it could explain why an earlier Court had accorded "standing" to Ms. *Flast*.⁵⁴⁹ Rather, an entirely different approach to standing distinguished *Flast* from *Valley Forge*. Although *Flast* ostensibly established threshold criteria, the Court essentially had looked for *legal* injury. The *Flast* Court found that legal injury in the nexus between the plaintiffs' claim and the applicable legal principles, that is, by considering the nature of the plaintiffs' claim on the merits. In *Valley Forge*, on the other hand, the Court was literalist and reductionist: "We simply cannot see that respondents have alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing."⁵⁵⁰

The court of appeals had tried to use the legal injury approach by recasting that approach in terms of standing doctrine. The court of appeals understood the plaintiffs' claim to rest, not on their status as taxpayers, but rather upon the " 'injury in fact' to their shared individuated right to a government that 'shall make no law respecting [an] establishment of religion,' "⁵⁵¹ which the court viewed as a "particular and concrete injury" to a "personal constitutional right."⁵⁵² The

view, the requirement of standing in taxpayer suits was a judge-made limitation imposed for separation of powers purposes. *Id.* at 130-33.

547. 454 U.S. 464 (1982).

548. *Id.* at 479-80. The property clause grants Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. CONST. art. IV, § 3, cl. 2.

549. To borrow the majority's own metaphor: "This reasoning process merely disguises . . . with a rather thin veil, the inconsistency of the court's results . . ." *Valley Forge*, 454 U.S. at 483.

550. *Id.* at 486 (emphasis in original) (footnote omitted). In the accompanying footnote, the Court specifically rejected any "spiritual stake" premised on the zone of interest analysis of *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970). *Valley Forge*, 454 U.S. at 486 n.22.

551. *Americans United for Separation of Church and State v. United States Dept. of HEW*, 619 F.2d 252, 261 (3rd Cir. 1980).

552. *Id.* at 265.

Supreme Court majority rejected the analysis that would make "the mere allegation of a legal right sufficient to confer standing,"⁵⁵³ and correctly noted that the lower court's analysis was inconsistent with the reduction-to-prototype, injury-in-fact analysis of *Schlesinger* and *Richardson*.⁵⁵⁴

The majority had an important reason to reject an analysis that focused on the assertion of a right as sufficient to meet the threshold requirement: To adopt the analysis would recreate the circularity of the legal interest test and threaten the integrity of the standing concept.⁵⁵⁵ In the public rights context, in which injury had never been understood as prototypical, there is *only* legal right (that is, legal injury). The plaintiff sues because the government did something the law prohibits. The "injury" is to whatever concern lies behind the law. Thus, to allow "standing" to members of the public because they assert bona fide legal rights would be to recreate the public rights model.

But consider what this conclusion implies about the stakes in modern standing decisions. A "no-injury" determination is necessarily a "no-right" determination. Because the "injury" is to the legal interest, the plaintiff's "stake" is precisely what is at stake *on the merits*. Once the tool of liberals to avoid conservative judicial action, the use of standing law as a jurisdictional bar is now an axe wielded by the conservative Court to cut down the existence of rights previously unquestioned.

Justice Brennan appreciated part of this argument in his dissent in *Valley Forge*, although he failed to grasp its full significance. He noted that, because

553. *Valley Forge*, 454 U.S. at 483 (emphasis added). *But cf.* *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("the court must assume jurisdiction to decide whether the allegations state a cause of action."). *Bell* presented no problems of standing because the plaintiff in *Bell* suffered injury consistent with the traditional private rights model. In *Bell*, the Court considered whether Bell's fourth amendment (rather than the state law of trespass) claim was sufficient to justify federal question jurisdiction. Thus, the question in *Bell* was one concerning the scope of a constitutional provision and whether that provision created rights directly enforceable in a federal court. In that context too, the question of jurisdiction is in some sense inseparable from the underlying constitutional claim on the merits. *See id.* at 680-85; *Yazoo County Indus. Dev. Corp. v. Suthoff*, 454 U.S. 1157, 1160-61 (1982) (Rehnquist, J., dissenting from the denial of certiorari).

554. *Valley Forge*, 454 U.S. at 482-83.

555. "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.* at 483. Once accepted, the notion that the assertion of a right confers standing would render standing law a "collapsed field" in which the reconceptualization simply obliterates our prior understanding of the subject. *See* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518, 541 (1986). Professor Kennedy cites *Shelley v. Kraemer*, 334 U.S. 1 (1948), as creating a collapsed field: "[I]f enforcement of discriminatory covenants is state action, then the private sphere 'disappears,' since all private arrangements are dependent for their structure on enforcement of private law ground rules." Kennedy, *supra*, at 541. Compare, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (statute authorizing a warehouseman's lien is not subject to constitutional scrutiny because there is no state action), *with id.* at 178 ("private" commercial behavior is only possible because the state provides "a framework of rules" backed up by the enforcement power of the state).

[a] plaintiff's standing is a jurisdictional matter for Art. III courts, and thus a "threshold question" . . . there is an impulse to decide difficult questions of substantive law obliquely in the course of opinions purporting to do nothing more than determine what the Court labels "standing"; this accounts for the phenomenon of opinions, such as the one today, that tend merely to obfuscate, rather than inform, our understanding of the meaning of rights under the law.⁵⁵⁶

He argued that "[t]he drafters of the Bill of Rights surely intended that the particular beneficiaries of their legacy should enjoy rights legally enforceable in courts of law."⁵⁵⁷ But Justice Brennan could not answer the majority's critique; he could not explain his position in terms of the process limitations expressed in current doctrine. He instead "[read] cases such as *Frothingham* and *Flast* as decisions on the merits of the taxpayers' claims."⁵⁵⁸

Justice Brennan *was* correct. The concept of standing necessarily undermines the concept of rights under law. He could not answer the critique because he could not step outside the current doctrine's ontological and reduction-to-prototype effects. We must first accept that the Court's treatment of standing as jurisdictional is historically unjustified before we are free to see standing doctrine's inevitable analytic consequences. The Court's standing doctrine is not just a matter of misdirected impulse. "Standing" is and can only be a question about the legal rights at stake. Consequently, the Court's application of standing to reject "jurisdiction" in public rights cases will always undermine the rights that comprise the core of our current understanding of the concept of "the rule of law."

The doctrine of standing necessarily undermines our understanding of the stakes in any given case; the Court focuses on ostensibly neutral, process-oriented criteria even as it unavoidably decides the merits of the plaintiff's claim. Perhaps *Simon v. Eastern Kentucky Welfare Rights Organization*⁵⁵⁹ illustrates best this phenomenon. In *Simon*, the Court employed the tripartite injury-in-fact, causation, and redressibility test of standing⁵⁶⁰ to reject the claim by indigents that a change in Internal Revenue Service ("IRS") regulations concerning hospitals eligible for

556. *Valley Forge*, 454 U.S. at 490 (Brennan, J., dissenting).

557. *Id.* at 494.

558. *Id.* at 484 n.20 (majority opinion); *see also id.* at 476 n.13 (majority opinion).

559. 426 U.S. 26 (1976).

560. The *Simon* formulation originated in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), in which the Court held that a mother had no standing to sue the prosecutor to enforce child support payment laws. In that case, however, Justice Marshall's majority opinion identified the requirements as deriving from the "unique context of a challenge to a criminal statute" and the "special status of criminal prosecutions in our system." *Id.* at 617, 619. The government defendants in *Simon* understood *Linda R.S.* in just that way, and framed their arguments accordingly. *Simon*, 426 U.S. at 37. In *Warth v. Seldin*, 422 U.S. 490 (1975), however, the Court elevated the *Linda R.S.* criteria to the constitutional standard for standing. As I explained in Section II, the recharacterization in *Warth* of the injury, causation, redressability criteria is a natural extrapolation from the *source-path-goal* structure of the private rights model. *See* notes 85-95 *supra* and accompanying text.

tax-exempt status under section 501(c)(3)⁵⁶¹ violated the terms of the statute. The plaintiffs included persons who had been turned away from hospitals that qualified for charitable status under the new standards. The plaintiffs sued the Secretary of the Treasury, alleging that the Nixon Administration's change in the relevant regulations had encouraged the hospitals to deny service to indigents.

The Court held that the plaintiffs had no standing. It accepted that at least some of the plaintiffs might have suffered injury-in-fact when denied access to needed medical services because they were indigent. It held, however, that this assumed injury was not enough for standing. In the Court's view, the existence of a case or controversy between the litigants depended on a twofold analysis: whether the defendants' challenged action caused the injury⁵⁶² and whether a favorable decision was likely to redress the injury.⁵⁶³ With regard to each prong of this analysis, the Court found the connection speculative: A hospital might have decided to deny treatment to indigents for reasons other than, or even in spite of, the tax implications. In that event, no court order restoring the IRS ruling (requiring treatment for indigents as a condition of charitable status) would result in the desired benefits to the plaintiffs because hospitals might decide to forgo the tax benefits in order to avoid providing the service.

The plaintiffs countered this reasoning by arguing that the hospital industry had represented to Congress the importance of such favorable tax treatment to not-for-profit hospitals. In response, the government argued that charitable contributions only accounted for four percent of hospital revenues. The Court interpreted this "conflicting evidence" as support for the government's position. It held that the plaintiffs had failed to establish that hospitals receiving tax-exempt status depend on charitable contributions.⁵⁶⁴ The Court concluded that "*the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire.*"⁵⁶⁵

Viewed through the lens of "standing," the Court's analysis seems to make sense. Remove that lens, however, and the elaborate structure that the metaphor sustains can be seen to collapse.

The reduction-to-prototype effect of the injury-in-fact requirement for standing focused the Court on the wrong injury. So did the causation analysis: "Cause" asks for "effect," and the Court looked for con-

561. 26 U.S.C. § 501(c)(3) (1982) provides that public safety organizations may be treated as tax exempt.

562. *Simon*, 426 U.S. at 41-42.

563. "Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III [case or controversy] limitation." *Id.* at 38; *see also id.* at 39 ("The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.").

564. *Id.* at 43-44.

565. *Id.* at 45-46 (emphasis added).

crete injuries: injuries "in fact." The Court treated the claim of the *Simon* plaintiffs in just this way:

The obvious interest of all respondents, to which they claim actual injury, is that of access to hospital services. In one sense, of course, they have suffered injury to that interest. The complaint alleges specific occasions on which each of the individual respondents sought but was denied hospital services solely due to his indigency. . . . [S]ome have been denied service. But injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant. The only defendants are officials of the Department of the Treasury. . . .⁵⁶⁶

There is a subtle and unaccountable shift here from the concept of "access to services" to that of "denial of services." In the private rights model, with its *source-path-goal* schema of causation by the defendant of an injury "in fact" to the plaintiff, denial of access is only an intermediate causal step to the ultimate injury, the denial of needed medical care. The new IRS policy did not cause that injury: that injury resulted from intervening causes controlled by other (non)parties. Thus, standing was lacking.

But the plaintiffs had presented a different case. They were concerned about specific instances of inability to obtain care (the prototype). But they experienced their situation and manifested their concern in terms of their loss of continuing access to care (the conceptual extension). They claimed that the charitable treatment of hospitals existed primarily to provide a source of free care to indigents financed, not directly by the government, but by private contributors.⁵⁶⁷ This claim rested on an assumption about, and an assessment of, rational responses to tax incentives. In a sense, then, the plaintiffs claimed to be third party beneficiaries of the tax incentive scheme of the code.⁵⁶⁸ "The relevant injury . . . [wa]s, then, injury to this beneficial interest—as respondents alleged, injury to their 'opportunity and ability' to receive medical services."⁵⁶⁹

By changing the determinants of charitable status, the IRS effectively reduced the flow of money that hospitals would use for free indi-

566. *Id.* at 40-41.

567. See *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (quoted in *Eastern Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325, 332-33 (D.D.C. 1973)).

The rationale for allowing the deduction of charitable contributions historically has been that by doing so, the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government. "The Government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds."

McGlotten, 338 F. Supp. at 456 (quoting H.R. REP. NO. 1860, 75th Cong., 3d Sess. 19 (1938)).

568. H. FINK & M. TUSHNET (1st ed.), *supra* note 14, at 319.

569. *Simon*, 426 U.S. at 56 (Brennan, J., dissenting). Justice Brennan's identification of "injury" with "opportunity" appears quite awkward. In contrast, use of the legal interest test would seem quite natural in this context.

gent care. No longer required to provide free services, the hospitals could instead funnel those funds to subsidize the care given others: the well-to-do and the insured. As a result, indigent plaintiffs faced a reduction of available services. This was the "injury" caused by the new IRS policy. Like any sensible, middle class person, the plaintiffs were concerned about the diminution of access. Most of us place substantial value on access to medical care when we need it. We do not wait for the moment of medical need to inquire into the availability of services. If we are middle class and have the financial resources, we spend substantial funds to provide ourselves and our families with assured access: It's called medical insurance. If the insurance company were to abrogate our policies, we would have standing to sue without waiting for an actual physical injury to occur, such as a denial of care because of inability to pay. In the private sphere, the protected interest (the deprivation of which confers "standing") is called "contract." But the *Simon* plaintiffs were caught in a double bind: They had neither a prototypical contract nor a prototypical injury.

Simon, then, illustrates a twofold reduction-to-prototype effect. The charitable provisions of the code were a nonprototypical contract in which the government provided tax benefits, the charitable donors provided money, and the hospitals provided care to the indigents who were the intended beneficiaries.⁵⁷⁰ When the IRS abrogated the deal, the indigent plaintiffs suffered injury to a vital, life or death interest. To recognize that the middle class policy holder has suffered a cognizable injury but to deny to indigents standing to challenge their parallel reliance on the program of public benefits embedded in tax policy is, simply, to confer a right on the merits in one case and not the other. The Court didn't see that because, arising in a setting of public benefits, the situation did not fit the private law prototypes.

Although Justices Brennan and Marshall disagreed with the majority in *Simon* on the standing issue, they too missed the central issue of the case. They concurred in the judgment because, to them, the case was not sufficiently ripe or concrete. It was not ripe because the new IRS ruling did not specify all of the circumstances and factors that would determine its application to other hospitals. The case was not concrete because the plaintiffs had not shown that the specific hospitals which

570. If the insurance analogy seems far-fetched consider the response of the Senate committee that rejected incorporating the new IRS ruling into the tax revisions of 1969. "The committee deleted from the bill those provisions which would have conformed the code to the result reached by the 1969 ruling. The committee decided to reexamine this matter in connection with pending legislation on Medicare and Medicaid." S. REP. NO. 91-552, 91st Cong., 1st Sess. 2090 (1969). Congress chose between providing insurance directly or doing so indirectly by creating tax incentives for hospitals to provide services and for donors to contribute the necessary funds. The tax incentives operated as a form of insurance for the indigents, assuring hospitals that they would receive funds from third parties to cover the expenses of providing medical care to the indigent. The charitable provisions of the code embodied this nonprototypical contract. Indigents were the third party beneficiaries.

provided their "opportunity and ability" to obtain free care were in the class of hospitals affected by the ruling.

If this reasoning sounds suspiciously like the majority's causation analysis, it is because the concurrence applied the same causal *source-path-goal* metaphor to a different *goal*. Justices Brennan and Marshall were no less constrained by the private rights model than was the majority. They also missed the public rights thrust of the plaintiffs' case.

The original Revenue Ruling excluded from the definition of "charitable" hospitals that did not provide some free care to indigents.⁵⁷¹ The new ruling stated explicitly that the promotion of the health of the community was inherently charitable "even though the class of beneficiaries . . . does not include . . . indigent members of the community."⁵⁷² The indigent plaintiffs knew that this policy revision would surely affect some of them. They sued to protect those victims, whom-ever they might be. But the Court wanted *prototypical sources*, identifiable victims with identifiable injuries, and *prototypical causation*. In applying the *source-path-goal* metaphor of the private rights model, the Court wanted the plaintiffs to show a shorter and clearer *path* and not the "attenuated line of causation"⁵⁷³ of a public case.

In the end, all of the members of the Court simply missed the point because the reductionist analysis of current doctrine prevented them from seeing the normative question—the merits—that lay behind the case. Nevertheless, the decision amounted to the adverse normative determination that both the majority and the concurrence purported to avoid.

Simon also reveals the distorting results of the ontological effect of the "standing" metaphor. The Court treated the question of standing as addressing the sufficiency of the allegations of the complaint.⁵⁷⁴ Standing purports to be a threshold question of justiciability; the logic of the metaphor therefore argues that standing should be judged on the basis of the pleadings. But the Court did not really do that. It first argued that *the complaint* did not establish the requisite causal connection between the defendant's action and the injury alleged. The Court then relied on the conflicting "evidence" and rejected the plaintiffs' case on causation as "purely speculative."⁵⁷⁵

Ordinarily, the allegations of a complaint don't "establish" anything; they merely assert what the plaintiff needs and intends to prove

571. See Rev. Rul. 56-185, 1956-1 C.B. 202-03, quoted in *Simon*, 426 U.S. at 30.

572. Rev. Rul. 69-545, 1969-2 C.B. 117-18, quoted in *Simon*, 426 U.S. at 49 n.1.

573. *Simon*, 426 U.S. at 45 n.25 (quoting *United States v. SCRAP*, 412 U.S. 669, 688 (1973)).

574. See *id.* at 39. The case actually went to the Court on cross-motions for summary judgment. The plaintiffs prevailed on their motion in the district court, but the court of appeals considered the case on the merits and reversed. The Supreme Court granted the cross-petitions for certiorari and ruled on the defendants' petition raising the jurisdictional issues. *Id.* at 35-37.

575. *Id.* at 42; see *id.* at 39-46.

at trial.⁵⁷⁶ Ordinarily, a defendant's motion for summary judgment is the procedural device that tests whether the plaintiffs can establish their factual allegations.⁵⁷⁷ But, in a sense, these criticisms are beside the point: The Court was deliberately ambiguous about whether the fatal flaw was a problem of pleading or a problem of proof.⁵⁷⁸ The "standing" metaphor necessarily produces this ambiguity: If causation is part of the jurisdictional prerequisite of the standing test, causation should ordinarily be ascertainable from the complaint. To admit otherwise would throw the whole endeavor into question. If the plaintiffs lost in *Simon* because they could not prove that the IRS caused their injuries, then they lost not because they had no standing but because the IRS was not responsible for their injuries. Admit that conclusion and one has admitted that to ask about causation is to ask about something else entirely: the merits of a private law dispute.

The Court's causation analysis necessarily suggests that, if we adhere to the private rights model, the flaw in the plaintiffs' case was on the merits. The essence of the remedial *source-path-goal* metaphor is proof of the causal *source-path-goal* metaphor: that the defendant's actions caused the alleged injury.⁵⁷⁹ Consider a familiar tort paradigm.

576. As Justice Brennan has twice argued, the Court has sidestepped entirely the ordinary liberality of pleading (and amendment) under the Federal Rules of Civil Procedure. See *id.* at 55 n.6 (Brennan, J., concurring); *Warth v. Seldin*, 422 U.S. 490, 527 n.6, 528 (1975) (Brennan, J., dissenting).

577. If the defendants had tested the causation issue by a motion for summary judgment, they would have forced the plaintiffs to come forward with evidence from which a reasonable trier of fact might be able to infer the requisite causation. See *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 250-251 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

578. Only in a footnote did the Court acknowledge the relevance of these ordinary procedural parameters to the decision in *Simon*. The footnote attempted to distinguish *United States v. SCRAP*, 412 U.S. 669 (1973), where

although . . . "the Court was asked to follow [an] attenuated line of causation," . . . the complaint nevertheless "alleged a specific and perceptible harm" flowing from the agency action. . . . Such a complaint withstood a motion to dismiss, although it might not have survived challenge on a motion for summary judgment. . . . But in this case the complaint is insufficient even to survive a motion to dismiss, for it fails to allege an injury that fairly can be traced to petitioners' challenged action. . . . Nor did the affidavits before the District Court at the summary judgment stage supply the missing link.

Simon, 426 U.S. at 45 n.25 (quoting *SCRAP*, 412 U.S. at 688, 689 & n.15). Justice Brennan argued that this "distinction of *SCRAP* will not 'wash.'" *Id.* at 62. But he too would have held that the plaintiffs failed to show "enough" causation at the summary judgment stage. See *id.* at 53.

579. Both before *Simon* and since, the Court has treated the causation question as the critical substantive question of a plaintiff's claim of governmental liability for the actions of its agents. See *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976); *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-94 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *Monell* "imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Monell*, 436 U.S. at 692.

Professor Casebeer has argued that *Rizzo*, itself a case that mixes standing and the merits, illustrates doctrinal manipulation in a Realist mode to sustain unidentified conclusions about the shape of the legal paradigm being imposed:

The opinion . . . boldly equates the section 1983 language "subjects or causes to be

A woman is waiting on line to board a bus. She stands at the rear of one of those aluminum and plexiglass bus shelters that line some cities' streets. A man holding a plain, wrapped package boards the bus. The driver negligently takes his foot off the brake. The bus lurches. The man falls. The package, containing fireworks, hits the ground and explodes. The bus shelter collapses and injures the woman. If this modern Ms. Palsgraf⁵⁸⁰ hopes to recover from the bus company, she will at least have to prove that the shelter collapsed as a result of the explosion and not as an independent result of defects in its manufacture. If she wants to recover from the more solvent manufacturer of the shelter, she will have to show that there were defects in its manufacture—that is, that a well designed and constructed shelter would have withstood the fireworks display. If she fails to prove causation in either case, she loses not because she had no standing but rather because she failed to establish the elements of the causal *source-path-goal* metaphor: she had no case on the merits. The court exists to make this very determination.

The degree of causation required for liability is the fundamental question of the suit. In many cases, causation is unproblematic because the *source* is clear and the *path* is short and direct: I accelerate too fast and my car hits your car. But in many cases the *source* is remote and the *path* is long. Then we have to ask for the *proximate* cause: "What we do mean by the word 'proximate' is, that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events *beyond a certain point*."⁵⁸¹

Problems of multiple, indirect causation are the most difficult for the *source-path-goal* metaphor of causation because there are many *sources* and criss-crossing *paths*.⁵⁸² As the causal paths multiply and cross one another, the prototype of the causal *source-path-goal* metaphor fails to

subjected" with the causation-in-fact standing requirement for an article III personal injury without arguing the exclusivity of direct causation for the responsibility of state actors to private citizens—in other words, on section II A, see II B; on section II B, see II A.

Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 401 (1983)(footnote omitted). My point, however, is that this identification of § 1983 causation with causation in standing doctrine is not an invention or abuse perpetrated by Justice Rehnquist; it is a consequence of the development of standing law from the *source-path-goal* metaphors of the private rights model. Substituting the word "is" for "becomes": "[t]he threshold question of who gets into court [is] the same question as how functionally do constitutional rights of individuals limit the power of the Sovereign, which [is] the same question as what is appropriate equitable relief for courts to grant against administration of government." *Id.* at 399.

580. See *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

581. *Palsgraf*, 248 N.Y. at 352, 162 N.E. at 103 (Andrews, J., dissenting) (emphasis added). Judge Andrews added: "This is not logic. It is practical politics." *Id.*

582. Suppose the evidence in my bus shelter hypothetical showed both that the bus driver was negligent and that there were defects in the manufacture and design of the shelter. To recover from the manufacturer in that case, my modern Ms. Palsgraf would have to show not just that the defect was a *remote* "but for" cause of the collapse, but also that it was the "proximate cause," that it is the causal source which was closer, its causal path shorter.

provide much structure and we get all the familiar distortions of proximate cause analysis. One way we try to find our way out of the maze is to ask whether one of the defendants was at least close enough to see it coming: Was the injury *foreseeable*?⁵⁸³ Was the victim amongst the *foreseeable* beneficiaries of the duties we expect of the manufacturer?⁵⁸⁴ Or, we might accept the limits of the *source-path-goal* schema and make a naked normative judgment.⁵⁸⁵ But even if the path were long and the proof slim, we would not (in the language of *Simon*) reject “standing” because the causal connection was “speculative.”⁵⁸⁶ The plaintiff would have “standing” to try to establish the attenuated causal *source-path-goal* metaphor and to argue the normative questions regarding the scope of the duty.

Simon pretermitted the ordinary judicial process by making these merits determinations on the pleadings as a threshold matter. The Court simply declined to trace the causal *path*. It could just as well have said any of the things that courts usually say in deciding the merits of similar tort cases: that the IRS ruling was not the “proximate cause” because hospital policy determinations independent of the tax consequences may have been the “real” cause of the denial of service; that it was not “foreseeable” that hospitals would gauge their provision of free services for indigents in response to changes in tax incentives (Congress’ attempt to influence hospital behavior in just this way, notwithstanding); that, when the IRS considered restructuring the tax incentives, it owed no duty to, and was free to ignore the potential effects on, indigent patients.

If standing law does no more (and no less) for us as a heuristic device than does proximate cause analysis in tort law, we should be little surprised. And if it serves merely to recreate the same sets of questions that we asked in the context of private tort law, neither should we be surprised at that result. The congruence between standing law and tort law is as predictable as is the facial characteristics of an individual and his or her clone. Standing law and tort law share the same animating genes—that is, the same conceptual schema.

But there is one critical difference. Standing is a threshold issue. It asks the same questions, but at the beginning of the lawsuit. Proximate cause cases at least have the benefit of a completed exploration of factual complexities and a full development of their analytic and normative consequences. Constitutional standing doctrine, on the other hand, asks the plaintiff to unravel all of these intricacies—the multiple *sources* and the criss-crossing *paths*—before the record is developed. It

583. See, e.g., *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co.*, (1967) 1 App. Cas. 617 (*Wagon Mound II*).

584. See, e.g., *Palsgraf*, 248 N.Y. at 341-42, 162 N.E. at 99 (majority opinion).

585. See, e.g., *In re Kinsman Transit Co.*, 388 F.2d 821, 824-25 (2d Cir. 1968) (*Kinsman II*); *In re Kinsman Transit Co.*, 338 F.2d 708, 719 (2d Cir. 1964) (*Kinsman I*).

586. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976).

is no wonder that the Court seems consistently to require prototypical injury and prototypical causation: That's all one could possibly see at that point. And, it is no wonder that this truncated process produces unsatisfactory opinions and bad decisions.

Standing law and tort law also share the same individualistic entailments of the causal *source-path-goal* metaphor. Consider the *Palsgraf* paradigm. The same conceptualizations that separate current standing law and the older public rights model also divide Judge Cardozo's opinion for the majority from Judge Andrews's dissent. Judge Cardozo argued that Ms. Palsgraf could not recover because *she* had suffered no legal wrong (no *source*).⁵⁸⁷ Judge Andrews's normative approach was more catholic:

Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. *The act itself is wrongful*. It is a wrong not only to those who happen to be within the radius of danger but to all who might have been there—a wrong to the public at large.⁵⁸⁸

Judge Andrews did not insist on a *source-path-goal* metaphor that personalized the issue. He took a regulatory approach that understood the basic unity of the community's interest: Negligent conduct endangers many different *parts* of the *whole*; it is "a wrong to the public at large" regardless of which individual *part* is injured. This schism between the individualistic, "personal" approach to rights and the regulatory, communal sense of law persists in current standing law.

Standing law reflects the features of tort law because, like the clone, it is an unmediated outgrowth of the original. As we have seen, standing law developed directly from the private rights model. Standing doctrine merely teased out the essence of the equity version of that model.⁵⁸⁹ Thus distilled, it crystallized that essence as constitutional precipitates consisting of the same elements. The result is therefore the same. Only the discourse is different, and obfuscatory.

VI. RECONSTITUTING STANDING

Before it can adopt a positive voice, freedom requires an effort at disalienation.⁵⁹⁰

587. "The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another." *Palsgraf*, 248 N.Y. at 342, 162 N.E. at 100.

588. *Palsgraf*, 248 N.Y. at 349, 162 N.E. at 102 (Andrews, J., dissenting)(emphasis added).

589. See, e.g., *Ex parte Young*, 209 U.S. 123, 162 (1908) (equity intervenes only for the protection of property: citing *Davis and Dobbins*); *Dobbins v. Los Angeles*, 195 U.S. 223, 241 (1904) (equity intervenes only for the protection of property: injunction of ongoing criminal proceeding); *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U.S. 207, 218 (1903) (equity intervenes only for the protection of property); *In re Debs*, 158 U.S. 564, 583-84 (1895) (equity available to protect government property in the mail).

590. F. FANON, *BLACK SKIN, WHITE MASKS* 231 (C.L. Markmann trans. 1967).

What would reconceptualized models of standing look like? What attitudes should shape participation in a legal system not dominated by the current metaphor? I suggest that, if we are to reconstitute standing doctrine in the public law context, we should choose rules that are reconstitutive rather than alienating. We could start with five propositions.

First, the Framers did not write a Constitution for, and did not envision a society consisting of, "a collection of portable little spheres of interest in which you and I and [others] plunge about like swimmers in so many diving bells."⁵⁹¹ Their society was not organized that way; modern society isn't either. Each of us lives within interactive webs of interests. Each of us belongs to numerous communities: the *part-whole* configurations that, like concentric rings, comprise the varying relationships of our lives: We are husbands and wives, parents and children, employers and employees, professionals and clients, as well as members of extended families, unions, professional organizations, political parties, and other citizenship groups.

Second, we ordinarily expect those who share our interests and our trust—whether intimate, professional, or political—to speak up for us. We feel betrayed when our family, friends, or professional colleagues do not stand up for us. The political premise of our democracy is that it is *representative* in character.⁵⁹² This communitarian assumption is no less characteristic of our practice of judicial review, in which the Court decides rules and principles that govern us all and not just the litigants before it.⁵⁹³ That universality is one reason for the continued validity

591. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 369 (1974) (discussing standing in the context of the fourth amendment).

My . . . question is whether the amendment should be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct. . . . Plainly, the Supreme Court is operating on the atomistic view, [which] is the premise upon which "standing" to invoke the exclusionary rule has been demanded, the premise upon which the Court has said that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." But . . . the fourth amendment speaks of "[t]he right of the people," . . . as in "We the People" or—since . . . the amendment's purpose may be squarely to control the police—as in "Power to the People"?

Id. at 367 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969) (citations omitted)). This atomistic focus is not inherent in any particular constitutional clause or conception, but rather in the adherence to the private rights model that dominates modern legal thought. The tension between an atomistic or regulatory focus is a basic dichotomy of social thought and organization.

592. See, e.g., U.S. CONST. art. IV, § 4 (guaranteeing republican form of government).

593. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Attorney General Meese's comments that the Court's authority to interpret the Constitution is limited to decision of the specific dispute before it and is binding only on the litigants caused an uproar because we see the Court's role as normative and communal, and not just as about resolving disputes between individuals. *Meese Says Rulings by U.S. High Court Don't Establish Law*, N.Y. Times, Oct. 23, 1986, at A1, col. 6; *Washington Talk: Meese and the Storm Over the Court*, N.Y. Times, Oct. 27, 1986, at A20, col. 3. Within the internal logic of the private rights model, there is something to Meese's point; but the paradigm itself fails to capture the fullness of the adjudicatory process.

of de Tocqueville's classic observation: "Scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question."⁵⁹⁴

Third, society establishes rights in order to protect particular interests through the medium of laws. The prototypical right is effectuated by a remedial scheme that involves coercive judicial remedies obtained by the injured individual. But not all rights fit a single mold. Sometimes the interests that society chooses to protect are shared by a community. Sometimes the correlative enforcement mechanism relies on the normative sanctions that can be brought to bear upon the wrongdoer, such as impeachment, political defeat, or public opprobrium. But all of these normative sanctions depend on access to some public forum. Public rights require a public forum, even if only to require the court to be sure that other kinds of remedies are available and appropriate.⁵⁹⁵

Fourth, the problems that arise from representation are only *instrumental*—that is, only practical problems. Standing law, premised as it is on individualism, posits otherwise, that there is a fundamental, normative requirement that rights are personal in nature. But there is nothing inherently wrong with allowing A to represent the interests of B. To the contrary, there are occasions when such representation is desirable or necessary. There are risks to representation, to be sure: The representative may act against or in ways inimical to the represented party's real interests. Accordingly, we make choices or impose limits. We weigh the instrumental benefits as well as the costs. We require representation at certain times⁵⁹⁶ and prohibit it at others.⁵⁹⁷ We impose fiduciary obligations or carve structural limitations.⁵⁹⁸ But these are instrumental considerations that present choices to be made, not

594. I A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (1835).

595. For example, it is common in English libel actions that the jury awards the plaintiff only nominal damages. The real sanction is the normative judgment of the community, which can only be obtained after a full airing of the facts before the jury.

596. The appointment of guardians ad litem, executors for estates of the deceased, or administrators for estates of the bankrupt exemplify instances in which the legal system requires representation by those without personal interest. The legal system also allows a petition for habeas corpus brought by a "next friend." See, e.g., *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921). The "next friend," however, must establish a reason for the representation, such as mental incapacity of the detained person. E.g., *id.* at 917 ("the application must set forth facts, which will satisfy the court that the interest of the next friend is appropriate, and that there is good reason why the detained person does not himself" apply for relief); see also *Gilmore v. Utah*, 429 U.S. 1012, 1014 (1976) (mother has "standing" only if petitioner is incompetent to seek relief on his own); cf. *Rees v. Peyton*, 384 U.S. 312 (1966) (court bears ultimate responsibility to decide question of the defendant's mental competence to withdraw petition when counsel seeks to proceed).

597. See, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940) (judgment cannot bind absent third parties when their interests were not adequately represented).

598. *Id.* The class action device, with its attendant restrictions, provides the best example of pragmatic legal rules designed to protect the interests of absent third parties. See *FED. R. CIV. P.* 23.

moral evils pretermitted by a priori philosophic or constitutional limitations.

Fifth, any particular regime governing participation imposes institutional costs and benefits. The current standing regime obfuscates the actual costs and exaggerates the benefits.⁵⁹⁹ The institutional constraints that we should treat as embodied in a "case or controversy" notion are implicated much more rarely than is suggested by current doctrine. This argument involves two elements: (1) that courts are better suited, more necessary, and more frequently employed as fora for debate over and enforcement of societal norms than the prevailing constitutional wisdom suggests; and (2) that the threat to democratic values stems from the loss of democratic control over decisions about access to and involvement in that judicial process as much as from the courts' normative work. Current standing law obfuscates the instrumental value of the rule of law in a functioning democratic system and the imperialism of an unaccountable judiciary that acts as both lawgiver and gatekeeper.⁶⁰⁰

I explore these principles in the four subsections that follow. In the first, I explore, in the context of recent cases, the ways that the Court has had to manipulate its own doctrine in order to permit representative public litigation inconsistent with its individualistic ideology of standing. In the second subsection, I explain why a multiplicity of metaphors better structures meaningful responses to a multidimensional reality. I develop the advantages of a system that is not restricted to a single model or metaphor. I illustrate this point with alternative models and metaphors that do a better job of recognizing rights and providing meaningful remedies in a society characterized by interdependence. In the third subsection, I consider how the Court's manipulation of these metaphors undermines self-governance. In the final subsection, I suggest how alternative models might better enable us to harmonize the processes of adjudication with notions of democratic governance.

A. *Testing and Transcending the Paradigm*

One measure of the individualistic paradigm of modern standing law is the Court's success in employing this paradigm to police the

599. Professor Brilmayer emphasizes the benefits of autonomy and self-determination thought to accrue from traditional justiciability doctrine. Brilmayer, *supra* note 11. For one critique of Brilmayer's thesis, see Tushnet, *supra* note 14. In saying that the benefits thought to accrue from standing doctrine are exaggerated, I do not mean to suggest either that autonomy and self-determination are unworthy goals or that standing law fails to reflect them. Rather, standing law works with a notion of autonomy that is so atomistic and fragmented that justiciability doctrine creates and reinforces conditions that *prevent* meaningful self-determination. *See, e.g.*, note 648 *infra* and text accompanying notes 662-664 *infra*.

600. *See, e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 308, 309 (1947) (Frankfurter, J., concurring) (upholding the principle that the Court has jurisdiction to determine its own jurisdiction simultaneously and asserting that a man may not be a judge in his own case).

boundaries of adjudication consistent with society's felt needs. The Court has found it necessary to distort the paradigm—sometimes beyond recognition—in order meaningfully to accommodate societal needs for adjudication in situations in which individualism simply fails to capture the more complex dynamics of lived, social experience. This discussion will demonstrate again that the standing paradigm does not work. The primary purpose of this discussion, however, is to discover what is needed to replace it.

In *Trafficante v. Metropolitan Life Insurance Company*,⁶⁰¹ one white and one black person sued under the Federal Fair Housing Act⁶⁰² as “persons aggrieved” by their landlord’s refusal to rent to other, nonwhite applicants. The lower federal courts held that the plaintiffs were not entitled to sue under the Act.⁶⁰³ The Supreme Court reversed. The majority found standing based on the allegation that the “injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial association.”⁶⁰⁴ This characterization restructured the issue in individualistic terms: The plaintiffs suffered a loss in “the very quality of their daily lives.”⁶⁰⁵ But the Court did not stop there. It also considered the congressional grant of a right to sue on two alternative bases not rooted in the plaintiffs’ special injury. It considered that the scheme created by the Act relied heavily, if not exclusively, on private attorneys general for enforcement.⁶⁰⁶ And it quoted Senator Javits’ observation that the injury of housing discrimination is to “the whole community.”⁶⁰⁷

No part of the Court’s rationale fits the paradigm of standing. After all, the Act prohibited discrimination, not the enforced segregation of whites. The Court’s reformulation emphasized the interests of collateral beneficiaries over those of the persons who were actually discriminated against, in contrast to its usual treatment of the right to be free of discrimination as a personal right.⁶⁰⁸ Moreover, even the personal right the Court did construct was premised on the benefits of community. The Court’s opinion moved inexorably, therefore, to the broader implications of the congressional grant of representational standing to vindicate the concerns of the community.

Nevertheless, *Trafficante’s* treatment of these issues has remained characteristic. Constrained by the individualist ideology, the Court has

601. 409 U.S. 205 (1972).

602. 42 U.S.C. § 3610(a) (1982).

603. *Trafficante v. Metropolitan Life Ins. Co.*, 322 F. Supp. 352 (N.D. Cal.), *aff’d*, 446 F.2d 1158 (9th Cir. 1971).

604. *Trafficante*, 409 U.S. at 209-10.

605. *Id.* at 211 (quoting *Shannon v. United States Dep’t of Housing and Urban Dev.*, 436 F.2d 809, 818 (3d Cir. 1970)).

606. *Id.* at 210-11.

607. *Id.* at 211 (quoting 114 CONG. REC. 2706).

608. *See Connecticut v. Teal*, 457 U.S. 440 (1972) (individual black may sue for employment discrimination even when employer hires minorities in numbers proportionate to labor market).

continued to find novel, "personal," congressionally created rights in order to solve problematic cases of representative standing. And, at times, this focus upon personal rights has resulted in anomalous holdings. In a subsequent housing discrimination case, *Havens Realty Corp. v. Coleman*,⁶⁰⁹ the Court held that, of two otherwise similarly situated surrogates, only the black plaintiff had standing to pursue a claim intended to benefit third parties subject to discrimination.

"Steering" by real estate and rental agents is a common practice of racial exclusion. Typically, real estate agents lie to black applicants for apartments or homes in traditionally white neighborhoods, telling them that an advertised unit is no longer available. The agents then take the black applicants to see an apartment or a house in a black or transitional neighborhood. To prohibit this practice, section 804(d) of the Act makes it illegal "[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available. . . when such dwelling is in fact so available. . . ."⁶¹⁰ But genuine housing applicants who are victims of this practice rarely know when they have been lied to. Accordingly, the only meaningful way to enforce the Act is to employ surrogate "testers": people who pose as renters or purchasers. White and black testers separately answer an advertisement for the same apartment or home in a white neighborhood. If the black is told that the unit has already been sold or rented and the white is shown the unit, then a violation of the Act has been proved. But, because neither of the testers has an actual interest in the unit, there is a question whether either has standing. That is, neither has suffered an injury-in-fact.

In *Havens Realty*, the Court upheld the standing of the black tester but denied standing to the white tester.⁶¹¹ The Court started from the premise that Congress has the power to extend standing "to the full limits of Art. III"⁶¹² and that, if Congress does so, "the courts . . . lack the authority to create prudential barriers. . . ."⁶¹³ Accordingly, "the Art. III minima of injury in fact" was "the sole requirement for standing."⁶¹⁴ The Court found that injury in the deprivation of the "enforceable right to truthful information" created by section 804(d).⁶¹⁵ Thus, only the black tester had standing because only he had been given false information.⁶¹⁶ Yet the white tester had the same relationship to the case and the same purely representational relationship to the real beneficiaries of the statute (seekers of housing who encounter

609. 455 U.S. 363 (1982).

610. 42 U.S.C. § 3604(d) (1982).

611. *Havens Realty*, 455 U.S. at 373-75.

612. *Id.* at 372 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979)).

613. *Id.* at 372.

614. *Id.*

615. *Id.* at 373.

616. *Id.* at 374-75.

discrimination) as did the black tester. The black and the white tester were as alike as two peas in a representational pod, but the Court managed to discriminate between them nevertheless.

*Singleton v. Wulff*⁶¹⁷ even better illustrates the Court's continuing struggle with the notion of group rights in the context of an individualist ideology. In *Singleton*, doctors challenged the statutory exclusion of most abortions from coverage under Medicaid.⁶¹⁸ A unanimous Court agreed that the doctors had standing because they had suffered injury-in-fact when they were denied the only source of compensation for medical services performed for indigents.⁶¹⁹ The Court split, however, on the question of *jus tertii*: whether the doctors could raise their patients' constitutional right to obtain an abortion. Justice Blackmun's plurality opinion upheld third-party standing.⁶²⁰ The plurality relied on purely instrumentalist considerations that made representation necessary and reliable. First, it noted the inextricable connection between the third party's enjoyment of her right and the course of conduct that the doctor-litigant sought to pursue,⁶²¹ the confidential⁶²² and intimate⁶²³ nature of the doctor/patient relationship, and the resulting fact that the doctors were "fully, or very nearly, as effective a proponent of the right as the" patient.⁶²⁴ Second, the plurality considered the practical obstacles to the woman's assertion of her own rights, including the loss of privacy entailed in a decision to litigate the abortion claim publicly and the imminent mootness of her claim.⁶²⁵

But, writing for the dissenters, Justice Powell argued that the plurality had inverted "the Court's previous position that the relationship between litigant and rightholder was subordinate in importance to 'the impact of the litigation on the third-party interests.'"⁶²⁶ In his view, the Court's prior decisions demanded greater practical impediments to justify third-party standing; he also argued that the plurality had overstated the obstacles to the indigent women's assertion of their own rights.⁶²⁷ The problem of potential mootness was refuted by the "ca-

617. 428 U.S. 106 (1976).

618. In *Singleton*, the Court declined to reach the question of the constitutionality of this exclusion because the issue had not been pressed or passed on below. *Id.* at 119-20. Subsequently, the Court upheld similar federal legislation excluding nontherapeutic abortion services from coverage under Medicaid. See *Maher v. Roe*, 432 U.S. 464 (1977).

619. *Singleton*, 428 U.S. at 113. See also *id.* at 121 (Stevens, J., concurring); *id.* at 122 (Powell, J., Burger, C.J., Stewart and Rehnquist, JJ., concurring in part).

620. *Id.* at 118. Justice Stevens concurred in the plurality's analysis only to the extent that the doctors otherwise had standing because their pecuniary interests were at stake and that they were asserting their own constitutional rights. *Id.* at 121-22.

621. *Id.* at 114-15 (plurality opinion).

622. *Id.* at 115 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)).

623. *Id.* at 117.

624. *Id.* at 115.

625. *Id.* at 117.

626. *Id.* at 128 n.5 (dissenting opinion) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972)).

627. *Id.* at 125-27.

pable of repetition yet evading review" doctrine exemplified by *Roe v. Wade*.⁶²⁸ The ability of the litigant to sue under a pseudonym mooted the privacy point.⁶²⁹ Justice Powell therefore accounted for the inversion as a concession of the weakness of the plurality's instrumentalist arguments for third-party standing. Moreover, because he saw the question as only instrumental, Justice Powell argued that the nature of the relationship was only a secondary safeguard to assure adequate representation.⁶³⁰ According to Justice Powell's view, representation was adequate only when the state directly interfered with the doctor/patient relationship, as when it criminalized the underlying medical procedure. Here, in contrast, "nothing more [wa]s at stake than remuneration for professional services."⁶³¹

Despite the fact that the plurality retained the instrumentalist focus on adequate representation, *Singleton* is significant far beyond the refinements of doctrine that seem to separate the plurality from the dissenters. *Singleton's* treatment of the relative importance of the nature of the relationship and of the difficulty of the obstacles, and its inversion of the criteria, suggest the possibility of two fundamental shifts in the ideology of standing.⁶³²

First, reliance on the instrumentalist *necessity* of representation as the only justification for third-party standing gives way to a concept of shared interests or *relational standing*. This is the true import of the plurality's discussion of the confidential and intimate nature of the relationship. The doctor/patient relationship—particularly with respect to a highly personal decision like contraception or abortion "in which the physician is intimately involved"⁶³³—is a paradigmatic relationship of trust. In this relationship of reliance and vulnerability, social mores already impose—or, at least, expect—duties of confidentiality, loyalty, and fiduciary obligation. This special relationship makes *Singleton* the easy case compared to those of self-appointed contraception advocates⁶³⁴ or buyers and sellers of real property⁶³⁵ relied upon by both the plurality and the dissent. In contrast, the dissent's blighted vision saw only an extension from one form of third-party self-interest (avoid-

628. *Id.* at 117 (plurality opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 124-25 (1973)); see *id.* at 126 (Justice Powell's discussion of plurality's statement).

629. See *id.* at 126. Justice Powell did not discuss the imperfect anonymity of pseudonymous litigation that might require the plaintiff to be available for deposition or to appear in court to testify.

630. See *id.* at 128 n.5.

631. *Id.* at 129. As he had in his opinion for the Court in *Simon*, Justice Powell ignored the obvious relationship between ability to pay and access to medical services in our economic system. See notes 567-570 *supra* and accompanying text.

632. Justice Powell argued that the plurality opinion "appears to have articulated a new rule of third-party standing" that "will be difficult to cabin." *Singleton*, 428 U.S. at 130 n.7.

633. *Id.* at 117; see also *id.* at 115 (discussing the confidential relationship between a doctor and married patients whom the doctor had advised on matters of birth control in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

634. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

635. *Barrows v. Jackson*, 346 U.S. 249 (1953).

ance of criminal sanction) to another, weaker form (mere pecuniary gain); from a direct prohibition on the relationship, to a mere economic inconvenience.⁶³⁶

Second, *Singleton* suggests a fundamental shift away from an understanding of representation as a grudging exception to an appreciation of its ubiquity. Contrary to Justice Powell's critique, Justice Blackmun's plurality opinion openly acknowledged the pliability of the "obstacles" to the women's own pursuit of their cases. It even suggested another available exception to mootness (in addition to the example of *Roe v. Wade*): "a class . . . whose fluid membership always included some women with live claims."⁶³⁷ To the plurality, these arguments counseled in favor, rather than against, third-party standing because both doctrines already implied the acceptability and normalcy of third-party representation: "[I]f the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss"⁶³⁸

The Court continued this debate four years later in *United States Parole Commission v. Geraghty*⁶³⁹ and *Deposit Guaranty National Bank v. Roper*.⁶⁴⁰ In these cases, plaintiffs who had failed to obtain class certification continued to pursue their cases even after their individual claims were resolved. In *Geraghty*, the named plaintiff's case was moot by the time an appeal from final judgment could test the class issue.⁶⁴¹ In *Roper*, the named plaintiffs' individual claims had been subject to an offer of judgment for the full amount. The district court entered judgment in favor of the plaintiffs, who nevertheless appealed the denial of class certification.⁶⁴²

In each case, while the majority opinion talked in terms of procedural doctrines such as finality of judgments,⁶⁴³ relation back,⁶⁴⁴ and the doctrine of mootness-avoidance known as "capable of repetition yet

636. My colleague Michael Fischl has emphasized to me the power of this judicial focus on self-interest to obscure the relevance of the altruistic motives of the litigants, and its persistence. See Fischl, *Self, Others, and Section 7: Contract Imagery and Protected Activities Under the National Labor Relations Act* (forthcoming) (on file with the *Stanford Law Review*).

637. *Singleton*, 428 U.S. at 117.

638. *Id.* at 117-18.

639. 445 U.S. 388 (1980).

640. 445 U.S. 326 (1980). The lineup in *Geraghty* was the same as in *Singleton*, except that Justice Stevens joined Justice Blackmun's majority opinion. The Court was fragmented in *Roper*. Seven Justices concurred in the judgment. Justice Blackmun thought *Roper* was controlled by *Geraghty*. *Id.* at 344. Justice Rehnquist concurred on the ground that the two cases were distinguishable, but that *Roper* followed from the Court's previous, if "muddled and inconsistent" cases. *Id.* at 341; see *id.* at 340. ("If I were writing on a clean slate, I might well resolve both these cases against the respondents."). Justice Stevens' position is discussed in the text accompanying note 671 *infra*.

641. *Geraghty*, 445 U.S. at 394. *Geraghty* challenged the Parole Commission guidelines. By the time of his appeal, however, he had served his entire sentence and was released.

642. *Roper*, 445 U.S. at 329-31. *Roper* was a consumer action against a bank for credit card interest overcharges, brought pursuant to the National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified as amended in scattered sections of 12 U.S.C. (1982)).

643. *Roper*, 445 U.S. at 332-35.

644. *Geraghty*, 445 U.S. at 398, 406 n.11.

evading review,"⁶⁴⁵ the dissent found no "case or controversy." But the majority clearly stumbled on the article III issue. It recounted the individualist dogma of standing and struggled to fit the case to that mold: "The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and *self-interested* parties vigorously advocating opposing positions."⁶⁴⁶ In both *Geraghty* and *Roper*, the Court could avoid dissonance only by using the *Trafficante* sleight of hand. That is, the Court found that Congress had created a personal right to obtain class status, to be invoked by the putative class representative, when it passed Rule 23 of the Federal Rules of Civil Procedure.⁶⁴⁷ Once that right was recognized, the injury-in-fact and personal stake conundra could be solved: "The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined."⁶⁴⁸

This "personal stake" in serving as a class representative is a fiction just as great as those invented by the Court in *Trafficante* and *Havens Realty*. The plaintiffs and putative class representatives in both *Geraghty* and *Roper* had exhausted all of their self-interest.⁶⁴⁹ As in *Trafficante* or *Havens Realty*, the plaintiffs were acting, not for themselves, but for

645. *Id.* at 398.

646. *Id.* at 403 (emphasis added).

647. FED. R. CIV. P. 23.

648. *Geraghty*, 445 U.S. at 404; *see also Roper* 445 U.S. at 331-32 (characterizing "the private interest of the named plaintiffs" as including the "right . . . to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims.")

It may well be the case that the Court's willingness to stretch standing doctrine in *Geraghty* and *Roper* was the result of two intensely pragmatic concerns. It had held that the denial of class certification is a nonappealable, interlocutory order. Yet it understood that mootness, as in *Geraghty*, or an offer of judgment, as in *Roper*, could forever insulate from appellate review an erroneous denial of class certification by a trial court. The nonappealability of a denial of class certification and the vulnerability of the plaintiff to strategic actions by the defendant, moreover, created opportunities for abuse by defendants in class action cases.

The problem with standing law, however, is that it prevents the Court from openly engaging in precisely such an instrumentalist calculus. The Court must instead create new, surrealistic, "personal" rights. And, of course, the continued treatment of altruistic litigation behavior as impermissible has real world consequences in other cases. Thus, in *Hewitt v. Helms*, — U.S. —, 107 S. Ct. 2672 (1987), the Court reversed a grant of attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1983), to a litigant who had not achieved the relief he sought for himself, even though he obtained substantial benefits for others in establishing state law due process procedures before confinement to administrative segregation. The Court reasoned that he was not a "prevailing plaintiff" under the statute. *Id.* at 2674. The legislative history is clear, however, that the purpose of the statute was not just to reward successful, self-interested litigants, but to encourage "private attorneys general." S. REP. No. 1011, 94th Cong. 2d Sess., 3 (1976); *see also* H.R. REP. No. 1558, 94th Cong. 2d Sess., 6-7 (1976).

649. "The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question." *Geraghty*, 445 U.S. at 420 (footnote omitted) (Powell, J., dissenting). Justice Powell also rejected the majority's characterization of the procedural "right" to certification as a personal one. He argued that Congress had no power under article III to confer jurisdiction in the absence of standing. *Id.* at 421.

other, absent victims of the primary illegality. But the reformulated "personal stake" of the representative was an even greater fiction in *Geraghty* and *Roper*. For the Court derived the "personal right" to serve as a class representative not from a substantive statute like the Fair Housing Act, but from Rule 23, a procedural rule. And, that "personal right" was ephemeral in the extreme: Everyone agreed that once the appeal had been taken and the class certified, the "proposed class representative" would be dismissed on typicality grounds.⁶⁵⁰

To defend its treatment of justiciability under article III, the *Geraghty* majority abandoned any notion of formal restraint, such as that usually ascribed to standing. Instead, it characterized justiciability doctrine as "flexible,"⁶⁵¹ "uncertain and shifting,"⁶⁵² "riddled with exceptions,"⁶⁵³ and highly pragmatic.⁶⁵⁴ Indeed, the *Geraghty* majority conceded partial, conceptual defeat:

The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction "upon the bare existence of a sharply presented issue in a concrete and vigorously argued case."⁶⁵⁵

Thus, cases like *Geraghty* do not fit the doctrinal categories of standing and the presumed exclusivity of the private rights model. These cases test the paradigm and find it wanting. To make the model meet society's needs, the Court is forced to indulge in fictions.

So what? If the Court can do it all the same, what does it matter? It matters. It matters because the use of fictions produces a body of case law that is thrice removed from reality. First, the Court ascribes to Congress the creation of "rights" that, doubtless, Congress never considered. The doctrine produces a series of anomalies, not the least of which is that Congress has the power to create rights exactly where the Framers did not. Thus, cases like *Trafficante*, *Havens Realty*, and *Geraghty* recognize new rights, "the invasion of which creates standing";⁶⁵⁶ yet the Court rejects precisely that syllogism in cases like *Valley Forge*,⁶⁵⁷

650. See *Geraghty*, 445 U.S. at 399-400 (majority opinion).

651. *Id.* at 400 (majority opinion).

652. *Id.* at 402.

653. *Id.* at 406 n.11.

654. *Id.* The discussion of article III in *Roper* was less intensive and more murky than that in *Geraghty*. In *Roper*, the Court noted that the only self-interest asserted by the plaintiffs was "their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation . . ." *Roper*, 445 U.S. at 334 n.6. The nineteenth century Massachusetts court in *Wellington* rationalized, with a similar argument, its petitioner's pursuit of mandamus relief absent a personalized stake different than that of the public at large. *In re Wellington*, 33 Mass. (16 Pick.) 67, 105-06 (1834); see notes 307-314 *supra* and accompanying text.

655. *Geraghty*, 445 U.S. at 406 n.11 (quoting the dissent, *id.* at 421).

656. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

657. *Valley Forge Christian College v. Americans for Separation of Church and State*, 454 U.S. 464, 481 (1982). See notes 547-558 *supra* and accompanying text.

Schlesinger,⁶⁵⁸ and *Richardson*.⁶⁵⁹

Second, it matters if the Court uses fictions to avoid existing standing doctrine because such fictions focus the rhetoric and, consequently, the Court's attention on the wrong people and the wrong things. That is, our ingenuity is engaged in finding "rights" granted to third-party surrogates when we should be concentrating on the problems of the real victims of the prohibited practice. We inevitably undervalue the suffering of these victims and, as a result, are less able adequately to respond to that suffering.⁶⁶⁰ For example, focusing on the black tester's personal right to truthful information, rather than on his or her capacity as representative of the actual victims, limits the remedies available in a tester's suit to those coextensive with the newly-defined "right." Thus, damages will be available to remedy the provision of false information. But, under *City of Los Angeles v. Lyons*,⁶⁶¹ the tester will not have standing to obtain an injunction against the practice.

In *Lyons*, the Court held that Adolph Lyons, a victim of a police chokehold, could seek only personal damages. The Court held that he did not have standing to enjoin the practice because, in its view, it was speculative that Mr. Lyons would again be subjected to the chokehold. But if the Court viewed the tester—or Adolph Lyons—as representative of the legal interests of absent victims, then these plaintiffs' "standing" to obtain injunctive relief on behalf of the absent victims would follow logically. Once again, the putatively jurisdictional question of "standing" is in fact several questions: Who has rights? What are they? And how can they best be effectuated?

Third, standing law distorts the very issues and values that it purports to vindicate. Standing law is frequently defended as assuring adequate representation to insure vigorous advocacy or protecting the autonomy and self-determination of the interested parties.⁶⁶² In many cases, however, standing law does just the opposite. In *Burstyn v. Miami Beach*,⁶⁶³ several plaintiffs joined in a suit challenging a local zoning ordinance that limited the number of Adult Congregate Living Facilities ("ACLFs"), community-based alternatives to nursing homes or

658. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974). See notes 523-535 *supra* and accompanying text.

659. *United States v. Richardson*, 418 U.S. 166, 204 (1974) (Stewart, J., dissenting). In dissent in *Richardson*, Justice Stewart analogized the statement and account clause of the Constitution to the Freedom of Information Act and argued that the constitutional clause gave to each citizen a right to receive public information regarding appropriations. Accordingly, standing existed by virtue of the denial of this specific, personal right.

660. For an excellent exposition of this argument, see Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1660-61 (1986).

661. 461 U.S. 95 (1983). *Lyons*—like *Havens Realty* and *Trafficante*—was not brought as a class action.

662. See Brilmayer, *supra* note 11.

663. No. 84-515 Civ-King (S.D. Fla. Jan. 15, 1985) (considering plaintiffs' standing). A favorable decision on the merits of the exclusionary zoning claim was rendered on June 12, 1987. *Burstyn v. Miami Beach*, No. 84-515 Civ. (S.D. Fla. 1987).

hospital care for elderly persons. The plaintiffs claimed that there were many more elderly persons than there were facilities to serve their needs. The case focused on two buildings that the owners wanted to convert to ACLFs. The plaintiffs included the state ombudsman council, two senior citizen groups, and one notorious ACLF proprietor who had been cited numerous times for abuses and violations by various state agencies. The district court held that only the proprietor had standing. The district court faithfully tracked the Court's holding in *Warth v. Seldin*,⁶⁶⁴ a case concerning a racial challenge to exclusionary zoning practices.

The significance of cases like *Trafficante*, *Singleton*, and *Geraghty* is not that they test the individualist paradigm of standing, but that they transcend it. These cases covertly reestablish the *part-whole* and *link* schemata that typified the public rights model. *Trafficante* concerned the legal recognition of interests in community; *Singleton* concerned relational interests; *Geraghty* concerned the instrumental value of representation.

Each of these cases can be better reconstructed in terms of one of the historical public rights models. *Trafficante* and *Havens Realty*, for example, become simple cases of representative, private attorney general standing, with congressional authorization to sue applied to all persons with relevant information. These cases become no more difficult than *Adams, qui tam v. Woods*,⁶⁶⁵ in which Congress authorized informers' suits against slave traders. *Geraghty* and *Lyons* become no more difficult than *County Commissioners v. People ex rel. Metz*⁶⁶⁶ or *Union Pacific Railroad v. Hall*,⁶⁶⁷ in which the courts held that members of the public could sue in mandamus when "the duty they seek to enforce by the writ is a duty to the public generally."⁶⁶⁸

The public rights approach was referred to in *Singleton*,⁶⁶⁹ hinted at (but not relied on) in *Geraghty*,⁶⁷⁰ and all but adopted in Justice Stevens' concurring opinion in *Roper*. He put it plainly: "[T]he absent members of the class should be considered parties to the case or controversy . . ."⁶⁷¹ In each of these cases—*Trafficante*, *Havens Realty*, *Geraghty*, and

664. 422 U.S. 490 (1975). In *Burstyn*, the court also cited and relied on *Lyons* and *Valley Forge*.

665. 6 U.S. (2 Cranch) 336 (1805); see notes 201-202 *supra* and accompanying text.

666. 11 Ill. 202 (1849); see notes 157-162 *supra* and accompanying text.

667. 91 U.S. 343 (1875); see notes 169-173 *supra* and accompanying text.

668. *Hall*, 91 U.S. at 354.

669. In *Singleton*, Justice Blackmun's plurality opinion noted that one way to avoid the problem of mootness was the certification of "a class . . . whose fluid membership always included some women with live claims." 428 U.S. at 117.

670. "It is clear that the controversy over the validity of the Parole Release Guidelines is still a 'live' one between petitioners and at least some members of the class respondent seeks to represent." *Geraghty*, 445 U.S. at 396 (majority opinion).

671. *Roper*, 445 U.S. at 342 (Stevens, J., concurring); see also *id.* at 344 ("[I]n this case, as in *Geraghty*, the named plaintiffs clearly remained appropriate representatives of the class at least for that limited purpose." (footnote omitted)).

Lyons—the real plaintiffs were the members of some absent group.

The area in which the courts have come closest to achieving this reconstituted public rights model is the one in which the communal stakes are most obvious: the environmental cases. This is the answer to the particularization conundrum raised in the introduction. It is not that some rights are “personal” and others “group” rights. Rather, it is that the courts can most easily see the widely shared “personal” stake in fresh air,⁶⁷² clean parks,⁶⁷³ and unspoiled wilderness areas⁶⁷⁴ because these are things we experience directly as individuals even as we share them in common with society.

In all of these cases, there is a “case or controversy” because there is a real, adversary issue presented in a concrete factual setting turning on questions of law. In each case, the nominal plaintiff was in fact acting for the group in a representative capacity without regard to his or her self-interest. Justice Blackmun’s observation in *Singleton* concerning the normalcy of such representation is equally apt here: Since the assertion of rights is so often representative in our system “there seems [to be] little loss”⁶⁷⁵ There may, in fact, be substantial gain.

B. *Meaning and Multiplicity of Metaphors*

We have seen how metaphors and models are central to human cog-

672. The Clean Air Act provides that “any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an emission standard or limitation under this chapter” 42 U.S.C. § 7604(a) (1982). The D.C. Circuit held that this statute is a grant of citizen standing, without any requirement of injury-in-fact. *Metropolitan Wash. Coalition for Clean Air v. District of Columbia*, 511 F.2d 809 (D.C. Cir. 1975). The Second Circuit disagreed. *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977). Federal Courts casebooks commonly ask readers, as a challenging question, whether the apparent grant of standing without reference to injury-in-fact under the Clean Air Act is constitutional. See, e.g., P. BATOR, P. MISHKIN, D. SHAPIRO & H. WESCHLER, *supra* note 21, at 183; D. CURRIE, *supra* note 21 53-54.

673. See, e.g., *United States v. SCRAP*, 412 U.S. 669, 678 (1973).

674. See, e.g., *Scenic Hudson Preservation Conference v. Federal Power Comm’n*, 354 F.2d 608 (2d Cir. 1965) (*Scenic Hudson I*) (Hays, J.), *cert. denied*, 384 U.S. 941 (1966); but see *Sierra Club v. Morton*, 405 U.S. 727 (1972).

Broadcast licensing, as well as environmental protection, is also a prototype in which the communal interest is salient. See, e.g., *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The commonality of the air waves and the centrality of the media in American society may explain the salience of the communal stake in broadcast regulation. Woody Allen recently presented testimony to the Subcommittee on Technology and the Law of the Senate Judiciary Committee in support of a bill that would recognize the moral rights of artists in their work (in response to the recent “colorization” of classic black and white films). Mr. Allen connected the communal value of art in culture with a “standingless” public rights model of enforcement, arguing that the legal system should protect the works of “people who contribute to the society by doing creative work” and that “this principle can be argued justly by any citizen”; the legal protection need not be invoked by “a directly involved artist.” *Legal Issues That Arise When Color is Added to Films Originally Produced, Sold, and Distributed in Black and White*: Hearing 100-391 Before the Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 26 (1987) (statement of Woody Allen), reprinted in *Allen, True Colors*, THE N.Y. REV. BOOKS, Aug. 13, 1987, at 38.

675. *Singleton*, 428 U.S. at 117-18.

nitive processes and how they operate to structure thought.⁶⁷⁶ We have seen, as well, how they sometimes disorder our legal thinking in surprising ways.⁶⁷⁷ In this section, we consider again the role of metaphor in language and thought in order to further the project of reconstruction. We will examine three important aspects of the operation of metaphor in thought. We will explore why it is always necessary to employ multiple metaphors to establish meaning, describe the variety of types of metaphor, and inspect the connection between purpose and metaphor.⁶⁷⁸

Suppose that we are standing by the ocean on a windless day. We might describe the sea as calm or flat. If it were a windy day, we might remark on the whitecaps or say that the sea was hoary or that the waves were rushing toward the shore. Each of these descriptions employs metaphor, although some so common we no longer perceive them as such. Each metaphor tells us something about the ocean. At the same time, each metaphor is partial and incomplete; it hides or negates other truths about the ocean. Even when a particular metaphor may be appropriate, it nevertheless hides other important aspects of the sea. The waves may appear to rush toward the shore and may, as any surfer knows, propel objects in that direction. But we also know—as we watch a discarded paper cup bob in place—that the water actually moves in place in a circular motion. The surface of the sea may appear flat, but beneath the surface is a reality of valleys, ridges, trenches, and the like. While the surface may appear calm, there also may be a deadly current underneath. We would use another metaphor to describe that part of the sea's reality: We call it *the undertow*—as if some underwater tug had fastened a tow line about our ankles with which to drag us out to sea.

We experience reality like the ocean. We structure our perception of it by means of metaphors, models, concepts, and categories. Each metaphor takes a slice of reality and compares that cross section with some aspect of our physical experience. These basic orientational⁶⁷⁹ and ontological metaphors⁶⁸⁰ are then combined and recombined to

676. See notes 61-103 *supra* and accompanying text.

677. See notes 499-675 *supra* and accompanying text. Milner Ball's discussion of the law also uses the methodology of metaphor suggested by the work of Lakoff and Johnson. See generally, M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY (1985).

678. I draw heavily upon G. LAKOFF & M. JOHNSON, *supra* note 63, which persuasively documents the overwhelmingly metaphoric nature of our language and thought.

679. *Id.* at 14-21. Orientational metaphors arise from schemata premised on basic kinesthetic experience such as *up-down*. A familiar example of an orientational metaphor in the legal world is the cry of the losing litigant: "I'll take it *up*; I'll take it to the *highest* court in the land if necessary."

680. *Id.* at 25-32. Where I grew up we "stood *on* line"; most of the rest of the country "stands *in* line." The latter is a metaphor based on the *container* schema: We conceptualize the line as a *container* holding the people, who are "in" it. The former employs the *source-path-goal* schema and an *object* metaphor: We conceptualize the line of people in terms of the *path* beneath them and the *goal* in front of them; they stand on the surface of the *object* beneath them. I suspect that it is not accidental that the *source-path-goal* schema which delineates purpose is the one used by New Yorkers.

form more descriptive structural metaphors.⁶⁸¹ These in turn are used to form cognitive models or concepts.⁶⁸² We use multiple metaphors—repeated cross sections or multiple snapshots—in order to capture more of what we experience and construct a more useful picture of the reality around us. We construct complex models of various sorts and use metaphoric extensions to reason about the world. This layering of metaphors and of models enables us to achieve meaning.

Part of the process of achieving meaning stems from the varieties of metaphor. The two metaphors invoked above—*the ocean is flat* and *the ocean is calm*—are of differential usefulness in structuring the concept “Ocean.” The first metaphor, premised on the basic, ontological *object* metaphor, is of limited usefulness: The ocean can be flat because it has a surface; it must have a bottom and edges. On the other hand, the second metaphor—*the ocean is calm*—is premised on the much richer personification metaphor. Thus, the ocean can be calm, treacherous, unforgiving, moody, a demanding mistress, or a stern taskmaster; the tide can come in and go out.⁶⁸³ Similarly, the sea can have the specific attributes of personhood of the English working class sailor, as in the personification metaphor: *Davy Jones’ locker*.

Metaphors based on simple physical concepts—up-down, in-out, object, substance, etc.—which are as basic as anything in our conceptual system and without which we could not function in the world—could not reason or communicate—are not themselves very rich. To say that something is viewed as a *container object* with an *in-out* orientation does not say very much about it. But, as . . . with the *mind is a machine* metaphor and the various personification metaphors, we can elaborate spatialization metaphors in much more specific terms. This allows us not only to elaborate a concept (like the *mind*) in considerable detail but also to find appropriate means for highlighting some aspects of it and hiding others. Structural metaphors (such as *rational argument is war*) provide the richest source of such elaboration. Structural metaphors allow us to do much more than just orient concepts, refer to them, or quantify them, as we do with simple orientational and ontological metaphors; they allow us, in addition, to use one highly structured and clearly delineated concept to structure another.⁶⁸⁴

The more important the concept the more likely that the concept is structured in terms of many different and richer, structural metaphors. Lakoff and Johnson identify at least five standard metaphors that our culture uses to understand and describe the concept “love,”⁶⁸⁵ and at

681. *Id.* at 61-68.

682. *Id.* at 56-60.

683. The expression, the tide *comes in and goes out*, also depends upon a metaphor that conceptualizes the dry land in terms of a *container* schema. It provides a good illustration of the way in which different but coherent metaphors are combined to achieve meaning.

684. G. LAKOFF & M. JOHNSON, *supra* note 63, at 61 (*italics* in original).

685. *Id.* at 49. Lakoff and Johnson also discuss a nonstandard metaphor—*Love is a collaborative work of art*—that reveals very different dynamics about a love relationship. *Id.* at 139-43.

least eleven for the concept "idea."⁶⁸⁶ In the latter case, each of these structural metaphors is based on one of two more basic ontological metaphors, *ideas are objects* or *ideas are living organisms*. Some examples of standard metaphors for the concept of "idea" follow.

Ideas (theories) are buildings: The argument is *shaky*; it needs more *support*; these are the *building blocks* of my theory.

Ideas are food: I can't *swallow* that metaphor theory; let me *chew* on it a while; he *spits out* ideas.

Ideas are people: That's her *brainchild*; he *breathed new life* into that idea.

Ideas are plants: The *roots* of this theory *lie* in the work of Sapir and Whorf; that idea has *borne fruit*; let me *plant* this thought.⁶⁸⁷

We establish truth by testing metaphors and their combinations against our experience for functionality. Truth (or relative objectivity) is both contingent on our metaphors and provisional on our experience. Since individual metaphors are inherently limiting, we modify them, reject them, or supplement them in order to achieve a better, more effective "fit" in our interaction with "reality."⁶⁸⁸

The value of this metaphoric theory of meaning is that it provides an elegant explanation of some otherwise unaccountable phenomenon. In the context of the law of standing, this theory can help bring a measure of coherence to otherwise unanswerable doctrinal difficulties. By examining the role that the standard cultural metaphors play in shaping our thinking, we can answer the injury conundrum raised in the intro-

686. *Id.* at 46-48.

687. *Id.* at 46-48. Lakoff and Johnson identify seven other metaphors for ideas:

Ideas are products: He has *generated* a lot of ideas; the idea is a little rough and needs to be *refined*.

Ideas are commodities: It's important to *package* that idea the right way for it to be *saleable*.

Ideas are resources: I *ran out of* ideas; let's *pool* our thoughts.

Ideas are money: He put in his *two cents' worth*; he's *rich* in ideas.

Ideas are cutting instruments: That's an *incisive* thought; she *cut* his theory to *shreds*.

Ideas are fashions: Ideas may be *chic* or *out-of-date*.

Ideas are light: Arguments and discussions may be *transparent* or *opaque*. *Id.* at 47-48.

There are others that are less prevalent in our culture such as—*Ideas are a physical force*: That is a *powerful* idea; that idea really *makes it work*; and *Ideas are (knowledge is) water*: The ideas *pour out* of him; he *thirsts* for knowledge.

These structural metaphors are cultural. For example, *Knowledge is water* is a persistent biblical metaphor. See, e.g., *Deuteronomy* 32:2 (Soncino ed.) ("My teachings shall fall as rain, my speech drip as the dew; as the light rain upon the tender grass and as the showers on the tall grass"); *Proverbs* 10:11 (Soncino ed.) ("The mouth of the righteous is a fountain of life."); *id.* 18:4 ("The words of a man's mouth are as deep waters; flowing brook, a fountain of wisdom."). Of course, the ancient Israelites lived in an exceedingly arid climate. Thus, one can see how their use of this metaphor was conducive to a cultural commitment to education.

688.

[T]ruth is relative to understanding, which means there is no absolute standpoint from which to obtain absolute objective truths about the world. This does not mean that there are no truths; it means only that truth is relative to our conceptual system, which is grounded in, and constantly tested by, our experiences and those of other members of our culture

G. LAKOFF & M. JOHNSON, *supra* note 63, at 193. For a further discussion on this and on the related issues of knowledge and objectivity, see G. LAKOFF, *supra* note 64 at 294-303.

duction.⁶⁸⁹ And by examining the relationship between purpose and the use of multiple models, we can see both why standing law is naturally dysfunctional and how we could begin to reconstruct it.

Two of the related conundra of standing law that we have examined are the effects of the injury-in-fact analysis and the scope of congressional power to create standing. In *Schlesinger*,⁶⁹⁰ the Court struggled with the notion that a conflict of interest, that is, the *threat* of a breach of fiduciary duty, could constitute an injury-in-fact.⁶⁹¹ The Court suggested that Congress could enact a conflict of interest statute, but that standing to enforce such a statute would nevertheless have to be premised on actual injury.⁶⁹² In *Richardson*, plaintiffs could not enforce a constitutional provision granting a right to public information because no one had suffered specialized injury.⁶⁹³ But in *Havens Realty*, a similar congressional grant of a right to accurate information did serve as the basis of standing because the deprivation of that right was the injury-in-fact.⁶⁹⁴

This conflict between the dicta in *Schlesinger*, in one case, and between the holdings in *Richardson* and *Havens Realty*, in another, suggests two problems that only the concept of metaphors and models can explain. First, why is it that the right to information granted by the Fair Housing Act ("FHA")⁶⁹⁵ or the Freedom of Information Act ("FOIA"),⁶⁹⁶ for example, can give rise to standing, while the same right granted by the statement and account clause cannot? The notion of "standing" suggests that the answer lies in the metaphor of individualism. The FHA and the FOIA directly address individual persons who ask for information.⁶⁹⁷ The statement and account clause, on the other hand, delineates what Congress may do. The connection between that

689. See notes 44-54 *supra* and accompanying text.

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

691. See notes 524-535 *supra* and accompanying text.

692. 418 U.S. at 224 & n.14.

693. *United States v. Richardson*, 418 U.S. 166 (1974).

694. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982).

695. 42 U.S.C. § 3604 (1982).

696. 5 U.S.C. § 552 (1982).

697. See, e.g., 5 U.S.C. § 552(a)(6)(c) (1982) ("[a]ny" person making a request to any agency"); 42 U.S.C. § 3604(d) (making it unlawful "[t]o represent to any person").

The expression of the statutory prescription in individualistic terms is clear in cases like *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979), where the Court focused on the statutory language in determining whether to imply a private cause of action from an otherwise regulatory statute. *Id.* at 689-94. In *Cannon*, Justice Stevens's majority opinion observed that

this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right on a class of persons that included the plaintiff in the case Put somewhat differently, because the right to be free of discrimination is a "personal" one, . . . a statute conferring such a right will almost have to be phrased in terms of the persons benefitted.

Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large.

Id. at 691 n.13.

clause and the complaining individual is twice derivative: Congress is accountable to the citizenry at large; the plaintiff is only one of many indistinguishable citizens.

The FHA and the FOIA organize our perception of the right to information of the bipolar private rights model and the *source-path-goal* schema. The plaintiff is the *source* of the request, which is a physical thing he or she *makes*⁶⁹⁸ and *delivers to* the defendant. The remedial *source-path-goal* metaphor moves that information from the governmental *source* to its *goal*: the citizen. The imagery of the statement and account clause, in contrast, is communal, not individualistic. The clause talks of *drawing from* the public treasury (as if from the communal well) and of *publishing* (from the same root as public) an account. This communal well metaphor does not cohere with the remedial *source-path-goal* metaphor of the private rights model. The relationship of the claimant in *Richardson* to the process, however, is not different in any meaningful sense from that of the FOIA plaintiff. It is only that we *see* the relationship differently.

But, how does this explanation address the injury-in-fact conundrum? Why can Congress say that the FHA tester or FOIA plaintiff has standing to enforce a right to obtain information even if he or she has by definition suffered no actual injury as a result of the withholding of that information? If the deprivation of the right is itself the injury-in-fact, then what of the hypothetical conflict of interest statute mentioned in *Schlesinger* or the plaintiffs in *Valley Forge*? In those cases, the Court seemed to be saying that real injury-in-fact is an irreducible constitutional requirement for standing, even when there is congressional specification of a right and authorization to sue to enforce it.

The answer lies in the way we use metaphor to think about information. Ideas are conceptualized by means of the ontological metaphor *ideas are objects*. In our legal system, the denial of an object that someone is entitled to receive is a classic injury: When real physical objects are involved, denial is a deprivation of property.⁶⁹⁹ Thus, we perceive the denial of information as an injury-in-fact.⁷⁰⁰ But a conflict of interest is a state, and it is a state that pertains to some person other than the plaintiff. Because a conflict is not conceptualized via the *object* meta-

698. The statutory language in the FOIA is: "Any person *making* a request to any agency." 5 U.S.C. 552(a)(6)(C) (1982)(emphasis added).

699. Many forms of property recognized by the law are really metaphoric extensions of the physical objects that are prototypical property, which is probably why lawyers refer to land as *real* property.

700. The role of the *object* metaphor in our conceptualization of information explains why information was seen as a *link* between the informer and the injured party in the representational model of the common law informers' statute. See text accompanying notes 199-200 *supra*.

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), revealed a process of reductive, non-metaphoric reasoning about the concept of injury similar to that in *Schlesinger*. Denial of medical care was "injury," but denial of reliable access to care was not. See notes 559-573 *supra* and accompanying text.

phor, it is not a thing that can be denied. For a conflict to be actionable, there must first be a consequential, *objective* injury.

There is a necessary relationship between variable human purpose and our ability to fashion and deploy multiple models in order to interact successfully with our environment. For example, there are many ways to conceptualize the planet we live on; each of these models works quite well for specific purposes. Thus, the idea that the earth is flat works perfectly well if I want to navigate from my house to the law school; a simple, two dimensional model—a road map—will suffice. But for other purposes, the two dimensional model would be entirely misleading. Once I estimated the time it would take me to travel from a small town near Santander to Santiago de Compostela on the north coast of Spain. I computed the distance on the map and figured the average speed the bus would make. When I boarded the bus on the main road, which stretched straight ahead for miles, I was confident that I would be in Santiago by mid-to-late afternoon. By the time I arrived at midnight, I wished that I had had a three dimensional or topographical map that showed how mountainous Galicia is.

I must replace the model *the earth is flat (but bumpy)* with the model *the earth is a sphere* if I plan to circumnavigate the globe. But if I plan to orbit the planet, I may want to know that it is flattened at the poles and bulging at the equator; I might also want to know that the essentially spherical earth has an irregular, nonspherical magnetic field.

In each of these examples, a particular model worked perfectly well for some purposes but not for others. It is not that pre-Copernican humans were silly to think the world flat, and that we are smarter because we know the earth is “really” round. Rather, a workable understanding of the planet emerges when we know that we may treat it as flat for some trips, bumpy for others, and round for yet others. Similarly, it is difficult and dysfunctional to try to capture all the possibilities and uses of adjudication in a single metaphor or model.

That the single term “law” should cover the Rule against Perpetuities as well as the result of a controversy under the Commerce Clause is a prolific source of confusion. It is a great pity that the differences in the content of the material, the intellectual approach, and the technique of adjudication between the two types of cases are not indicated at least by recognizing the broad classification of “private law” and “public law.”⁷⁰¹

Yet, our legal doctrine uses a single, simple orientational metaphor (“standing”)—and a single, related model (the private rights model)—in its attempt to capture all of the limits and possibilities of the process of adjudication. Public rights cases simply do not fit into the more limited private rights model: They are square pegs forced into round

701. Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 909, 910 (1923).

holes. Thus, the law of standing seems incoherent much of the time and, in fact, does not work very well. In contrast, we employ a rich variety of structural metaphors that inform our understanding and organize our experience of the functional aspects of the adjudicatory process.

Litigation is an ordeal: The basic event is a *trial*, which is usually a continuous event with a final, determinative end.⁷⁰² The actual experience of trial is an ordeal for most litigants and lawyers.⁷⁰³

Litigation is combat: Litigators are *adversaries*; they talk *strategy* and make a *plan of attack*; they go for the *jugular*. They *fight it out* in court. This metaphor derives from the *rational argument is war* metaphor that is conventional in our culture.⁷⁰⁴

Litigation is a play: There is much role playing at a trial; all lawyers want their witnesses to *stick to the script*. We try to *tell a story*.⁷⁰⁵

*Litigation is a religious ritual*⁷⁰⁶: Judges wear priestly robes; the participants have special, even honorific, names; even simple forms of speaking are ritualized ("Did there come a time that . . .").⁷⁰⁷

*Litigation is a game*⁷⁰⁸: There are *winners* and *losers*, rules of the game, prosecution and defense *teams*.⁷⁰⁹

702. See *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976) (emphasis on finality of trial); but compare with Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); and Resnick, *Tiers*, 57 S. CAL. L. REV. 837 (1984) (discussing the benefits of repeated review).

703. See, e.g., Eisenberg, *A Doctor on Trial*, N.Y. Times, July 20, 1986, (Magazine) at 26, 28 ("I was accustomed to stress in delivery and operating rooms, but my trial was a stress marathon."); Geoghegan, *Warren Court Children*, NEW REPUBLIC, May 19, 1986, at 17, 19-20 ("To me, the great surprise was that a trial is . . . a physical contest not so unrelated to trials in primitive times. Through the trial, you are constantly sizing up someone's stamina When lawyers say they are 'on trial,' it is no slip: you are 'on trial,' like the client.").

704. See notes 211-213 *supra* and accompanying text. One of the more colorful invocations of this metaphor is the Court's expressed desire to make "the state trial on the merits the 'main event' so to speak, rather than a 'tryout on the road.' . . ." *Wainwright v. Sykes*, 433 U.S. 90 (1977). The Court draws on the world of boxing in its reference to "the main event" and "tryout on the road."

705. See Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975); M. BALL, *supra* note 677, at 23 ("A trial is a theatrical performance in which each side seeks to persuade the judge or jury by means of a play which passes from fact to metaphor."); see generally J. HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* 76-88 (1950).

706. I invoked a variant—*Law is a religion*—in the text at note 506 *supra*. For a discussion of the persistence of the metaphor of religion in legal scholarship, and its role in the process of judicial review, see Winter, note 19, *supra* at 692-99.

707. The structure of both the courtroom and the proceeding is designed, like religious ritual, to reinforce basic social values. For example, the robes and the bench emphasize the authority of the state; the right to be heard expresses the dignity of the individual. See, e.g., T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 125-32 (1935); C. FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* 123-35 (1970); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1391-92 (1971). Professor Simon mounts a critique of the use of this notion of ritual to justify the trial process in *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wisc. L. REV. 29, 94-101.

708. See J. HUIZINGA, *supra* note 705.

709. Simon, *supra* note 707, argues that the game analogy is more apt than is the religious ritual analogy because games divide the participants into winners and losers and reli-

Apparently inconsistent metaphors, such as these metaphors about litigation, are coherent, and therefore work together, when they each have similar entailments.⁷¹⁰ Each of these structural metaphors shares entailments with the orientational "standing" metaphor: We stand at religious ceremonies; most of our fighting is upright (as in "stand up and fight like a man"); the notion of ordeal is often expressed through this metaphor (as in "if you can't stand the heat, get out of the kitchen"); and the only people who always remain seated at a play are the audience. Games commonly have threshold requirements as anyone who couldn't "ante up" in poker or didn't make the cut for the varsity squad knows all too well.

There is, however, an important structural metaphor with which "standing" does not fit: *Adjudication is a dialogue*. "Dialogue" is from the Greek *dialogos*. It is formed from the preposition *dia*—meaning through, between, or across⁷¹¹—and the noun *logos*, which signifies the universal rationality.⁷¹² The *dialogue* metaphor does not fit either sense of "standing": Not only do we usually converse seated, but we usually welcome participation from anyone with something meaningful to add.⁷¹³ This metaphor is, therefore, partially submerged in our system. Although the *dialogue* metaphor is invoked—whether we argue a motion, put on witnesses, or introduce physical evidence, we commonly

gious ritual is generally designed to establish and maintain community. *Id.* at 100 (citing C. LEVI-STRAUSS, *THE SAVAGE MIND* 32 (1966)).

Simon, however, errs on two counts. First, one need only think of excommunication to conclude that religious ritual may separate as effectively as it conjoins. The truth is that religion (at least Western religion) is as much about hierarchy and authority as it is about true community. Consider the biblical story of Korah. The premise of his challenge to Moses was that "all of the congregation in its entirety is holy and God is in their midst; why do you place yourselves above the congregation of God?" *Numbers* 16:3 (Soncino Press 1941). The response was that the earth swallowed up these mutineers. *Id.* at 16:31-33. Second, Simon's assumption that only one analogy is "apt" misses the point that we frequently use more than one metaphor to capture (and structure) different aspects of a described reality.

710. G. LAKOFF & M. JOHNSON, *supra* note 63, at 41-45.

711. The *dia* prefix is not the same as *dyo*, which means two and is the source of the English prefix "di-."

712. I choose *dialogue* because it is so much richer in its connotations of community, rationality, and cosmology than is the word "conversation."

713. Of course, it is also true that a conversation can be overwhelmed and communication destroyed if there are too many participants. This objection is projected onto the standing context in the form of the fear of a flood of litigation if the standing requirements are not rigidly enforced. The answer, however, is simple and belies the seemingly inescapable logic of what is, after all, only an instance of metaphoric reasoning and not a description of "reality"—that is, of actual behavior by real world litigants. First, the real world costs of litigation form a substantial barrier to the profligate use of adjudication. Second, the asserted "flood-gates" problem is merely a pragmatic one; it can be controlled by a variety of instrumentalist mechanisms such as attorney fee provisions, Rule 11 sanctions where appropriate, and other equitable devices. Third, and most important, legal metonymies may be employed to see that many viewpoints are represented while still keeping the number of participants down to manageable size.

Many of these devices are already subsumed in Rule 23 governing class actions and other current practices. The appointment of class representatives, the definition of subclasses, the participation of intervenors and amici curiae by leave of court all illustrate the conventionality and manageability of more pluralistic participation in the adjudicatory process.

refer to the event as a *hearing*—the *dialogue* metaphor is more typically used in descriptions of the appellate process.⁷¹⁴

The coherence of the individualist metaphor of “standing” with the five structural metaphors for litigation discussed above highlights that which is ritualized, painful, and disjunctive about the process. Together with the related private rights model, the individualist metaphor obscures and partially excludes from our legal world several critical aspects of our social world. The metaphor recognizes only self-interest as a motivator of human action; it denies the possibility that we may care for others and be moved to act upon that concern. It obscures not just that we are relational beings, but also that we exist in a variety of different kinds of relations and groups.

A fuller and more functional system would recognize at least five different group models based on *part-whole* and *link* schemata in addition to the familiar individualist, private rights model of legal controversies premised on the *source-path-goal* schema.

(1) *An aggregative model*: This model is exemplified by the class action premised on a common question of fact, which prior to the 1966 amendments to the Federal Rules of Civil Procedure was referred to as the “spurious” class action.⁷¹⁵ In these circumstances, the class is really just an aggregation of individual claims connected by a common circumstance, such as multiple accident victims in an airplane crash.

(2) *A representational model*: This model is altruistic. The individual may act for other affected individuals because the latter are unable to act for themselves. The altruism may be partial or pure. The petition for a writ of habeas corpus brought by the “next friend” of the person

714. See Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1977) (“Oral advocacy of this caliber truly makes argument, as Felix Frankfurter observed, ‘a socratic dialogue between the Court and counsel.’”); Board of Students Advisors, Harvard Law School, INTRODUCTION TO ADVOCACY 136-37 (3d ed. 1985) (describing oral argument as a “conversation”).

A wonderful and rich use of the dialogue metaphor appears in the classic article by Professor Aleinikoff and the late Robert Cover. They use the metaphor to characterize federal habeas corpus as a “federal-state dialogue” in which “an open-ended dialogue can ensue. The ‘dialectical federalism’ that emerges from this dialogue becomes the driving force for the articulation of rights.” Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1048 (1977). See also B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 6 (1980) (“the principle of Rationality conceives . . . dialogue as the foundation of all claims of right”); M. BALL, *supra* note 677, at 122 (proposing the metaphor of “law as medium—law as connecting rather than disconnecting, enhancing a flow of dialogue”); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1873-77, 1886 (1987) (conceiving “rights as tools of communal dialogue”). Compare, however, the Court’s use of the boxing metaphor in its development of the doctrine of procedural default in habeas. The boxing metaphor is not only combative, but also dialogue-ending. Cf. E. SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 4 (1985) (Discussing the practice of torture, Scarry notes: “Prolonged pain does not simply resist language but actually destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned.”) The legal implications of Scarry’s work are discussed in Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602-03 (1986).

715. See FED. R. CIV. P. 23 advisory committee notes to the 1966 Amendment.

who is incarcerated illustrates the pure model: In contrast, the informer's action brought by someone who has information about, but is unaffected by, an illegal action illustrates the partial model: The informer is offered private gain as a consequence of his or her public service.

(3) *A communal model*: Individuals may share more than a predicament; they may actually share a community of interest. This rationale led to the modification of Rule 23 in 1966, and is illustrated by an early school desegregation case, *Potts v. Flax*,⁷¹⁶ relied on by the drafters of the amendment.⁷¹⁷

In *Potts v. Flax*, the school board challenged the district court's award of class-wide relief. In the board's view, a "class action was not appropriate since each student is admitted, assigned and transferred as an individual. . . . [The board questioned] the right to bring a class action by reason of the intrinsic nature of the rights involved."⁷¹⁸ But the Fifth Circuit held that: "The peculiar rights of specific individuals were not in controversy."⁷¹⁹ Indeed, the court of appeals held that, even if the case had not been brought as a class action, the district court could not have entered an order specifying that only the named black plaintiffs be admitted to the previously all-white school. Rather, only class-wide relief would have been constitutionally permissible.

There is at least considerable doubt that relief confined to individual specified Negro children either could be granted or, if granted, could be so limited in its operative effect. By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. . . . [T]o require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the *class* discrimination. . . .⁷²⁰

While the holding in *Potts* is unremarkable, there is something that seems incongruous about its dicta suggesting both that individual relief might be prohibited in an individual case and that, instead, class relief might be required. But the *Potts* court recognized that there are situations in which the individual cannot be separated from the group to which he or she belongs without causing or condoning substantial injustice.

(4) *A relational model*: This model introduces notions of volitional community and of intimacy. Cases like *Singleton v. Wulff*⁷²¹ exemplify this model. In *Singleton*, it is the doctor/patient relationship that is af-

716. 313 F.2d 284 (5th Cir. 1963).

717. See FED. R. CIV. P. 23(b)(2) advisory committee notes to the 1966 amendment (discussing *Potts*).

718. *Potts*, 313 F.2d at 288.

719. *Id.*

720. *Id.* at 289 (emphasis in original).

721. 428 U.S. 106 (1976).

fectured by the challenged state action, not the doctor as (money-making) individual and the patient as (abortion-seeking) individual. The individuals seek out each other, and their complaint is that the state is impinging on their activities as a unit, that is, on their relationship. Important human relationships depend on intimacy, vulnerability, and trust. These individuals share a stake in their interaction;⁷²² the relationship they form is an entity that is richer than the sum of its individual, selfish parts.

(5) *A constituent model*: This model is familiar to us as the shareholders' derivative suit that the early twentieth century Court first employed in considering citizen and taxpayer standing before *Fairchild* and *Frothingham*.⁷²³ This model recognizes that, altogether, individuals *are* the entity they constitute.⁷²⁴ Thus, they may sue on its behalf against others. More importantly, constituents may sue *the entity* to make it conform to the law. Both derivative suits and the seventeenth through late nineteenth century mandamus petitions served this purpose.

Current standing law is completely coherent only with the first of these, the aggregative model. Standing law does not cohere with the pure representational model, although, as in *Havens Realty*, a fiction can sometimes make standing law do some of the work of a representational model.⁷²⁵ Standing law can accommodate the communal model when a representative individual with a live claim sues, although *Lyons* provides a disturbing counterexample.⁷²⁶ Standing law cannot accommodate the fourth model unless the relational case is a sufficiently close variant of the individualist prototype.⁷²⁷ Standing law completely sub-

722. The relational model applies also to the situation in which two individuals share something that each of them would have separately. For example, roommates share what would otherwise be their individual privacies. Problems arise when the state conducts a search targeted against one roommate and the other later seeks to invoke the fourth amendment to protect herself. In fourth amendment doctrine, this raised an issue that used to be known as "standing" until the Court figured out that "standing" and the substantive right were really one and the same. See *Rakas v. Illinois*, 439 U.S. 128 (1978); *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

The Court, however, invokes the individualist notion that fourth amendment rights are personal to achieve the same disaggregating result fourth amendment "standing" previously achieved. *Id.* See *Amsterdam, Perspectives on the Fourth Amendment*, *supra* note 591, at 367-69. For extensive discussions of the problems presented by this individualist model and of the development of a relational model in the fourth amendment context, see Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. — (1987) (forthcoming).

723. See notes 393-412 *supra* and accompanying text.

724. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1980) (lawyer owes duty of loyalty to corporate entity, and not to management who engaged his or her services or to any individual stockholder, director, officer or employee).

725. *Haven Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

726. *City of Los Angeles v. Lyon*, 461 U.S. 95 (1983).

727. In *Singleton*, the plurality and dissent differed in their assessment of how close the doctors' self-interested motivation was to the individualist prototype. In his partial concurrence, Justice Powell argued that the doctors' concern for the patients' rights was only sufficiently strong if the state had actually criminalized the procedure, placing the doctor and the patient in exactly the same self-interested position. *Singleton*, 428 U.S. at 128-31. Justice

verts the importance of the constituent model, as *Valley Forge* illustrates.⁷²⁸

Thus, "standing" obscures several important aspects of our everyday reality. Standing law allows only the possibility that we act out of self-interest; it ignores the fact that we often act out of concern for others. By refusing to recognize altruism as legally cognizable, standing law devalues the social importance of altruism. Standing affirms and reinforces values in modern culture that are disjunctive, fragmented, and alienating.

Our legal system is unable effectively to deal with those aspects of society that the metaphor of "standing" and its doctrinal derivative obscure. Because the law sees us only as individuals, it obscures the communal and relational aspects of our experience. Thus, when presented with public injustice or the claims of a victimized group, the law sees "nothing more than a collectivity of private suits. . . ."⁷²⁹ Standing law disaggregates our interests and thus diminishes them. This process is most apparent in the suppression of the constituent model, where the price we pay is exacted in the diminution of the instrumental value of the rule of law in a functioning democratic system. This, I think, is what Justice Brennan had in mind in his dissent in *Valley Forge*, where he complained that the majority's standing decisions "tend merely to obfuscate, rather than to inform, our understanding of the meaning of rights under the law."⁷³⁰

C. *Standing and Self-Governance*

Perhaps the reason the law of standing so often seems incoherent is that it is superimposed on a process that is largely dialogical and normative. Standing is individualistic and, thus, merely aggregative in its approach to groups. But both the dialogical and normative character of the adjudicative process are inherently communal. The law is incoherent because the metaphors involve mutually exclusive entailments. One consequence is that a doctrine which is justified in terms of the separation of powers and the protection of democratic, majoritarian choice becomes instead, an undemocratic tool of exclusion. Rather than a tool to maintain the legal balance of our system, standing law becomes a principal mechanism for making constitutional guarantees unenforceable and for subverting the rule of law.

Blackmun's plurality opinion argued that the doctors' self-interested concern for payment was sufficient to motivate them as reliable representatives of their patients. *Id.* at 112-13.

728. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

729. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (suit by state as *parens patriae*). For a better illustration of the Court's inability to appreciate a public injustice in the context of standing law, see *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), or *Sierra Club v. Morton*, 405 U.S. 727 (1972).

730. *Valley Forge*, 454 U.S. at 490 (Brennan, J., dissenting).

Dialogue is communal in that it is participatory. Normativity too is communal in that it addresses, organizes, and often originates⁷³¹ from the community. In the actual experience of our legal system, the process of constitutional adjudication is dialogical both in its normative methodology and in its processes. Both individual cases and substantive constitutional doctrines are explicitly interactive in drawing from other societal sources the sum and substance of the fundamental values to be considered protected by specific constitutional provisions.⁷³² Indeed, large portions of modern constitutional doctrine are explicable only in terms of "the dialogue between the Court and society over the content of our norms and deepest values."⁷³³ And, constitutional adjudication is obviously dialogical in its process. It is largely appellate. As we climb the appellate ladder, the briefs and oral arguments get longer and the degree of participation by non-party amici curiae increases. John Stuart Mill justified judicial review in part by observing that constitutional adjudication in the Supreme Court is particularly dialogic: "[I]ts declarations are not made at a very early stage of a controversy; . . . much popular discussion usually precedes them; [and] the court decides after hearing the point fully argued on both sides by lawyers of reputation. . . ."⁷³⁴

The dialogic nature of the Court's process is substantially at odds with the conceptualization of the adjudicative process by means of "standing" and the private rights model. Despite the persistence of the Court's apparent dedication to the individualistic premises of standing, it is less disciplined regarding its own self-governance. The Court seems quite comfortable in its normative role⁷³⁵ despite the absence, in

731. See, e.g., *Nashville Chatanooga & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940) (Frankfurter, J.) (in considering the nature of law, one cannot "disregard the gloss which life has written upon it. Settled . . . practice . . . can establish what is . . . law Deeply embedded traditional ways of carrying out . . . policy, . . . are often tougher and truer law than the dead words of the written text."); Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 715 n. 48 (1975) (citing Dworkin, *The Model of Rules*, 35 *U. CHI. L. REV.* 14 (1967)) (law "consists of the generally accepted social norms [to be] applied in the decision of the cases, norms that are—contrary to the positivist's notion— best seen as 'part of the law,' quite independent of their promulgation through defined law making procedures.").

732. Winter, *supra* note 19, at 682-92.

733. *Id.* at 701.

734. J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 327 (New York 1863).

735. Justice White's dissenting opinion in *Miranda v. Arizona*, 384 U.S. 436, 531 (1966), provides a candid statement of the Court's apparent comfort with its normative role:

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation [W]hat [the Court] has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do

See also *Bivens v. Six Unknown Agents*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (stating that, in considering the remedies available for a constitutional violation, "the range of policy considerations we may take into account is at least as broad as the range of those a legislature

many cases, of a traditional, bipolar legal controversy. Two recent examples are *Attorney General of New York v. Soto-Lopez*⁷³⁶ and *Bob Jones University v. United States*.⁷³⁷

In *Soto-Lopez*, two American citizens of Puerto Rican origin challenged actions by the New York City Civil Service Commission denying them a veterans employment preference. New York limited the preference to veterans who were state residents at the time of their enlistment. Both plaintiffs were long-term New York City residents, but both were Puerto Rican residents when they enlisted. The plaintiffs sued the city, arguing that the residency requirement violated their constitutional right to travel. The New York State Attorney General intervened pursuant to the applicable federal statute, section 2403(b) of the Judicial Code.⁷³⁸ The plaintiffs won in the court of appeals. The State of New York appealed. The City of New York, which was the only entity from which the plaintiffs could seek any concrete relief, did not appeal. Thus, appellant's only interest before the Supreme Court was in the constitutionality of the state statutory and state constitutional provision limiting eligibility for the veterans' preference.

Although counsel for Mr. Soto-Lopez raised the issue of justiciability at oral argument, the Court's opinion gives not the slightest hint that it was even questioned.⁷³⁹ The problem of justiciability created by section 2403, however, was noted by commentators at the time of its passage.⁷⁴⁰ When confronted with this problem, lower courts

would consider"). J. VINING, *supra* note 27, at 52-53, notes that this normative focus is not a recent development.

736. 476 U.S. 898 (1986).

737. 461 U.S. 574 (1983).

738. 28 U.S.C. § 2403(b)(1982). This provision was added to § 2403 in 1976, Pub. L. No. 94-381, § 5, 90 Stat. 1120. It provides in relevant part:

(b) In any action, suit, or proceeding in a court of the United States to which the State . . . is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence . . . and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party . . .

Id. Subsection (a) provides a right of intervention to the federal government to defend congressional statutes from constitutional attack. That statute was passed in 1937, Pub. L. No. 352-50, —Stat. 751, and was originally a companion to the Roosevelt court packing bill, S. 1392. *See* Cong. Rec. 1161, 7365 (1937). The statute was in large part a response to the danger of collusive suits brought to declare New Deal and other progressive legislation unconstitutional. *See* *Legislation*, 51 HARV. L. REV. 148, 148-49 (1937) [hereinafter, *Legislation*, HARV. L. REV.]; *Legislation, Revision of Procedure in Constitutional Litigation: The Act of 1937*, 38 COLUM. L. REV. 153, 153-54 (1938) [hereinafter *Legislation*, COLUM. L. REV.].

739. It is perfectly possible that the Court would have found the case justiciable. The City of New York had agreed to provide relief to the plaintiffs, but that agreement was contingent on the outcome of the state's appeal. *See* *Nixon v. Fitzgerald*, 457 U.S. 731, 743-44 (1982) (\$142,000 settlement did not moot case because of agreement to make additional payment of \$28,000 contingent on outcome in the Supreme Court); *but cf.* *Graddick v. Newman*, 453 U.S. 928 (1981) (questioning state attorney general's "standing" to seek stay of order addressed to state in case in which Governor was true defendant).

740. *Legislation*, HARV. L. REV., *supra* note 738, at 150 (discussing 28 U.S.C. § 2403(a)); *see also* *Legislation*, COLUM. L. REV., *supra* note 738, at 159-60. These contemporaneous com-

had held that "the desirability of an advisory opinion is not a substitute for justiciability. . . . There is a difference between permitting the [government] to play an active role during the pendency of private litigation, and permitting it to go forward with the litigation in its own right after the private parties have composed their differences."⁷⁴¹

In *Bob Jones*, the justiciability problem ran even deeper than in *Soto-Lopez*. By the time the case reached the Supreme Court, the litigation was purely unipolar because the government had switched positions and agreed with the plaintiff. The Carter Administration had denied tax exempt status to a private religious school because of the school's avowed policy of racial discrimination. When the case reached the Court, however, the Reagan Administration indicated that it would revoke the relevant regulation denying tax exempt status to such schools. The Court appointed a private individual, former Secretary of Transportation William T. Coleman, Jr., as a special amicus curiae to argue the government's former position. The government moved to dismiss the case as moot.

The Court's discussion of the lurking problem of justiciability was confined to a footnote.⁷⁴² The Court stated that the District of Columbia Circuit had enjoined the government from granting tax exempt status to schools that discriminate, observing that the Reagan Administration had informed the Court that it would *not* revoke the regulation. But the justiciability question remained unresolved, because the government had not changed its position in the *Bob Jones* case. Moreover, when the District of Columbia Circuit case was later appealed, the Supreme Court held that the plaintiffs did not have standing to raise the question.⁷⁴³

Both of these decisions are good ones. Each reinforces notions of community: *Soto-Lopez* reaffirms that, under the Constitution, our community is national and not state or local; *Bob Jones* declares that the nation will not subsidize with favored tax status institutions that shun segments of the community. But neither fits the ordinary model of adjudication that the Court so rigidly insists on in cases like *Simon* or *Valley Forge*.

"[P]eople in power get to impose their metaphors."⁷⁴⁴ The Realists and post-Realists are partly correct that the Court manipulates standing, but they miss the true focal point of that manipulation. Standing is not an on/off switch that the Court flips depending on its feeling about

mentators saw the problem not in terms of "standing," but rather in terms of "abstract questions, or questions which are or have become moot, or which do not permit of a decree or judgment." *Legislation*, HARV. L. REV., *supra* note 738, at 150; cf. *Graddick*, 453 U.S. 928 (1981).

741. *Ruotolo v. Ruotolo*, 572 F.2d 336, 338-39 (1st Cir. 1978).

742. *Bob Jones*, 461 U.S. at 585 n.9 (citing *Wright v. Regan*, No. 80-1124 (D.C. Cir. Feb. 18, 1982)).

743. *Allen v. Wright*, 468 U.S. 737 (1984).

744. G. LAKOFF & M. JOHNSON, *supra* note 63, at 157.

the merits of the particular case. The Court's actions only look calculated in that way because standing is not really separable from the merits. The manipulation is different: The Court's invocation of standing limits the normative work of the lower courts. But, the Court is more flexible in the way in which it allows standing law to guide its own decisions, partly because the Court appreciates that its role is inherently normative. Who could be better to discuss the relevant norms with than the New York Attorney General in *Soto-Lopez* or a "lawyer of reputation"⁷⁴⁵ like Bill Coleman in *Bob Jones*?

But this inconsistency permits "traces of self-government" only at the Court,⁷⁴⁶ denying the citizenry at large the possibility of participation. If, however, our adjudicative process is about the "commitment to the pursuit of mediative practical reason through normative dialogue. . .,"⁷⁴⁷ as I believe it is, then a commitment to democracy and self-government implies citizen participation. An earlier generation held this view, recognizing the constituent model and understanding that every citizen "is interested, as a citizen, in having the laws executed, and the right in question enforced."⁷⁴⁸ Indeed, that generation viewed citizen interference to "see that a public offence be properly pursued and punished, and that a public grievance be remedied" as a *duty*, as well as a right; they saw it as the onus of democratic self-government.⁷⁴⁹

This vision of the process of active self-governance by the citizenry now marches down the halls of the legal academy under the republican banner.⁷⁵⁰ The republican vision is exactly contrary to the Court's view, which rejects any possibility "that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts."⁷⁵¹ But the republican vision of participation and reason is closer to that of the first Congress—which authorized uninjured and unaffected informers to enforce in court legal restrictions on customhouse officials—than is the monochromatic vision of current constitutional doctrine.

The real problem of the supposedly counter-majoritarian tendency of judicial review is that so much of the normative work of the courts occurs through a process that is exclusionary rather than participatory.

745. J.S. MILL, *supra* note 734, at 242.

746. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74 (1986) ("[T]he courts, and especially the Supreme Court, seem to take on as one of their ascribed functions the modeling of active self-government that citizens find practically beyond reach.").

747. *Id.* at 74.

748. County Commissioners v. People *ex. rel.* Metz, 11 Ill. 202, 208 (1849).

749. The People *ex. rel.* Case v. Collins, 19 Wend. 56, 65 (N.Y. Super. Ct. 1837).

750. See, e.g., G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW (1986); Michelman, *supra* note 746; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

751. United States v. Richardson, 418 U.S. 166, 179 (1974).

The systematic destruction of the constituent model through modern standing law denies the notion that, in a democracy committed to self-government, the *whole* cannot be something more powerful than the sum of its *parts*. This undemocratic denial is what renders unacceptable much of current standing law, which disallows equally to each and every constituent the possibility of asserting the rights of the group and of the entity, as illustrated by *Richardson*, or *Schlesinger*, or *Valley Forge*. It is, thus, an affirmation of authoritarianism in the guise of democracy; it is a denial of self-governance.

The public rights model, in contrast, recognizes that *we* are the government and that we are entitled to decide our fate. We do so by adopting communal norms and by enforcing them. The public rights model is republican in both the particular, American, historical sense⁷⁵² and in the "deep" sense that Professor Michelman identified: It is "participatory, conversational, inclusive, reasonable, and strongly committed to immediacy."⁷⁵³ By "immediacy," Michelman means that "self-government is the business of the self, not to be displaced onto any distanced force."⁷⁵⁴

Thus, "freedom consists of socially situated self-direction—that is, self-direction by norms cognizant of fellowship with equally self-directed others."⁷⁵⁵ Only the public rights model recognizes that we exist in a community with self-directing others. Only this model affirms the ability of the individual citizen to be heard above the din of pluralistic, self-interested, majoritarian politics, and to participate directly in the normative process. The answer to the "baffling" question of "where to find self-government under 'this Constitution'"⁷⁵⁶ is hidden in that part of our history obscured by the law of standing: the public rights model.

D. *Managing Our Metaphors*

The Framers' generation had a better understanding of the meaning of rights in a democracy, in part because they were not restricted by the monophonic "standing" metaphor. Today, the Court's dominant ideology of standing doctrine allows us to hear with only one ear. Not surprisingly, we hear less: "The fox knows many things, but the

752. "Americans began their history with a very intimate version of democratic local government But there has existed, side by side with—indeed almost as an aspect of—local democracy, the somewhat countervailing concept that the charter of a local body is a legally enforceable compact among the citizens, a concept to which judicial enforcement of the Constitution has given popular currency.

Jaffe, *supra* note 5 at 1282.

753. Michelman, *supra* note 746, at 36.

754. *Id.* at 42.

755. *Id.* at 75.

756. *Id.* at 57 (quoting Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 215 (1983)).

hedgehog knows only one great thing."⁷⁵⁷ The Framers' generation was alert to citizen participation; the modern Court uses standing as a defense against such participation in much the same way that the hedgehog uses its porcupine-like quills against its enemies.

The advantages of the original participatory scheme were twofold. First, with more models at its disposal, the law of justiciability could accommodate greater portions of our reality as necessary. Second, the original scheme was designed to maintain the constancy of political (read: democratic) choice. Because the limitation of adjudication to cases and controversies was only a limitation to the judicial forms, the legislature could control the work of the courts by creating new rights, new remedies, or new forms of action.⁷⁵⁸ Furthermore, the doctrine of that era recognized that not all questions were equally suited to judicial determination, even if the questions could be raised by one of the recognized forms. *Marbury*, which concerned a public rights model and emphasized the common law's requirements, or the identity of rights and remedies,⁷⁵⁹ recognized that there were some "acts that are only politically examinable."⁷⁶⁰ This political question doctrine, with all its doctrinal difficulty, preserved the constancy and immediacy of the underlying political choice.

Professor Tushnet observed that "when the political questions doctrine fell into desuetude after *Baker v. Carr*, it was replaced . . . by the standing doctrine."⁷⁶¹ Standing law thus replaced a direct choice about the uses of adjudication with a surrogate doctrine viewing the adjudicative process by means of an abstracted vision of the process' elements. But this abstracted vision fails in three ways: because "standing" considers only one part of the process, the private rights model; because standing is a surrogate, too far removed from the realities and policies it seeks to address meaningfully to accomplish its purpose;⁷⁶² and because the balance that standing law attempts to strike is defined in putatively neutral, process-oriented terms. Even if this neutral posture were possible, it would still be dysfunctional. Standing law has no mechanism for adjusting the balance with changing times and situations; it therefore presumes that the balance sought by Justices

757. Archilochus, Fragment 103, quoted in J. BARTLETT, FAMILIAR QUOTATIONS 68a (14th ed. 1968).

758. The Framers handled the jurisdiction of the federal courts in a similar manner. They left to Congress the question of the existence and uses of lower federal courts, and they gave it the power of limiting the jurisdiction of the Supreme Court. U.S. CONST. art. III, § 1 & § 2, cl. 2.

759. *Marbury v. Madison*, 5 U.S. (1 Cranch) 87, 102-03, (1803).

760. *Id.* at 105, 107.

761. H. FINK & M. TUSHNET (2d ed.), *supra* note 14, at 231 (referring to *Baker v. Carr*, 369 U.S. 186 (1962)).

762. Standing law as a surrogate might have seemed to work in *Frothingham*. But even *Frothingham* was in the context of a more fluid conceptual structure that allowed the Court to address directly the separation of powers issue. Only now, having lost that structure, does the separation of powers seem wholly dependent on standing law.

Brandeis and Frankfurter in the substantive due process era will be appropriate for the twenty-first century. In contrast, the original participatory scheme preserved choice, recognizing that some things are better mediated by reasoned adjudication and others by the ballot box, the legislative bargain, or executive discretion. The participatory vision required an ongoing discrimination among areas of relative institutional competence and effectiveness.⁷⁶³ The original scheme allowed the balance to shift with changes in society; it acknowledged that our situation and our needs for governance are not static.

The cost of the current system is the cost of obfuscation. That cost is manifest in cases like *City of Los Angeles v. Lyons*, where human life and constitutional constraint on state power were balanced against law enforcement's need for discretion to pursue its mission effectively.⁷⁶⁴ Instead, the Court focused on whether Adolph Lyons had a *personal* controversy with the City of Los Angeles regarding the future conduct of its police officers. That he had once been choked nearly to death was irrelevant because, in the Court's view, that fact did not address the likelihood that *Mr. Lyons* might be subjected to a chokehold again. That others were dying while the case continued was irrelevant. Also irrelevant was that they too could not be present because the police had not yet chosen them as victims. And most irrelevant was the political process, which ultimately stopped the carnage, but not until another six individuals had died.⁷⁶⁵

Lyons was a case in which standing law disaggregated individuals who shared an important, life-or-death interest. But equally importantly, Adolph Lyons and the other victims were also constituents harmed by their own government. They depended entirely on the "rule of law" to constrain that government from harming them unjustly. When Adolph Lyons pressed their claim against government, he was insisting on public rights. He was insisting on their behalf that government act only within the community's norms, as expressed in the Constitution and in the normative process of its interpretation.

What gave Mr. Lyons the "right" to speak for others and insist on legality in others' behalf? Is it not preferable that others assert their own rights, as the Court acknowledged in *Singleton*?⁷⁶⁶ From the individualist standpoint, Mr. Lyons' concern was officious, intermeddling, and inappropriate. Standing law would permit him to act only in his

763. See Regan, *Community and Justice in Constitutional Theory*, 1985 WISC. L. REV. 1073, 1117-22.

764. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). The allegation in *Lyons* concerned the routine use of often fatal chokeholds against traffic violators. Thus, in *Lyons*, the relevant aspect of the law enforcement mission was less immediately related to the protection of human life than in *Tennessee v. Garner*, 471 U.S. 1 (1985), where the question was whether the police could use deadly force to prevent the escape of a fleeing burglary suspect. There, the Court held that deadly force could only be used against dangerous suspects.

765. *Lyons*, 461 U.S. at 116 n.3 (Marshall, J., dissenting).

766. *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (plurality opinion).

own self-interest. The Court could not see any such interest because the Court thought it highly "speculative" that Mr. Lyons would be subject to the challenged police practice again.

But, a plaintiff like Adolph Lyons can be motivated by something more than the Court allows. True, Mr. Lyons had been wronged and he sought monetary relief for himself. And, as the dissent argued, his concrete interest made him a reliable representative for the interests of the as yet unidentified future victims.⁷⁶⁷ But, one's motivation can be broader, more generous. No doubt Adolf Lyons was angered about his own mistreatment. But such anger can be expressed as concern for others. Mr. Lyons' suit reflected such an extension of self—the identification of the interests of the self with those of others—precisely what the "law of standing" does not allow.⁷⁶⁸ Standing law not only leads to bad decisions, it represents bad sociology and bad morality as well.

Cases like *Singleton*, *Geraghty*, and *Roper* recognize that altruism may be, if we will it. Rule 23, like its forebearer bills of peace in equity,⁷⁶⁹ acknowledges that communities of interest do exist and that the law can recognize and address them. Acknowledging the altruistic, relational, communal, and constitutive models I have suggested will raise other questions: (1) How to save the meaningfulness of the adjudicatory process after standing has been abandoned; (2) how to make representation work; and (3) how to decide who makes these determinations. The answers to these questions are already implicit in existing legal doctrine and theory.

To say that the essence of the process lies not in the private rights model, but in the self-referring notion that a dispute is justiciable when it is "definite and concrete, touching the legal relations of parties having adverse legal interests" is not new.⁷⁷⁰ Courts at the dawn of the age of standing recognized that "[t]he prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defence set up

767. "Because Lyons has a claim for damages . . . his personal stake in the outcome of the controversy adequately assures an adversary presentation of his challenge to the constitutionality of the policy. Moreover, the resolution of this challenge will be largely dispositive of his requests for declaratory and injunctive relief." *Lyons*, 461 U.S. at 126 (Marshall, J., dissenting) (footnote omitted).

768. Of course, standing law is not the only area of current doctrine that emphasizes, even insists on, selfishness. See also Fischl, *supra* note 636.

769. [I]f one person is committing, or threatening to commit, torts against each of many others, each tort involving the same questions of fact and law as every other, the many (or a few of them representing themselves and all the others) may file a bill against the one, and obtain an injunction; for otherwise each of them would have to bring an action against him. In such cases the bill is commonly called a bill of peace. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV., *supra* note 476, at 127. Mr. Lyons' suit might conceivably have fared better under this old equity practice. But see text accompanying notes 764-765 *supra*.

770. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); accord *Havens Realty v. Coleman*, 455 U.S. 363, 371 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731, 744 (1982).

by the party pursued."⁷⁷¹ What we need for justiciability are parties who have taken up adverse positions, a presentation of an abstract legal question in a factual setting sufficiently concrete to inform judgment, and "judicially discoverable standards"⁷⁷²—a question that fits the existing legal categories and is susceptible to the dominant modes of legal thought. The Court asked only for these elements in *Hayburn's Case*. It was not concerned that the Attorney General had no personal stake; it was concerned that the outcome of the controversy would turn on executive discretion rather than the result of the Court's "mediative practical reason through normative dialogue."⁷⁷³

The stripped-down definition of "case or controversy" that I have just described is only the common denominator of the political question and standing doctrines. It would account for virtually all of the classic decisions in cases mounting generalized challenges to constitutional amendments or congressional statutes.⁷⁷⁴ If the definition doesn't say very much, it is because there isn't much to say. Once we recognize that legislation and adjudication are not dichotomous, but are merely different points on a single normative spectrum, then we are free to assume responsibility. In the meantime the courts hide, like Professor Vining's octopus at the bottom of the ocean:

Inside the self-constructed home everything does not depend on everything else and entities do not dissolve conceptually into some other entity or some larger unity. The court can swim out into the great sea around and dart back when frightened by its dark vastness. . . . Fear may make it too difficult to admit, except by allusion, that one is swimming in the sea and that one's behavior is a reaction to it. Denial is a normal defense of the human mind against great fear; the legal mind is not peculiar in this regard.⁷⁷⁵

Cases like *Lyons* remind us that there is a real human cost to this particular defense-mechanism.

The answer to the second question—that of assuring adequacy of representation—starts with the recognition that the problems of representation are purely instrumental. For years, commentators have recognized that the broad equitable powers of the federal courts are entirely sufficient to assure the competence and adequacy of representation.⁷⁷⁶ Nineteenth century law, as described in cases like *Wellington*⁷⁷⁷ and *Hall*,⁷⁷⁸ employed just such a flexible, instrumentalist

771. *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406 (1900); see notes 329-342 *supra* and accompanying text; see also *Clark v. Kansas City*, 176 U.S. 114, 118 (1900).

772. *Baker v. Carr*, 369 U.S. 186, 214 (1962).

773. Michelman, *supra* note 746, at 74.

774. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 438 (1938); *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Fairchild v. Hughes*, 258 U.S. 126 (1922); *Leser v. Garnett*, 258 U.S. 130 (1922).

775. J. VINING, *supra* note 27, at 94 (footnote omitted).

776. See, e.g., *Chayes*, *supra* note 90, at 1311-12; *Monaghan*, *supra* note 101, at 1392-97; *Spann*, *Expository Justice*, 116 U. Pa. L. Rev. 585 (1983); *Tushnet*, *supra* note 14, at 1716-17.

777. *Wellington*, Petitioner, 33 Mass. (16 Pick) 87, 94 (1834).

approach. Rule 23 already provides a model less cumbersome than the statutory informer suit with its multiple complications⁷⁷⁹ and more easily regulable than the English relator practice.⁷⁸⁰

I do not mean to suggest, however, that we reconstitute standing in the class action mode. Rather, in a democracy, the issue of how we reconstitute models of justiciability should be open to discussion and debate. The point of this article is not to advance a particular doctrinal proposal as the solution to our problems, but rather to open the debate on the *occasions* for public rights litigation. Standing in the shadow of current doctrine,⁷⁸¹ congressional power to determine appropriate justiciability models seems in doubt.⁷⁸² It should not be. The answer to the third question—who makes decisions about access to the courts—lies in fundamental democratic premises: The elaboration of the public rights model and the occasions for its invocation should be “a development to which the courts contribute but in which the legislature has an even greater hand.”⁷⁸³

If standing is really about the right to be recognized and its concomitant remedies, then Congress, and not the Court, should have the ultimate power to define standing. Congress may recognize or create legal rights; it may structure the most meaningful remedies to see their fruition within a society of competing interests. If standing law seeks to define the proper uses of adjudication in a democratic society, then the democratic process should be the primary mechanism through which the uses and limits of adjudication are chosen. The nineteenth century Court explicitly acknowledged the primacy of Congress in determining the limits of justiciability in mandamus cases like *Kendall* and *Hall*.⁷⁸⁴

The current system is democratically dysfunctional. The Court decides how the judicial process is to be used and for what. In so doing, the Court inevitably decides what rights citizens have to demand that government behave according to the general will. Yet, the Court does so without accounting to the public for its reasoning. This system is more undemocratic than adjudicative norm-making; it takes control of government out of the hands of government's constituents. Standing law disaggregates the citizenry; it is a judicial version of divide and con-

778. *Union Pac. R.R. v. Hall*, 91 U.S. 343, 355-56 (1875); see notes 169-173 *supra* and accompanying text.

779. For a discussion of the problems raised by informers' actions, see note 191 *supra*.

780. For a discussion of the relator practice, see notes 136-138 *supra* and accompanying text. For a proposal for public actions via the class action device, see Doernberg, "We the People": *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 42, 110-17 (1985).

781. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224 n.14 (1974).

782. *Id.*; see also note 672 *supra*; *Federal Election Comm. v. Nat'l Political Action Comm.*, 470 U.S. 480 (1985). For a particularly sensitive and insightful reading of the social ideals behind NCPAL, see Frug, *Argument as Character*, 40 STAN. L. REV. 869, 896-921 (1988).

783. Wechsler, *supra* note 100, at 7.

784. See text accompanying notes 169-173 & 177-183 *supra*.

quer. Democratic politics—and republican participation—should have a greater say in what the courts do and how they do it. We may ask less of the courts than we do now; we may insist on more. But it is for us to say.

VII. CONSTRUCTING NEW MEANINGS, CREATING NEW POSSIBILITIES

A new meaning is the equivalent of a new word.⁷⁸⁵

The world grows smaller, and humans grow increasingly interdependent on one another. A nuclear accident in the Ukraine taints the milk in Oregon. A decision by the IRS in Washington may affect the health care available to indigents in Kentucky. The ultimate price of a decision regarding the training provided police rookies, or the discipline imposed on an errant officer, may be exacted in the life of an innocent citizen.⁷⁸⁶

At the same time that we grow increasingly interdependent we are, nevertheless, increasingly fragmented. We live in segregated neighborhoods, but we cannot segregate the effects of innercity blight and underclass status; these conditions impose costs that leave none of us untouched. We are less and less capable of bridging the gaps of race, wealth, and sectional need. We are increasingly unable to see our common needs, and less and less able adequately and meaningfully to provide for them.

The individualist ideology embedded in the social construct of standing is a part of this problem. This constraint reinforces our false sense of separation, and acts as a substantial legal impediment to supportive and mutually protective action. Our ability to succeed as a society in our third century under the Constitution will depend on whether, as individuals, we can nevertheless recognize a shared stake in the community. It will depend on our willingness to stand up for the common social good and for interests larger than our own. It will depend on our commitment to provide fora that encourage relatedness. It will depend on our capacity for community and for self-governance.

Yet, a utopian communitarianism might recreate the problem of collectivism that individualism purported to solve. It might allow the *whole* (read: government) to do things to the *part* (i.e., the individual) in the name of the greater good. This critique, however, misconstrues the communal enterprise that I am advocating. I do not argue that we should discard individualism, nor that we should abandon the salutary notion of constitutional rights. Rather, we need to find a way to integrate a sense that we are, inescapably, individuals-in-communities. Only in this way can we avoid the polar pitfalls of individualism and collectivism. The dual model system of adjudication—recognizing both

785. W. STEVENS, *Adagia*, in *OPUS POSTHUMOUS* 159 (1957).

786. *Cf.* *Brandon v. Holt*, 469 U.S. 464 (1985); *Tennessee v. Garner*, 471 U.S. 1 (1985).

private and public rights—provides one legal mechanism through which we can seek and attempt to maintain a sense both that we are individuals and that what happens to varied communities upon which we depend matters very much to each of us.

The recognition of a place for altruism in our legal system, moreover, does not require us to abandon notions of individualism. Altruism need not depend on communitarian notions of moral responsibility nor on long term self-interest.⁷⁸⁷ Altruism can be selfishness turned around. Because I can see me in you (the self in others), I can be motivated to act for you as if I were acting for myself. The stranger, thus, can be metaphor for the self.⁷⁸⁸ We see the sameness and therefore can assimilate the needs of the other to our experience of our own, and we can do so even in specific situations in which our needs are not directly implicated. Altruism can be a form of transcendent individualism.

We must recognize that we are both individuals and members of communities, and grapple with the implications of individualism *and* communitarianism.⁷⁸⁹ I believe that this is still possible in our society. My hope is that the standing metaphor is merely frozen and not petrified in our law and social structure. I have tried, in this article, to thaw the block of doctrine and miscast history to allow consideration of the possibility of alternatives. If the metaphor can be defrosted, then perhaps we can reanimate it. For the metaphor of “standing” is capacious enough to encompass more than a sense of individualism; it can also include a sense of altruism. No longer need we always stand alone, apart from one another. Instead, we may stand up for one another; we may stand by each other. We will still stand as individuals, but our sense of ourselves will be changed. Then we will be able to answer the questions Hillel asked some nineteen and one half centuries ago: “If I am not for myself who will be for me? And when I am by myself, what am I? And if not now, when?”⁷⁹⁰

We are adrift. Life's random misfortunes lap at the gunnels; grey finned Chaos swims around us. The storms of the moment toss and blow us about. From time to time they threaten the more tyrannous typhoons that we observe on the horizon at a

787. See generally T. NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970).

788. See, e.g., *Leviticus* 19:18 (“Love thy neighbor as thyself.”) (emphasis added). An excellent exposition of the role of this metaphoric reasoning from self to others as a basis for moral reasoning is provided by the philosopher Richard Rorty. “[W]e all care quite a bit about a koala when we see it writhing about. . . . Pigs rate much higher than koalas on intelligence tests, but pigs don't writhe in quite the right humanoid way, and the pig's face is the wrong shape for the facial expressions which go with ordinary conversation. So we send pigs to slaughter with equanimity, but form societies for the protection of koalas.” R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 190 (1979).

789. See Regan, *supra* note 763, at 1131-32.

790. *ETHICS OF THE FATHERS* 1:14. The version quoted is my own translation from the original Hebrew Mishnah. For English versions, see *PIRKEI ABOTh, THE ETHICS OF THE TALMUD: SAYINGS OF THE FATHERS* 1:14 (R.T. Herford ed. 1945); *A TREASURY OF JEWISH FOLKLORE* 105 (N. Ausubel ed. 1948).

distance. We watch that horizon for intimations of rescue. But mostly we are parched by the sun's harsh light of indifference, its reflection of our alienation. The rubber of our craft bakes and blisters. We are alone in the end. Together. Rowing. No one stands in a lifeboat.