

## THE STANDING DOCTRINE'S DIRTY LITTLE SECRET

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**ABSTRACT**—For the last forty years, the Supreme Court has insisted that the standing doctrine's requirements of imminent injury-in-fact, causation, and redressability are mandated by Article III of the Constitution. During that same time, however, the federal courts have consistently permitted Congress to relax or altogether eliminate those requirements in many "procedural rights" cases—ones in which a federal statute creates a right to have government follow a particular procedure, including to provide judicial review of agency decisions. This Article asks how best to rationalize this contradiction. After examining several possibilities, we conclude that the best course is to recognize openly that the Case or Controversy Clause of Article III means different things in different types of litigation. In one "tier"—cases where Congress has made it clear that it has created procedural rights that may be vindicated in court without meeting the usual injury, causation, and redressability requirements—the plaintiff should merely be required to show that he or she falls within the "zone of interests" the statute aims to protect. In all other cases—the other "tier"—existing Article III standing requirements would apply.

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INTRODUCTION

For the last forty years, perhaps no procedural doctrine has had more influence on the course of constitutional adjudication in federal courts than the set of often mystifying rules known as “standing to sue.” Litigants must demonstrate they have suffered an injury-in-fact that is caused by the

defendant's conduct and is likely redressable by a grant of the plaintiff's prayed-for relief.<sup>1</sup> Many a challenge to government action has been turned away because the plaintiff, though able to demonstrate a violation of legal rights, lacked sufficiently "imminent" or "concrete" injury, or failed to convince the court in pretrial proceedings that the requested relief would be sufficiently likely to remedy the alleged injury.<sup>2</sup> As a result, dozens of critical questions of federal law have either gone unresolved or been resolved de facto by highly partial government actors.

The Supreme Court has steadily maintained that the Constitution mandates these rules. Article III grants Congress the authority to confer the "judicial Power" of the United States on federal courts to adjudicate "Cases" or "Controversies" that fall into certain enumerated categories.<sup>3</sup> Although it is hardly obvious from analysis of the constitutional text, the Supreme Court has long held that Article III compels most of the requirements of the standing doctrine. But for years now, the Justices and the cognoscenti of federal practice have known that this is not true—and that the Court's own decisions prove the point.

In its 2007 blockbuster decision in *Massachusetts v. EPA*, the Supreme Court held that Massachusetts had standing to obtain review of the Environmental Protection Agency's (EPA) decision not to regulate greenhouse gases.<sup>4</sup> Although Justice John Paul Stevens's opinion for the 5–4 majority rested in part on a state's special standing to sue the federal government on behalf of its citizens,<sup>5</sup> it also rested in large part on the proposition that Congress may relax the "redressability" and "immediacy" standards in the law of standing where procedural injury is concerned.<sup>6</sup> But if, as the Court keeps saying, these rules are constitutionally compelled, how can Congress relax them?

Although one might be tempted to write this off as the four "liberal" Justices plus Justice Anthony Kennedy simply overreaching the bounds of standing law, that is not the case. In support of his statement that Congress may sometimes relax redressability and imminence standards, Justice Stevens cited Justice Antonin Scalia's 1992 majority opinion in *Lujan v. Defenders of Wildlife*.<sup>7</sup> There Justice Scalia, one of the Court's former

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<sup>1</sup> *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>2</sup> *See, e.g., id.* at 565 n.2 (finding insufficient imminence); *Allen v. Wright*, 468 U.S. 737, 757 (1984) (finding an insufficient likelihood that the requested remedy would redress the claimed injury); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (holding that a private citizen does not have "a judicially cognizable interest in the prosecution" of another).

<sup>3</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>4</sup> 549 U.S. 497, 526 (2007).

<sup>5</sup> *Id.* at 520 ("Given . . . Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.").

<sup>6</sup> *Id.* at 517–18 (citing *Lujan*, 504 U.S. at 560–61, 572 n.7; *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002)).

<sup>7</sup> *Id.* at 518.

administrative law professors,<sup>8</sup> acknowledged in a discursive footnote that Congress *must* have the power to relax redressability and imminence standards in some cases<sup>9</sup>—for if that were not true, how could one explain a neighbor’s unquestionable standing to sue to force a developer to file an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA)?<sup>10</sup> As Justice Scalia explained, it is rarely clear that forcing a developer to file an EIS will actually stop the development; such orders are usually sought as a delay tactic. Nor can the plaintiff very often show that the development—and therefore his aesthetic or property value injury—is imminent, as actual construction depends on many variables other than the approval of an EIS. Yet the redressability requirement of standing normally insists that plaintiffs demonstrate that the remedy they seek will likely cure the injury-in-fact of which they complain.<sup>11</sup> Moreover, plaintiffs must normally demonstrate that the injury is just about to happen, lest the litigation be declared unripe.<sup>12</sup>

Indeed, Justice Scalia’s footnote in *Lujan* was intellectually modest. He could have cited even more devastating proof that Congress sometimes has the power to relax or eliminate other supposed minimum requirements of the Article III standing doctrine—including injury-in-fact. The Freedom of Information Act (FOIA) permits any person to obtain judicial enforcement of a proper request for documents subject to disclosure under the Act.<sup>13</sup> That is, anyone can get federal court enforcement of a proper document request, even if the original request was made purely out of personal curiosity. As we explain in more detail below, the “birther” cases—involving plaintiffs seeking access to documents related to President Obama’s birth and citizenship—illustrate this point. A plaintiff may seek enforcement of a valid FOIA request without having to show any injury-in-fact at all.<sup>14</sup> In

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<sup>8</sup> Justice Stephen Breyer is the other. See Thomas O. Sargentich, *Justice Stephen Breyer’s Contribution to Administrative Law*, 8 ADMIN. L.J. AM. U. 713, 713 (1995).

<sup>9</sup> *Lujan*, 504 U.S. at 572 n.7.

<sup>10</sup> *Id.* Justice Scalia explained:

There is this much truth to the assertion that “procedural rights” are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. . . . [O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

*Id.*

<sup>11</sup> See, e.g., *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (“In no event . . . may Congress abrogate the Art. III minima: A plaintiff must always have suffered ‘a distinct and palpable injury to himself’ that is likely to be redressed if the requested relief is granted.” (citation omitted)).

<sup>12</sup> See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (noting that courts are traditionally reluctant to grant certain remedies until a controversy is “‘ripe’ for judicial resolution”).

<sup>13</sup> 5 U.S.C. § 552(a)(6)(E)(iii) (2006).

<sup>14</sup> The statute allows any curious party to gain access to information about government activity. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 137 & n.2 (1975) (citing § 552(a)(3)(A))

other procedural contexts,<sup>15</sup> such a case would be dismissed for lack of standing on grounds that the plaintiff was asserting no more than a “generalized grievance.”

This development not only breaks the normal rules of redressability and imminence, it violates the most fundamental rule of Article III standing. Plaintiffs must properly allege that they have suffered a concrete injury-in-fact—that is, a personal stake in the outcome of the controversy. If someone requests documents covered by FOIA simply out of curiosity, how can it be said that this person has suffered a concrete injury-in-fact? Such a plaintiff may have a legal right to the documents, one created by FOIA, but the Court has consistently said that the violation of a mere legal right is not enough for standing.<sup>16</sup> An injury-in-fact, according to the Court, is something more fundamental than a legal right. It is a “real-world,” tangible harm—a “prelegal injury,” as Cass Sunstein has put it.<sup>17</sup> One’s inability to satisfy one’s curiosity<sup>18</sup> about what his government may be doing behind closed doors is most certainly not what the Court has found to constitute concrete injury-in-fact.<sup>19</sup> Instead, in other contexts, the Court has said that sort of complaint is a generalized grievance that no one has standing to lodge in federal court.<sup>20</sup>

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(describing the FOIA requirement that records be made available “to any person”). *But see* § 552(b) (listing the FOIA statutory exceptions to required disclosure).

<sup>15</sup> *See, e.g.,* *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (“Plaintiffs also bring a procedural claim under NEPA. To satisfy the injury in fact requirement, and thereby meet the first prong of Article III standing, a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. . . . Once a plaintiff has established an injury in fact under NEPA the causation and redressability requirements are relaxed. [T]he members must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.” (alteration in original) (citations and internal quotation marks omitted)). Thus, when plaintiffs sue to vindicate most procedural rights, they must establish an injury-in-fact that is particularized to them, even if they cannot satisfy the usual imminence or redressability standards.

<sup>16</sup> *Compare, e.g.,* *Allen v. Wright*, 468 U.S. 737, 754 (1984) (a litigant’s “asserted right to have the Government act in accordance with law is not sufficient,” by itself, to confer standing and therefore federal jurisdiction), *with* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (“[T]he injury required by Art. III may exist solely by virtue of *statutes* creating legal rights, the invasion of which creates standing.” (emphasis added) (alterations and citations omitted)).

<sup>17</sup> Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1451 (1988).

<sup>18</sup> By no means do we mean to suggest that FOIA is just about satisfying people’s idle curiosity. We believe it is a highly positive step in helping to assure transparency and accountability in government. We merely mean to point out that high-minded motives are not required to get a FOIA request enforced. One can do it out of sheer curiosity and need not show any personal nexus to the subject matter of the request whatsoever.

<sup>19</sup> *See, e.g.,* *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (rejecting a challenge to the Line Item Veto Act by individual members of Congress for lack of standing).

<sup>20</sup> *See, e.g.,* *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (holding that a taxpayer lacked standing to challenge the reporting of government expenditures under the Central Intelligence Agency Act because his claim amounted to a generalized grievance).

If *Massachusetts v. EPA* and the *Lujan* footnote acknowledged that the causation and redressability requirements of Article III standing are sometimes optional, the FOIA cases demonstrate that injury-in-fact is also not indispensable in many other cases. And these are not the only examples. This relaxation of Article III requirements occurs in a variety of contexts involving procedural rights.<sup>21</sup> But the Court has never explained why. If the legitimacy of the judiciary depends in large part on courts having to explain their decisions, then the Court should explain this seeming anomaly.

In Part I, we review the blackletter law of the standing doctrine—that standing to sue is supposed to be governed by the Case or Controversy Clause of Article III, which requires injury-in-fact, causation, and redressability. We also explain the connection between the standing doctrine and the doctrine prohibiting federal courts from adjudicating generalized grievances, and we review Supreme Court authority that denominates Article III deficiencies as jurisdictional.

In Part II, we elaborate on the standing doctrine’s contradiction. In several areas, the federal courts have tolerated congressional elimination of some constitutionally mandated requirements. In fact, the Supreme Court’s own jurisprudence involving environmental impact statement cases, FOIA and other “informational injury” statutes, and the *Chenery* doctrine demonstrates that the standing doctrine’s “little secret” is not an isolated problem but a thoroughgoing contravention of the Article III orthodoxy.

In Part III, we attempt to resolve the contradiction without disturbing existing precedent. We look to the Necessary and Proper Clause as a possible source of reconciliation. We first sketch out how the Necessary and Proper Clause functions in the constitutional scheme and then present one possible argument for why the Necessary and Proper Clause would permit Congress to waive the standing requirements if it would further the exercise of Congress’s Article I powers.<sup>22</sup> However, we ultimately conclude that the Necessary and Proper Clause argument falls short in a number of ways and poses separation of powers problems of its own.

We then begin looking at possible solutions that would require some repudiation of existing doctrine. We acknowledge that the problem would go away if the Court were to stop insisting that the standing doctrine is

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<sup>21</sup> By “procedural rights,” we refer (as Justice Scalia did in his *Lujan* footnote seven) to those rights affirmatively conferred by statute or regulation. Procedural rights are entitlements to process that may be divorced from any underlying “real-world” desiderata, such as a right to have governmental officials consult with environmental experts before moving forward with a construction project, or, most typically, a right to obtain judicial review of an agency ruling. The procedural right is divorced from the underlying matter in the sense that the plaintiff is entitled to the process whether or not it will make any difference in the real world. One can make a more than plausible argument that process can never be divorced from the real world because there is no Platonic line between the two, but mercy to our readers requires us to forbear from such discussion.

<sup>22</sup> *Infra* Part III.B. As we explain in that Part, there is support for this proposition in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

required by Article III or if the Court were to overrule the many cases permitting Congress to relax or eliminate the Article III requirements in procedural rights cases. However, because the Court has repeatedly refused invitations to recognize the standing doctrine as something other than a threshold constitutional requirement, and because overruling the procedural rights cases would be an administrative nightmare that could hamstring Congress's ability to promulgate federal legislation, we do not seriously explore these "nuclear options."

Instead, after seriously examining Justice Kennedy's *Lujan* concurrence and finding that it ultimately comes up short in solving the problem, we finally recommend what we believe to be the best overall solution: frank recognition that the Case or Controversy Clause has two tiers, one for cases where Congress has created procedural rights and made it clear that they can be enforced without meeting the normal injury, causation, and redressability requirements (a "naked" zone of interests test<sup>23</sup>); and another tier for all other cases, where the normal requirements apply.

Finally, in Part V, we offer a historical perspective in support of our two-tier solution. We examine the preconstitutional English practice of litigating "public actions," which, like procedural rights cases today, did not require the plaintiff to have a particularized injury in the matter. If the Framers were aware of the common law practice permitting legal "strangers" to maintain a public action, it would explain the Court's insistence in the modern day that procedural rights cases likewise have different standing requirements than other cases. We also examine the sketchy drafting history of Article III, drawing from it the lesson that the Case or Controversy Clause ought not be assigned too technical or inflexible a meaning.

#### I. THE ARTICLE III STANDING REQUIREMENTS

To explain the dissonance in the standing doctrine, we begin with the cases in which the Supreme Court has steadfastly held that certain elements of standing are constitutionally mandated. In the 1970s, the Court handed down a series of decisions in which it elaborated on the constitutional dimensions of the standing doctrine. In such cases as *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>24</sup> *Warth v. Seldin*,<sup>25</sup> and *Linda R.S.*

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<sup>23</sup> The concept of special standing rules in procedural rights cases is similar to what some call "statutory standing," though we avoid the phrase since "statutory standing" can have a very different meaning from the concept we put forward in this Article. See generally Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89 (2009) (examining different conceptions of the phrase "statutory standing").

<sup>24</sup> 426 U.S. 26, 39–44 (1976).

<sup>25</sup> 422 U.S. 490, 499–504 (1975).

*v. Richard D.*,<sup>26</sup> the Court made it clear that Article III requires a plaintiff to demonstrate three things in order to maintain any action in federal court: injury-in-fact, causation, and redressability. In other words, at the pleading stage, at least, the plaintiff must plausibly allege that she suffered some real-world harm and she must make a plausible case that it was the defendant's conduct (and not some third party or exogenous factor) that caused the harm and that the plaintiff's requested remedy would likely cure the harm. The Court's most recent decisions continue to recite that these requirements are constitutionally mandated.<sup>27</sup>

It is not obvious how the Court extracted these requirements out of the text of Article III. But this has been explored elsewhere in considerable detail, and we will not revisit the matter here.<sup>28</sup> We must, however, explain what the Court means by injury-in-fact, causation, and redressability, for they are terms of art with technical denotations.

#### A. *Injury-in-Fact*

The most important thing to understand about injury-in-fact is the “in-fact” part. For years, the Court based a plaintiff's standing to challenge federal agency action on something called the legal right test: Did the defendant violate a vested legal right held by the plaintiff?<sup>29</sup> In more modern terms, this amounted to the question of whether the plaintiff had alleged a valid cause of action, which is to say, an entitlement to a judicial remedy based on the facts alleged in the complaint. But in 1970, that changed.

In *Association of Data Processing Service Organizations v. Camp*,<sup>30</sup> Justice William O. Douglas led the majority in discarding the legal right test and replacing it with an injury-in-fact test.<sup>31</sup> If “injury-in-fact” sounds

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<sup>26</sup> 410 U.S. 614, 616–18 (1973).

<sup>27</sup> See, e.g., *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

<sup>28</sup> See, e.g., EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED 83 (2011) [hereinafter LEE, JUDICIAL RESTRAINT IN AMERICA] (finding no linkage of standing doctrine to the Constitution until the 1920s); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (standing should be viewed as nothing more than whether the plaintiff has a cause of action on the merits); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 608 (1992) [hereinafter Lee, *Deconstitutionalizing Justiciability*] (doubting that the “case or controversy” language in Article III was meant to require doctrines like mootness or standing); see also *infra* Part IV.A, notes 260–68.

<sup>29</sup> E.g., *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939) (where private power companies sought to enjoin TVA from operating, claiming that the statutory plan under which it was created was unconstitutional, the Court denied the competitors standing, holding that they did not have that status “unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege”).

<sup>30</sup> 397 U.S. 150 (1970). The companion case was *Barlow v. Collins*, 397 U.S. 159 (1970).

<sup>31</sup> *Camp*, 397 U.S. at 152–54. The Court also instituted a “zone of interests” requirement in cases brought under the judicial review provisions of certain federal statutes. See *id.* at 153; see also, e.g.,



redundant to a layperson, it is only because the layperson does not appreciate that it replaced what amounted to an “injury-at-law” test. Whereas the federal courts had previously denied standing to scores of plaintiffs seeking review of federal agency action on the ground that they had not alleged what we would today call a valid cause of action, the *Camp* Court made it clear that the plaintiff did not have to show a valid cause of action *to have standing to sue*. The plaintiff did not have to show a legal harm, only an injury “in fact.”

*Camp* illustrates the difference between the two ideas. An industry association representing data processing providers sought judicial review of the Comptroller of the Currency’s ruling that banks could provide data processing services as well.<sup>32</sup> The plaintiff alleged that the ruling violated the Bank Service Corporation Act of 1962, which the plaintiff claimed prohibited banks from engaging in any activity other than banking.<sup>33</sup> The data processors were not, of course, concerned about preserving the soundness of the banking industry or the welfare of bank customers, but rather that their de facto monopoly on data processing services was being broken up. The lower federal court, following longstanding precedent, held that the plaintiff industry association lacked standing to sue because it had no entitlement to a competitive market advantage over banks.<sup>34</sup> Neither the 1962 Act nor any other positive law granted the data processing industry any such right to a monopoly on providing data processing services.<sup>35</sup>

The Supreme Court reversed. Justice Douglas, nonchalantly overruling more than forty years of precedent without any acknowledgement, stated that the legal right test is irrelevant to standing—that whether a legal right was violated instead goes to the merits.<sup>36</sup> The correct test for standing is whether the Comptroller’s ruling caused the data processors “injury-in-fact,” and the answer to that was clearly affirmative.<sup>37</sup> Banks would now cut in on the data processors’ monopoly, causing market share diminution.<sup>38</sup>

The difference between legal harm and injury-in-fact is critical to this Article. Cass Sunstein put it best: injury-in-fact is “prelegal” harm.<sup>39</sup> It could be measured conventionally—that is, would most people consider it “harm”? (This could easily be converted into a commonsense locution of

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Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 870 (2011) (plaintiff could sue under 42 U.S.C. § 2000e-3 of Title VII because he was within the “zone of interests” of the statute).

<sup>32</sup> *Camp*, 397 U.S. at 151.

<sup>33</sup> *Id.* at 155.

<sup>34</sup> *Id.* at 152–53.

<sup>35</sup> See *Ass’n of Data Processing Serv. Orgs. v. Camp*, 406 F.2d 837, 839 (8th Cir. 1969) (“[T]he courts uniformly have denied standing to competitors who otherwise possess no legal right to be free from competition.”), *rev’d*, 397 U.S. 150 (1970).

<sup>36</sup> See *Camp*, 397 U.S. at 153.

<sup>37</sup> *Id.* at 152–53.

<sup>38</sup> See *id.* at 152.

<sup>39</sup> Sunstein, *supra* note 17, at 1447.

“injury,” even though there is no epistemology for ascertaining what common sense dictates in any given situation.) It could be measured in premodern terms—what would a certain religious tradition consider “harm”? It could be measured in market terms—does the defendant’s conduct diminish an economic interest held by the plaintiff? Or it could be measured in secular moral terms—would a philosophical idealist view such conduct as creating “harm”? But the one measure we could not use to define injury-in-fact, according to Justice Douglas, is merely whether positive law prohibits the alleged conduct from producing the alleged results.

Under Justice Douglas’s new system, an injury-in-fact is not in itself sufficient to maintain a lawsuit; a plaintiff still needs to show the violation of a legal right, which is to say, a cause of action.<sup>40</sup> Another way to define “cause of action” is that the plaintiff is entitled to a judicial remedy because of the interaction of the defendant’s conduct and some provision of positive law. To win a federal lawsuit, a plaintiff needs both a legal harm (cause of action) and an injury-in-fact (“real-world harm,” however the Court decides to measure that). But the two types of harm must be conceptually distinguished: as one group of commentators has put it, “The possession of rights cannot logically be a prior condition for bringing suit in any case where the question being litigated is: Who has what rights?”<sup>41</sup> And conversely, just because a “legal harm” has been committed does not mean that the plaintiff asserting it as a cause of action was the party actually injured. According to the Court, this means that the mere existence of a legal harm cannot automatically confer the injury-in-fact sufficient for standing.<sup>42</sup>

Thus, current standing doctrine, as established by *Camp*, is based on a nonlegal baseline of what constitutes injury. For example, the Court has said that “pocketbook” or “wallet” injury always qualifies, but that mere

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<sup>40</sup> This is otherwise known as *damnum absque injuria*—“damage without legal wrong.” See, e.g., F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280–81 & n.22 (2008). See generally Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1025–35 (surveying jurisprudence on *damnum absque injuria*).

<sup>41</sup> Michael C. Jensen et al., *Analysis of Alternative Standing Doctrines*, 6 INT’L REV. L. & ECON. 205, 209 (1986). We would like to emphasize that this is a description of the Court’s jurisprudence; we do not endorse this statement normatively. It would be perfectly coherent to have a regime under which the plaintiff is asked a single question: “What legal right of yours did the defendant violate?” It would be perfectly coherent to not require a court to ask, “Were you harmed in some social, moral, philosophical, or political sense?,” which is what the injury-in-fact doctrine effectively asks. In other words, “harm” is an inevitably value-laden concept. This point is hammered home not only by Sunstein, but also by William Fletcher in *The Structure of Standing*, *supra* note 28, at 225 n.27.

<sup>42</sup> Except as permitted by the Court in the cases we identify as defying this orthodoxy—the very cases that give rise to the standing doctrine’s “dirty little secret.” See *infra* Part II.

“ideological” or “psychic” harm never does.<sup>43</sup> If the plaintiff alleges that her property value has been diminished in some nontrivial way, this allegation always satisfies the injury-in-fact test. But if the plaintiff alleges that she has been harmed simply because her government has acted illegally in the treatment of someone else, she has failed the injury-in-fact test because the emotional harm associated with seeing non-family members mistreated is not a “cognizable” (concrete)<sup>44</sup> harm. There is no positive law that preordains the characterization of this kind of harm as noncognizable; Sunstein’s point is that it is noncognizable because the Supreme Court says so. “There is no prepolitical or prelegal way to decide who is a [mere] bystander” for standing purposes, he argues.<sup>45</sup>

Still, we concede that the Court has gone a long way in finding harms cognizable. In addition to wallet injury, the Court has recognized that “stigmatic” harm can be cognizable so long as the stigma emanates from the defendant’s personal treatment of the plaintiff;<sup>46</sup> “aesthetic” injury is cognizable, as in the despoiling of beautiful natural settings, so long as the plaintiff is among those who personally go to the lands in question to enjoy their beauty.<sup>47</sup> But the Court remains adamant that ideological injury is not cognizable; one may not sue based on the alleged harm that is done her simply because her government has acted illegally.<sup>48</sup>

In addition to being concrete or judicially cognizable, the injury must be “imminent.”<sup>49</sup> It is not clear whether imminence in the standing doctrine refers to a temporal concept, a probabilistic concept, or both. At times the Court has found a lack of imminence where the Court’s concern seemed to be that the alleged injury was not destined to happen immediately, which

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<sup>43</sup> Compare, e.g., *Camp*, 397 U.S. at 153–54 (discussing wallet injury, as well as certain noneconomic injuries such as aesthetic, conservational, recreational, and spiritual injuries and collecting cases); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687–90 (1973) (same), with, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere harm to an ideological interest will not suffice). The Court remains opposed to permitting standing in purely ideological cases. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 662 n.4 (2003) (Stevens, J., concurring in dismissal of certiorari); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (federal courts may not “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws”); *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) (court may not take on “ideological disputes about the performance of government”).

<sup>44</sup> The Court uses the terms “concrete” and “cognizable” as interchangeable. See, e.g., *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752, 2754 (2010) (using “concrete” and “cognizable” as interchangeable adjectives describing what suffices as “injury”); *Salazar v. Buono*, 130 S. Ct. 1803, 1815 (2010) (same); *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 300, 301 (2008) (Roberts, C.J., dissenting) (same).

<sup>45</sup> Sunstein, *supra* note 17, at 1436 n.18.

<sup>46</sup> See *Allen v. Wright*, 468 U.S. 737, 755 (1984).

<sup>47</sup> See *Sierra Club*, 405 U.S. at 734.

<sup>48</sup> See *infra* Part I.D.

<sup>49</sup> E.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

would denote a temporal matter;<sup>50</sup> at other times, the Court has found imminence lacking because the injury was too “conjectural,” which denotes an insufficient probability of the injury ever occurring.<sup>51</sup>

The ambiguity is further complicated by the unexplained relationship between imminence in the standing calculus on the one hand and the supposedly separate doctrine of ripeness on the other. Under that doctrine, the federal courts must refuse to adjudicate a case if the facts of the case at bar are too embryonic—insufficiently developed—to support an intelligent judicial decision.<sup>52</sup> In addition to sufficiency of factual development, the court will look at whether the plaintiff will suffer undue hardship if she is not permitted to have her claim adjudicated now. One might think that the courts ought to regard ripeness as purely a temporal matter (that is, “when” and not “if”) while they regard imminence in the standing doctrine as being about probability of occurrence (“if” rather than “when”). But that is beyond the scope of this Article; for present purposes, we will assume that imminence in the standing doctrine covers both temporality and probability.

### B. Causation

By the 1970s, the touchstone of standing had become the existence of a “personal stake in the outcome of the controversy.”<sup>53</sup> Thus, the Court not only required that the plaintiff suffer an injury-in-fact, but also that the injury be “fairly traceable” to the defendant’s conduct.<sup>54</sup> This has become known as the causation prong of the standing doctrine.

In *Simon v. Eastern Kentucky Welfare Rights Organization*, a group of indigents and an organization representing them sued the Internal Revenue Service (IRS) for issuing a revenue ruling that permitted hospitals to retain their nonprofit (and therefore tax-advantaged) status even though they were providing only emergency room services, and not full services, to indigents.<sup>55</sup> The theory of the plaintiffs’ case was simple: hospitals had an incentive to provide indigents with as little care as possible, provided that it would not endanger the hospitals’ nonprofit status.<sup>56</sup> Many or most hospitals are critically dependent on private donations, and donors can give more money to nonprofits than to for-profit organizations because the donations

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<sup>50</sup> See, e.g., *id.* at 559–60.

<sup>51</sup> See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

<sup>52</sup> See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 90 (1947) (“We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication.”).

<sup>53</sup> See *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>54</sup> E.g., *Allen v. Wright*, 468 U.S. 737, 756–57 (1984).

<sup>55</sup> 426 U.S. 26, 28–32 (1976).

<sup>56</sup> *Id.* at 33.

are deductible.<sup>57</sup> By issuing the revenue ruling in question, the IRS encouraged the hospitals to drastically cut the range of their services to indigents without worrying that their donations would dry up.

The Supreme Court held that the plaintiffs lacked standing because the indigents' undoubted injury (inability to get full hospital services) was not fairly traceable to the revenue ruling.<sup>58</sup> "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications," Justice Lewis Powell wrote for the majority.<sup>59</sup> In other words, unlike an ordinary tort case for damages, the plaintiff in a federal court proceeding seeking injunctive relief is required to make a convincing case at the pleading stage that the defendant's conduct caused the plaintiff's injury.

*Allen v. Wright*<sup>60</sup> illustrates the same point on analogous facts. Plaintiffs were parents of African-American children enrolled in public schools that were then under federal court orders to desegregate.<sup>61</sup> Large numbers of white parents then pulled their children out of those public schools and sent them to white-only private schools, leaving the public schools with too few white students to carry out desegregation effectively.<sup>62</sup> The plaintiffs sued the IRS for failing to enforce antidiscrimination requirements in the private schools, which were not entitled to nonprofit status if they discriminated on the basis of race.<sup>63</sup>

This time Justice Sandra Day O'Connor wrote for the majority, holding that the plaintiffs lacked standing.<sup>64</sup> They had alleged adequate injury because their children were denied the benefits of being educated in a desegregated public facility.<sup>65</sup> But, as in *Simon*, the Court found it too conjectural that the IRS's lax enforcement of the nonprofit rules against the private schools had led white parents to move their children to those private schools. O'Connor asked: "Is the line of causation between the illegal conduct and injury too attenuated?"<sup>66</sup> Pointing to the facts of *Simon*, Justice O'Connor wrote:

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<sup>57</sup> Whether they actually *will* give more money is an empirical question on which we have no data. But the assumption that they would give more money was central to the plaintiff's case. *See id.* at 28–29.

<sup>58</sup> *Id.* at 41–42.

<sup>59</sup> *Id.* at 42–43.

<sup>60</sup> 468 U.S. 737 (1984).

<sup>61</sup> *Id.* at 739–48.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 753.

<sup>65</sup> *Id.* at 752.

<sup>66</sup> *Id.*

The chain of causation is even weaker in this case. It involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.<sup>67</sup>

She concluded: "The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing."<sup>68</sup>

### C. Redressability

Both *Simon* and *Allen v. Wright* highlight the redressability prong as well. In both cases, the Court held that it was far too speculative to consider whether forcing the IRS to deny nonprofit status to the hospitals and discriminatory private schools would cure the plaintiffs' respective injuries.<sup>69</sup> Would private donations to the hospitals decrease sufficiently for the hospital to restore full services to indigents? Would donations to the discriminatory private schools decrease enough that they would have to raise tuition to a level where white parents would relent and send their children back to public school, or force closure of the discriminatory private schools for lack of funding? These scenarios involved certain empirical suppositions that the Court was unwilling to entertain, and the Court was further unwilling to proceed on the basis of the sweeping economic theory that people will consume less of any commodity as its price increases.<sup>70</sup> There was just not enough evidence, even at the pleading stage, that the price to hospitals and private schools of discriminating against indigents and black students, respectively, would actually increase. Therefore, the plaintiffs' injuries would not necessarily have been redressed if the Court had granted the requested relief.

Another case that crisply depicts the redressability doctrine is *Linda R.S. v. Richard D.*<sup>71</sup> The plaintiff was the mother of an illegitimate child whose father refused to make support payments.<sup>72</sup> The state had a statute authorizing punishment of such "deadbeat dads," but uniformly refused to

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<sup>67</sup> *Id.* at 759.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 760 & n.24; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

<sup>70</sup> Contrast the Court's treatment of redressability with that of Justice Stevens: "The purpose of this scheme, like the purpose of any subsidy, is to promote the activity subsidized; the statutes 'seek to achieve the same basic goal of encouraging the development of certain organizations through the grant of tax benefits.' If the granting of preferential tax treatment would 'encourage' private segregated schools to conduct their 'charitable' activities, it must follow that the withdrawal of the treatment would 'discourage' them, and hence promote the process of desegregation." *Allen*, 468 U.S. at 785 (Stevens, J., dissenting) (citation omitted).

<sup>71</sup> 410 U.S. 614 (1973).

<sup>72</sup> *Id.* at 614-16.

prosecute fathers of illegitimate children.<sup>73</sup> The mother sued for injunctive relief that would have ordered the prosecutor to go after the father, on the theory that the threat of punishment would make him pay the child support.<sup>74</sup>

Writing for the majority, Justice Thurgood Marshall held that the mother lacked standing to sue for such relief.<sup>75</sup> For one thing, any such court order would violate a long tradition of permitting prosecutors to make independent decisions about whether to pursue particular violations. “[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another,” the Court stated.<sup>76</sup> Second, it was too conjectural whether the prayed-for injunction would result in redress of the plaintiff’s injury, which was the failure to receive support payments. “The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative,” Justice Marshall wrote.<sup>77</sup>

#### D. Generalized Grievances

Another important element of the standing doctrine is the prohibition against generalized grievances, which gave birth to the standing doctrine in the early 1920s and, according to the Court, has been in force ever since.

The first case to discuss generalized grievances was *Fairchild v. Hughes*.<sup>78</sup> In early 1920, state legislatures were in the process of ratifying the Nineteenth Amendment, guaranteeing women the right to vote. Thirty-five states had passed resolutions purporting to ratify the amendment, and the Secretary of State had indicated that, upon receiving one more certification, he would declare the amendment adopted.<sup>79</sup> On July 7, 1920, a man named Charles S. Fairchild filed a bill in equity in the Supreme Court of the District of Columbia, asking that the “so-called Suffrage Amendment . . . be declared unconstitutional and void” and that the Secretary of State be enjoined from declaring that it had been adopted.<sup>80</sup> Mr. Fairchild declared himself to be a citizen and a taxpayer of the United States and a member of the American Constitutional League, a voluntary association dedicated to spreading knowledge about the fundamental principles of the Constitution, “especially that which gives to each State the right to determine for itself the question as to who should exercise the

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 616.

<sup>75</sup> *Id.* at 617–18.

<sup>76</sup> *Id.* at 619.

<sup>77</sup> *Id.* at 618.

<sup>78</sup> 258 U.S. 126 (1922).

<sup>79</sup> *Id.* at 128–29.

<sup>80</sup> *Id.* at 127.

elective franchise therein.”<sup>81</sup> The trial court refused to issue the requested relief, whereupon the Secretary of State announced that he had received a certificate of ratification from the thirty-sixth state and therefore that the amendment had been adopted.<sup>82</sup>

The U.S. Supreme Court found that Fairchild lacked what we now call standing to pursue the claim. “Plaintiff’s alleged interest in the question submitted is not such as to afford a basis for this proceeding,” wrote Justice Louis Brandeis for the Court.<sup>83</sup> He explained:

In form [the action] is a bill in equity; but it is not a case within the meaning of § 2 of Article III of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is “brought before the court[s] 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.”<sup>84</sup>

Fairchild’s problem was not a failure to allege a violation of rights, but rather his lack of a sufficiently proximate and distinct connection to the matter being adjudicated. He had only alleged that he was a citizen and a taxpayer, which failed to distinguish him from most Americans. He had further alleged that he was a member of the American Constitutional League, a voluntary association apparently devoted to the propagation of certain ideas. But anybody could join an organization advocating views about the alleged illegality of government conduct. In the end, Fairchild’s complaint was a generalized grievance—a request by no one in particular to have courts police the government to see that it follows the law.

The next year, the Supreme Court handed down another decision based on the same rationale. In *Frothingham v. Mellon*, a certain Mrs. Frothingham sued various federal officials for an injunction to stop the continued appropriation of funds to an anti-infant mortality program enacted by Congress.<sup>85</sup> Frothingham alleged that she was a federal taxpayer and that some of her remittances were being used for this illegal purpose.<sup>86</sup> Her legal theory was that the legislation violated states’ rights under the Tenth Amendment, although her actual motivation appears to have been a belief that funds were being mishandled during the appropriation process.<sup>87</sup> In any event, the Supreme Court held that she lacked standing to pursue the injunction.

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 128.

<sup>83</sup> *Id.* at 129.

<sup>84</sup> *Id.* (second alteration in original).

<sup>85</sup> 262 U.S. 447, 479 (1923).

<sup>86</sup> *Id.* at 486.

<sup>87</sup> *See id.* at 479–80.



Writing for the Court, Justice George Sutherland found that Frothingham had an insufficient interest in the subject matter of the suit.<sup>88</sup> She failed to allege that she had suffered any legal injury as a result of the challenged program or that she was about to suffer any such injury. “It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief,” Justice Sutherland wrote, quoting Justice Thompson.<sup>89</sup> “We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.”<sup>90</sup>

Federal courts are courts of limited jurisdiction; they do not sit to police the legality of governmental conduct at large. Frothingham’s suit invited the federal courts to do just that—in this case, to police the legality of the infant mortality statute. Although it was true that a tiny amount of her tax remittances presumably went to grants to fund infant mortality research at the state level, this failed to distinguish her from any other taxpayer. Hers was a generalized grievance.

As we will explain, the three cardinal elements of Article III standing are the first three identified above—*injury-in-fact*, causation, and redressability. They eventually grew out of the generalized grievance concept born in *Fairchild* and *Frothingham*.<sup>91</sup> But the generalized grievance rhetoric is still employed separately in modern cases, whether as a proxy for the plaintiff’s lacking an *injury-in-fact* or as a more prudential analysis superimposed on the supposedly mandatory standing requirements. Either way, if a plaintiff raises what the courts consider a generalized grievance, she lacks standing under the traditional analysis.

### E. The Standing Doctrine’s Relationship to Article III

The standing doctrine is generally accepted in the academic community as being a judicial creation of relatively recent vintage, having emerged in the mid-twentieth century.<sup>92</sup> Nevertheless, the doctrine has roots

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<sup>88</sup> *Id.* at 487 (plaintiff’s tax contribution to program under challenge was “comparatively minute and indeterminable”).

<sup>89</sup> *Id.* at 484 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 75 (1831)).

<sup>90</sup> *Id.* at 488.

<sup>91</sup> See generally LEE, *JUDICIAL RESTRAINT IN AMERICA*, *supra* note 28, at 73–78 (tracing the personal stake requirement and, eventually, the *injury-in-fact*, causation, and redressability requirements, from the generalized grievance cases of the 1920s and 1930s).

<sup>92</sup> See, e.g., John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (asserting that the Supreme Court “fabricat[ed] the doctrine[] of standing” in the mid-twentieth century). *But see* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (arguing that the standing doctrine or a reasonable facsimile goes back to the Founding).

in *Marbury v. Madison*<sup>93</sup> and the jurisprudence leading up to it.<sup>94</sup> In *Marbury*, as well as in the Correspondence of the Justices and in *Hayburn's Case*, the Supreme Court enunciated what are now basic principles of American constitutional law: the need for separation of powers and the concomitant requirement that the judicial power extend only to cases and controversies—namely, that federal courts not make pronouncements in the abstract, without any live issues before them.<sup>95</sup> Later, the Supreme Court linked these considerations to the Case or Controversy Clause of Article III, and today the standing doctrine is considered constitutionally required and jurisdictional in nature.<sup>96</sup>

However, the standing doctrine has many strands, and Article III does not compel all of them. The Supreme Court has also imposed other prudential standing requirements to limit the discretion of the judiciary. The “zone of interests” requirement, which requires those who seek judicial review of federal agency action to demonstrate that they “arguably fall within the zone of interests” that Congress intended when it enacted the enabling statute, is confessedly prudential.<sup>97</sup> While in theory the Article III requirements are irreducible, Congress may waive the prudential standing requirements,<sup>98</sup> including the zone of interests requirement.<sup>99</sup> The rule that generally prohibits litigants from asserting the legal rights of third persons not before the court is also prudential, and Congress could do away with that as well.<sup>100</sup>

Since the early 1970s, however, the Court has insisted that the requirements of imminent injury-in-fact, causation, and redressability are

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<sup>93</sup> 5 U.S. (1 Cranch) 137 (1803); see Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

<sup>94</sup> See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (“[B]y the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and . . . it is the duty of each to abstain from, and to oppose, encroachments on either.”); Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782–1793, at 488–89 (Henry P. Johnston ed., 1891) (Justices of the Supreme Court refused to render an advisory opinion requested by the President and Secretary of State, holding that such an opinion would be “extra-judicial[.]” and thus would violate the “lines of separation drawn by the Constitution between the three departments of the government”).

<sup>95</sup> See sources cited *supra* note 94.

<sup>96</sup> See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 611 (2007) (“The constitutional requirements for federal-court jurisdiction—including the standing requirements and Article III—are an essential ingredient of separation and equilibration of powers.” (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998))).

<sup>97</sup> E.g., *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

<sup>98</sup> *Id.*; *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”); *id.* at 500–01 (the requirements for injury and causation are constitutionally required; the ban on third-party standing and the prohibition against federal courts deciding generalized grievances are merely prudential).

<sup>99</sup> *Bennett*, 520 U.S. at 162 (citing *Warth*, 422 U.S. at 498, 501).

<sup>100</sup> See, e.g., *Warth*, 422 U.S. at 500–01.

mandated either by the Judicial Power Clause of Article III, the Case or Controversy Clause of Article III, the original intentions of the Framers, or some combination of these. In *Camreta v. Greene*,<sup>101</sup> decided in 2011, Justice Elena Kagan reiterated what the Court has said consistently over the last forty years:

Article III of the Constitution grants this Court authority to adjudicate legal disputes only in the context of “Cases” or “Controversies.” To enforce this limitation, we demand that litigants demonstrate a “personal stake” in the suit. The party invoking the Court’s authority has such a stake when three conditions are satisfied: The petitioner must show that he has “suffered an injury in fact” that is caused by “the conduct complained of” and that “will be redressed by a favorable decision.”<sup>102</sup>

Justice Anthony Kennedy’s majority opinion in another 2011 case, *Arizona Christian School Tuition Organization v. Winn*, said almost the exact same thing.<sup>103</sup>

It is Justice Antonin Scalia’s majority opinion in *Lujan v. Defenders of Wildlife*<sup>104</sup> that the Court now routinely cites for the proposition that Article III mandates the imminent injury-in-fact, causation, and redressability requirements. But a closer look at Justice Scalia’s *Lujan* opinion and Justice Kennedy’s concurrence in that same case strongly suggests that the Justices are well aware that the matter is more complicated: Congress clearly does have the power to alter some of these rules that are assertedly mandated by Article III.

## II. THE SECRET EXPOSED: AREAS WHERE CONGRESS HAS BEEN PERMITTED TO RELAX OR ELIMINATE THE ARTICLE III REQUIREMENTS

Despite the oft-repeated orthodoxy that injury-in-fact, causation, and redressability are required by Article III, federal courts have tolerated congressional relaxation or elimination of these “constitutional minima” in multiple lines of precedent. In this Part, we survey some of these cases to demonstrate that the rhetoric of Article III standing is in fact inconsistent with much of the reality of it.

### A. *Environmental Impact Statements: The Supreme Court’s Acknowledgement in Lujan*

The text of Justice Scalia’s majority opinion in *Lujan* did not break new ground in terms of the relationship between Article III and the injury, causation, and redressability strands of the standing doctrine. The Endangered Species Act of 1973 (ESA) requires every federal agency to

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<sup>101</sup> 131 S. Ct. 2020 (2011).

<sup>102</sup> *Id.* at 2028 (citations omitted).

<sup>103</sup> 131 S. Ct. 1436, 1442 (2011).

<sup>104</sup> 504 U.S. 555 (1992).

consult with the Secretary of the Interior to help ensure that no agency action jeopardizes the continued existence of any endangered species or its habitat.<sup>105</sup> In 1978, the Departments of Interior and Commerce jointly issued a regulation that extended the consultation obligations of the ESA to actions taken abroad, not just those in the United States.<sup>106</sup> By 1986, however, the White House had changed hands, and the Interior Department issued a new regulation that limited the consultation requirement to agency actions in the United States or on the high seas.<sup>107</sup>

The Defenders of Wildlife brought an action in federal district court against the Secretary of the Interior, seeking a judicial declaration to the effect that the new regulation violated the ESA and an injunction that would require the Secretary to promulgate a new regulation that was consistent with the Act.<sup>108</sup> The district court found that the plaintiffs lacked standing to sue, but the Court of Appeals for the Eighth Circuit reversed.<sup>109</sup> On remand, the district court granted the plaintiffs' motion for summary judgment and issued the prayed-for declaratory and injunctive relief.<sup>110</sup>

Because the case had been decided on summary judgment, the Supreme Court was left to sort through the plaintiffs' declarations, which had been carefully crafted to avoid the springes set by previous standing decisions. In particular, *Sierra Club v. Morton* established that a public interest organization suing to protect the environment from allegedly harmful government action had to properly plead that at least some of its members partake of the geographical area in question.<sup>111</sup> In *Sierra Club*, the Club alleged adequate injury-in-fact—the despoliation of the Mineral King Valley, a spectacular natural setting that was about to be developed into a vacation resort by Walt Disney Enterprises.<sup>112</sup> The allegation of aesthetic injury was sufficient for Article III purposes; it was concrete and cognizable.<sup>113</sup> But the Sierra Club neglected to establish that any of its members ever used, or intended to use, Mineral King Valley. At a minimum, said the Court, the plaintiff must allege that she is within the group of people who would be injured by the government's action.<sup>114</sup>

In *Lujan*, the lawyers for Defenders of Wildlife assembled declarations in an effort to surmount this requirement. The Court of Appeals focused on

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<sup>105</sup> 16 U.S.C. § 1536(a)(2) (2006).

<sup>106</sup> *Lujan*, 504 U.S. at 558.

<sup>107</sup> *Id.* at 558–59.

<sup>108</sup> *Id.* at 559.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> 405 U.S. 727, 734–35 (1972).

<sup>112</sup> *Id.* at 729, 734.

<sup>113</sup> *See id.* at 734.

<sup>114</sup> *Id.* at 734–35.

two of them, executed by members Joyce Kelly and Amy Skilbred.<sup>115</sup> Justice Scalia described their declarations in some detail:

Ms. Kelly stated that she traveled to Egypt in 1986 and “observed the traditional habitat of the endangered Nile crocodile there and intends to do so again, and hopes to observe the crocodile directly,” and that she “will suffer harm in fact as the result of the American role in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . .” Ms. Skilbred . . . traveled to Sri Lanka in 1981 and “observed the habitat” of “endangered species such as the Asian elephant and the leopard” at . . . the site of the Mahaweli project[,] . . . although she “was unable to see any of the endangered species”; “this development project,” she continued, “will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited, which may severely shorten the future of these species”; that threat, she concluded, harmed her because she “intends to return to Sri Lanka in the future and hopes to be more fortunate in spotting at least the endangered elephant and leopard.” . . . [A]sked . . . if and when she had any plans to return to Sri Lanka, she reiterated that “I intend to go back to Sri Lanka,” but confessed that she had no current plans: “I don’t know when. There is a civil war going on right now. I don’t know. Not next year, I will say. In the future.”<sup>116</sup>

Despite the plaintiffs’ best efforts, the *Lujan* majority found these declarations insufficient for standing.<sup>117</sup> The main problem was a lack of imminence—it was simply not clear if or when Kelly and Skilbred would actually go to Egypt or Sri Lanka again to see these endangered species. “[T]he affiants’ profession of an ‘inten[t]’ to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough,” according to the Court.<sup>118</sup> “Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”<sup>119</sup>

Justice Scalia went on to find that the plaintiff also failed the redressability requirement. Even if the injunction were to take effect, how could one be sure that other agencies would actually consult with the Secretary of the Interior on projects abroad, particularly given that the Reagan Administration’s Justice Department had taken the position that the consultation requirement was not binding to begin with?<sup>120</sup> Interestingly,

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<sup>115</sup> *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 120 (8th Cir. 1990), *rev’d*, 504 U.S. 555 (1992).

<sup>116</sup> *Lujan*, 504 U.S. at 563–64 (alterations omitted).

<sup>117</sup> *Id.* at 562–64.

<sup>118</sup> *Id.* at 564 (second alteration in original).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 568–69.

however, Justice Kennedy did not join this portion of the opinion, leaving the redressability analysis with only a four-Justice plurality.<sup>121</sup>

Concurring in all but the redressability analysis, Justice Kennedy wrote a brief separate opinion suggesting an openness to congressionally created standing to challenge federal agency action in anything other than a complete blunderbuss manner. His remarks deserve careful attention:

As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of *Marbury* suing Madison to get his commission, or *Ogden* seeking an injunction to halt Gibbons' steamboat operations. *In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view.* In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.<sup>122</sup>

Thus, Justice Kennedy agreed with Justice Scalia's footnote seven but wanted to make clear why Congress should be able to relax the standing requirements within certain limits. Justice Kennedy elaborated on this view:

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, *the party bringing suit must show that the action injures him in a concrete and personal way.*<sup>123</sup>

In other words, cases bringing only generalized grievances would remain barred. The citizen-suit provision of the ESA did not, in Justice Kennedy's view, surmount even this very low threshold. It came too close to allowing anyone to sue to stop the federal government from violating what amounted to internal housekeeping rules with respect to interagency consultations.

Eventually, we will examine the Kennedy concurrence much more closely.<sup>124</sup> But the majority's footnote seven is truly an eye-opener. Nominally, it is a response to the plaintiff's argument that the limitation of

<sup>121</sup> *See id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>122</sup> *Id.* at 580 (emphases added) (citations omitted). The two decisions alluded to are, of course, Chief Justice John Marshall's magisterial opinions in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>123</sup> *Lujan*, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

<sup>124</sup> *See infra* Part IV.C.

the consulting requirement caused them a “procedural injury,” which entitled them to seek judicial review under circumstances where a plaintiff might not otherwise have such a right.<sup>125</sup> But instead of sweeping aside this shallow argument with a single dismissive sentence, former professor Justice Scalia delivered an intellectually honest mini-lecture on standing to seek judicial review of agency action:

There is this much truth to the assertion that “procedural rights” are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right *without meeting all the normal standards for redressability and immediacy*. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.<sup>126</sup>

This passage is astonishingly candid and has equally astonishing consequences. Justice Scalia, the member of the Court probably most closely associated with strict adherence to the Article III standing doctrine, admitted in this note that it is simply too late in the day to claim that Congress has no power to alter the Article III requirements of imminence (an integral element of the injury-in-fact requirement) and redressability.

Congress has already granted aggrieved persons the right to seek judicial review of agency action (or inaction). This right exists even where it is extremely unlikely that the plaintiff’s injury, such as aesthetic injury or decline in property value caused by building a new dam, will ultimately be redressed because the license is likely to be granted whether or not an environmental impact statement is prepared and filed. Congress has granted aggrieved persons the right to seek review even though the injury can hardly be characterized as imminent. The dam would not be built for many years, and the vicissitudes of the federal budget and simple politics could still scuttle the dam project. But intellectual honesty impelled Justice Scalia to note that the federal courts have long tolerated such suits for failure to file environmental impact statements under these conditions, which concededly do not meet the Article III requirements for redressability and imminence. Water under the bridge—or, as Justice Scalia might himself say, water over the dam.

The Court’s subsequent standing precedent confirms what Justice Scalia discussed in that *Lujan* footnote. The prospect of rising ocean waters brought *Massachusetts v. EPA*<sup>127</sup> to the Supreme Court. A group of private organizations petitioned the EPA to regulate greenhouse gas emissions from

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<sup>125</sup> *Lujan*, 504 U.S. at 572 n.7 (majority opinion).

<sup>126</sup> *Id.* (emphasis added).

<sup>127</sup> 549 U.S. 497 (2007).

new motor vehicles under the Clean Air Act.<sup>128</sup> Four years later, the EPA denied the petition on two grounds: first, that the agency lacked authority to regulate greenhouse gases and second, that in any event the agency would not choose to exercise such authority.<sup>129</sup> A number of states, including Massachusetts, joined as plaintiffs and were found not to have standing to obtain judicial review of the agency's decision by the Court of Appeals for the D.C. Circuit.<sup>130</sup>

The Supreme Court reversed, 5–4, with Justice John Paul Stevens writing for the majority. The Court found that Massachusetts had standing to seek judicial review of the agency's denial of the petition to regulate greenhouse gases.<sup>131</sup> The State's injury-in-fact was the potential loss of its coastal lands to rising sea levels.<sup>132</sup> In dissent, Chief Justice John Roberts protested that Massachusetts had failed the redressability test.<sup>133</sup> The State had not demonstrated that the regulation of new motor vehicle emissions in the United States would redress Massachusetts's claimed injury, the loss of coastal lands.<sup>134</sup> Eighty percent of greenhouse gas emissions already originate outside the United States, Chief Justice Roberts argued, and that percentage would only increase as China and India continued to develop economically.<sup>135</sup> Thus, the redressability of the State's injury was too conjectural. It was contingent on the behavior of third parties not before the Court. If China and India were not to greatly reduce their emissions, wrote Chief Justice Roberts, the allegedly injurious climate changes would occur whether or not the EPA regulated new tailpipe emissions in the United States. Ocean levels would still rise. Massachusetts would still lose land.<sup>136</sup>

That might be true, responded Justice Stevens, but the State would not lose *as much* land as it otherwise would.<sup>137</sup> Here, Justice Stevens's key intellectual move was to view redressability as a matter of degree rather than as an all-or-nothing proposition. Rather than ask whether the regulation of new vehicle emissions in the United States was likely to reverse the process of climate change completely, Justice Stevens asked whether such regulation was likely to lead to *some* diminution or slowing of climate change. For redressability purposes, it did not matter that China and India were much larger producers of greenhouse gases or that they were unlikely to make drastic reductions in emissions. "A reduction in domestic

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<sup>128</sup> *Id.* at 510.

<sup>129</sup> *Id.* at 511–14.

<sup>130</sup> *Id.* at 514.

<sup>131</sup> *Id.* at 517.

<sup>132</sup> *Id.* at 518–23.

<sup>133</sup> *Id.* at 542–46 (Roberts, C.J., dissenting).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 545.

<sup>136</sup> *Id.* at 545–46.

<sup>137</sup> *Id.* at 525–26 (majority opinion).



emissions would slow the pace of global emissions increases, no matter what happens elsewhere,” Stevens wrote.<sup>138</sup> Even if a reduction in domestic emissions only caused a modest slowing in the process of climate change, that presumably would also bring a small decrease or delay in the loss of coastal lands, or a small decrease in the risk that any coastal lands would be lost. That, in turn, would constitute redress—however partial.<sup>139</sup>

Justice Stevens’s critical move—from a binary concept of redressability to one of degree—was made possible by the principle recognized in Justice Scalia’s *Lujan* footnote and in Justice Kennedy’s *Lujan* concurrence. The principle is that Congress has the power to relax the standards for redressability and imminence. Justice Stevens wrote:

[A] litigant to whom Congress has “accorded a procedural right to protect his concrete interests”—here, the right to challenge agency action unlawfully withheld—“can assert that right without meeting all the normal standards for redressability and immediacy.” When a litigant is vested with a procedural right, that litigant has standing if there is *some possibility* that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.<sup>140</sup>

Congress had granted Massachusetts (and all other aggrieved persons)<sup>141</sup> a “procedural right” to challenge agency action wrongfully withheld. Against the argument that Massachusetts’s loss of coastal lands was too temporally remote, the principle recognized in *Lujan* left open the conclusion that Congress had relaxed the immediacy requirement for standing and therefore that Massachusetts did not have to meet the normal imminence standard. It merely needed to show that there was “some possibility” that such regulation would somewhat diminish the risk that coastal lands would be lost.

*Lujan* and *Massachusetts v. EPA* may be the first instances in which the Supreme Court openly admitted that the standing requirements may be relaxed. But, as we explain in the following sections, federal courts have permitted this to occur with respect to several procedural rights created by Congress. These cases demonstrate that the *Lujan* and *Massachusetts v. EPA* cases are not outliers but rather reveal a deeper contradiction in the law of standing.

### B. *The Freedom of Information Act and Informational Injury*

Although *Lujan* and *Massachusetts v. EPA* establish beyond doubt that Congress has the power to relax the imminence and redressability requirements, there is another area in which Congress has eliminated the

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<sup>138</sup> *Id.* at 526.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 517–18 (citations omitted) (emphasis added).

<sup>141</sup> *See, e.g., infra* Part II.B (describing a provision granting review to any person).

injury requirement altogether: the Freedom of Information Act (FOIA). Indeed, a strong case could be made that FOIA violates even Justice Kennedy's *Lujan* acknowledgement that Congress may grant standing except to "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."<sup>142</sup> For, under well-established law, *anyone* has standing to request judicial review of an agency's refusal to disclose documents under FOIA, even if just to see that government is following the law or out of sheer curiosity.<sup>143</sup>

FOIA states: "Except [as otherwise specifically provided], *each agency, upon any request for records* which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, *shall make the records promptly available to any person.*"<sup>144</sup> This provision literally grants "any person" a right to receive nonexempt records upon a proper request to a federal agency. It does not say any "injured person," or any "aggrieved person," as many judicial review provisions say, but simply "any person."

In *NLRB v. Robbins Tire & Rubber Co.*,<sup>145</sup> the Supreme Court made it clear that "any person" really means "any person":

FOIA . . . is broadly conceived, and its basic policy is in favor of disclosure. . . . [U]nless the requested material falls within one of the[] nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to *any member of the general public.*<sup>146</sup>

On this point, the Court in *EPA v. Mink* stated, "[the Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."<sup>147</sup>

The phrase "judicially enforceable public right" is striking; the Court has ruled out any such concept in most other places, including claims asserting violations of the Guaranty Clause (nonjusticiable)<sup>148</sup> and claims

<sup>142</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment); *see also infra* Part IV.C (discussing whether FOIA violates the standing doctrine under Justice Kennedy's theory).

<sup>143</sup> Of course, this is not to denigrate the importance of transparency in government or to impugn the motives of most FOIA requesters. The point is simply that the statute makes no distinction between someone who wants documents relating to something directly affecting her and someone who simply is curious.

<sup>144</sup> 5 U.S.C. § 552(a)(3)(A) (2006) (emphasis added).

<sup>145</sup> 437 U.S. 214 (1978).

<sup>146</sup> *Id.* at 220–21 (emphasis added) (citation and internal quotation marks omitted).

<sup>147</sup> 410 U.S. 73, 80 (1973). The quoted language is repeated in multiple Supreme Court decisions, including *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

<sup>148</sup> *See, e.g., City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980) (Guaranty Clause not justiciable); *see also Baker v. Carr*, 369 U.S. 186, 209–10 (1962) (explaining the Guaranty cases as they bear upon the political question doctrine). *But see generally* Erwin Chemerinsky, *Cases Under the*

asserting generalized grievances (quintessentially nonjusticiable).<sup>149</sup> Outside of FOIA, the Court has recognized very few instances that come close to anything like a “judicially enforceable public right.” One of them is taxpayer standing to enforce the Establishment Clause, and the case recognizing the right to enforce that provision in the courts, *Flast v. Cohen*,<sup>150</sup> has subsequently been whittled down to the slenderest possible reed.<sup>151</sup> Lest there be any doubt that FOIA was meant to create a judicially enforceable right to access, a quick read of § 552 dispels it:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.<sup>152</sup>

Where does this leave us? Not only can one obtain judicial enforcement of her FOIA right to see nonexempt documents leading up to the Department of Transportation’s participation in a series of decisions that led to a highway being built next to her house, but someone with no possible concrete interest in the matter whatsoever has the exact same right to access to those documents with the exact same standing to seek judicial review of any denial of that access. The plaintiff could be a reporter, an academic, or an ex-agency employee who simply feels the agency mistreated her. The motive could be public minded, intellectual, voyeuristic, or vengeful. Whatever the plaintiff’s motivation, courts do not inquire but merely apply the statute.

The “birther” cases are a prime example of the generalized grievances that federal courts are willing to entertain in the name of FOIA. In countless cases where an interested citizen made a FOIA request for documents relating to President Obama’s citizenship, international travel, birth, and so on, courts did not reject the claim as a generalized grievance. For instance, in *Taitz v. Ruemmler*, Orly Taitz, an indefatigable leader of the birther movement, sought review of the Obama Administration’s refusal to release

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*Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994) (arguing that the Court should do an about-face on the Guarantee Clause justiciability question).

<sup>149</sup> *E.g.*, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

<sup>150</sup> 392 U.S. 83 (1968).

<sup>151</sup> *See* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 603–09 (2007) (plaintiff lacked standing under *Flast* to challenge the President’s appropriation of monies to faith-based community groups because Congress did not specifically allocate the funds to the Executive Branch for that purpose; the President exercised his discretion to use them in that manner); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 476–82 (1982) (plaintiff lacked standing under *Flast* to challenge transfer of federally-owned land to the Northeast Bible College because it was accomplished under the Property Clause rather than under the Taxing and Spending Clause).

<sup>152</sup> 5 U.S.C. § 552(a)(4)(B) (2006).

his long-form birth certificate.<sup>153</sup> The district court affirmed the decision of Kathy Ruemmler, White House Counsel, not to release the documents allegedly in her possession because “the Supreme Court has long held that the President’s personal staff and advisors are not ‘agencies’ subject to FOIA requests.”<sup>154</sup>

What is remarkable about the case is that the court resolved it on the merits *even though* the court was dismissive of its basis, calling it a “Sisyphean quest.”<sup>155</sup> The court’s colorful language serves to emphasize (though perhaps unintentionally) the remarkable aspect of this FOIA case: the fact that the plaintiff could validly require the government to respond to a request that in any other context would assuredly be dismissed for lacking the requisite concreteness or cognizability, or as a generalized grievance. Indeed, other birther plaintiffs have gotten further in their review, notwithstanding the generalized nature of the grievances.<sup>156</sup>

This permissiveness in FOIA cases is rendered more dramatic yet when compared to another birther case that arose in a different procedural context. In *Berg v. Obama*, Phillip J. Berg, an attorney and self-proclaimed lifelong member of the Democratic Party, challenged President Obama’s eligibility for the presidency directly under the Natural Born Citizen Clause.<sup>157</sup> Berg sought orders compelling the production of Obama’s long-form birth certificate, enjoining Obama from running for President, and enjoining the Democratic National Convention from selecting Obama as the nominee on the grounds that Obama was not a “natural born citizen” within the meaning of Article II of the Constitution.<sup>158</sup> The district court dismissed Berg’s complaint because it asserted no more than a generalized grievance:

Plaintiff’s stake is no greater and his status no more differentiated than that of millions of other voters. . . . [H]e avers that he and “other Democratic Americans” will experience irreparable harm. This harm is too vague and its effects too attenuated to confer standing on any and all voters.<sup>159</sup>

Thus, courts held in one context that a birther request is a nonjusticiable generalized grievance and thereby incapable of constituting an injury-in-fact, but permitted the same basic claim to go forward in the

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<sup>153</sup> Taitz v. Ruemmler, No. 11-1421, 2011 WL 4916936, at \*1 (D.D.C. Oct. 17, 2011), *aff’d*, No. 11-5306, 2012 WL 1922284 (D.C. Cir. 2012) (per curiam).

<sup>154</sup> *Id.* (citing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980)).

<sup>155</sup> *Id.*

<sup>156</sup> See, e.g., Strunk v. U.S. Dep’t of State, 770 F. Supp. 2d 10, 17 (D.D.C. 2011) (in FOIA suit seeking access to documents regarding President Obama’s deceased mother, the court held, inter alia, that a genuine issue of material fact remained as to the sufficiency of the Department of Homeland Security’s search for the documents, precluding summary judgment).

<sup>157</sup> 574 F. Supp. 2d 509, 512 (E.D. Pa. 2008) (citing U.S. CONST. art. II, § 1, cl. 4), *aff’d*, 586 F.3d 234 (3d Cir. 2009).

<sup>158</sup> *Id.* at 512, 514 (citing U.S. CONST. art. II, § 1, cl. 4).

<sup>159</sup> *Id.* at 519 (footnote omitted) (citation omitted).

context of a FOIA request.<sup>160</sup> Why is one type of “Sisyphean quest” permitted to go forward but another not? These cases demonstrate that in FOIA cases, there is no rock bottom for injury-in-fact—no injury-in-fact is required at all.<sup>161</sup> This situation goes beyond Congress relaxing the imminence qualifier to the injury-in-fact requirement or relaxing the redressability requirement. FOIA represents the flat-out elimination of the injury-in-fact requirement. (By corollary, it also wipes out the causation and redressability requirements as well since they are yoked to the injury prong.) It permits anyone standing to sue for enforcement of a request to see documents based on *any* motivation, including simple desire to see that the government follow the law.

As it turns out, FOIA is just the beginning. The Supreme Court’s cases discussing whether informational injury is sufficient to satisfy the injury-in-fact requirement reveal the same chasm between procedural rights cases and common law cases. The Supreme Court was first faced with the question of whether informational injury can satisfy injury-in-fact in *United States v. Richardson*.<sup>162</sup> In that case, the plaintiff sought information about Central Intelligence Agency (CIA) expenditures and challenged the constitutionality of a statute permitting the CIA not to disclose the information. He claimed that as a federal taxpayer, he was entitled to the information under the Constitution’s Accounts Clause, which requires that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”<sup>163</sup> The Supreme Court held that Richardson lacked standing to demand this information under the Accounts Clause because he had no personalized injury and was asserting nothing more than a generalized grievance. As the Court explained, there was “no ‘logical nexus’ between [his] asserted status of taxpayer and the

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<sup>160</sup> This is more than a pattern: significantly, it occurs with procedural regularity. “As Chief Justice Marshall explained in an early decision of the United States Supreme Court, the existence of numerous decisions that have permitted a judicial procedure without explicitly discussing the procedure’s validity are properly viewed to ‘have much weight, as they show that [the asserted flaw in the procedure] neither occurred to the bar or the bench.’” *Perry v. Brown*, 265 P.3d 1002, 1019 (Cal. 2011) (alteration in original) (quoting *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 88 (1809)) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962)).

<sup>161</sup> This is not to say that such plaintiffs could never assert a valid injury-in-fact—merely that they have not been required to do so in FOIA cases, yet they have been required to do so in traditional review cases. Nor is this unique to birthers. We simply have not come across any FOIA cases requiring the plaintiff to demonstrate injury-in-fact beyond the invasion of a statutory right. *See, e.g.,* *Feinman v. FBI*, 680 F. Supp. 2d 169, 173 (D.D.C. 2010) (“The denial of this right to request ‘specific information’ [under FOIA] constitutes an injury-in-fact for standing purposes, ‘because the requester did not get what the statute entitled him to receive.’” (alterations omitted) (quoting *Zivotofsky ex rel. Ari Z. v. Sec’y of State*, 444 F.3d 614, 617–18 (D.C. Cir. 2006))).

<sup>162</sup> 418 U.S. 166 (1974).

<sup>163</sup> *Id.* at 167–69 (quoting U.S. CONST. art. I, § 9, cl. 7).

claimed failure of the Congress to require the Executive to supply a more detailed report of the [CIA's] expenditures."<sup>164</sup>

However, the Court reached precisely the opposite result from *Richardson* when faced with an informational injury suit that was authorized by an act of Congress. In *FEC v. Akins*, a group of voters sought review of the Federal Election Commission's (FEC) decision declining to classify a particular group, the American Israel Public Affairs Committee (AIPAC), as a "political committee" subject to certain reporting requirements.<sup>165</sup> The plaintiffs did not want to vote for candidates who had received money from AIPAC, an organization whose lobbying activities some found objectionable.<sup>166</sup> The plaintiffs filed suit under the Federal Election Campaign Act of 1971 (FECA)<sup>167</sup> and asked the FEC to find that AIPAC violated FECA and to classify AIPAC as a political committee, which among other things would require AIPAC to disclose its political contributions.<sup>168</sup> The FEC declined to do so, and the plaintiffs sought review in federal district court.<sup>169</sup> The case made its way to the Supreme Court, which addressed the question of whether the plaintiffs had standing.<sup>170</sup>

The Solicitor General argued that the plaintiffs suffered no injury-in-fact, just like the plaintiff in *Richardson*. The Court disagreed, noting that "Congress has specifically provided in FECA that 'any person who believes a violation of this Act has occurred, may file a complaint with the Commission'" and, further, that "any party aggrieved by an order of the Commission dismissing a complaint filed by such party may file a petition."<sup>171</sup> The plaintiffs had standing, said the Court, because "[t]he injury of which [they] complain[ed]—their failure to obtain relevant information—is injury of a kind that FECA seeks to address."<sup>172</sup> In other words, their injury-in-fact was the invasion of their statutory (procedural) right to the information. That Congress had authorized the suit was virtually the beginning and end of the discussion.

The Court distinguished *Richardson* on one very important ground: unlike in *Richardson*, in which the plaintiff was suing for information directly under the constitutional provision, the *Akins* group was suing under a statute specifically authorizing "any person" to sue, and they were suing

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<sup>164</sup> *Id.* at 175.

<sup>165</sup> 524 U.S. 11, 13–15 (1998).

<sup>166</sup> *See id.* at 15–16.

<sup>167</sup> 2 U.S.C. § 431(4) (2006).

<sup>168</sup> *Akins*, 524 U.S. at 13–15 (citing, inter alia, §§ 432–434).

<sup>169</sup> *Id.* at 18.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 19 (citing § 437(a)(8)(A), (g)(a)(1) (1998)) (alterations omitted).

<sup>172</sup> *Id.* at 20.

for the particular harms FECA sought to prevent.<sup>173</sup> Thus, the difference was that in *Akins*, Congress had specifically authorized the suit.

Both the FOIA birther cases and the *Richardson–Akins* dichotomy illustrate that there are indeed two different levels of the standing doctrine—one for traditional common law review (under, for instance, the “general directives” of the Constitution) and another for cases in which Congress has granted a procedural right to review. These cases are two examples of what linguists would call a minimal pair—two cases that are identical in every material respect except one. The distinguishing feature is the key to figuring out why we see different results in each case in the pair. Here, the two FOIA review cases were virtually identical except for one feature—the vehicle for the suit. In *Berg v. Obama*, the plaintiff was suing under the Natural Born Citizen Clause,<sup>174</sup> and the case was dismissed for lack of standing; whereas in *Taitz v. Ruemmler*, the plaintiff was suing under FOIA, and the case was decided on the merits.<sup>175</sup> Likewise, the two informational injury cases were identical in all material respects except for the vehicle for the suit. In *United States v. Richardson*, the vehicle was the Accounts Clause, and the suit was dismissed for lack of standing;<sup>176</sup> whereas in *Akins*, the vehicle was FECA, and the Court held that the plaintiff had standing.<sup>177</sup> The distinguishing feature in both of these minimal pairs is whether Congress specifically authorized a suit or not. Thus, the rule we can ascertain is that, for whatever reason, the Supreme Court treats the standing requirements differently in procedural rights cases—Congress really may grant standing to litigants even without their having to show an injury-in-fact.

Before moving on to explore the implications of this observation, we first take a moment to defend our premise here—namely, that informational injury cannot confer an injury-in-fact sufficient to confer traditional Article III standing.

Some will argue that one can suffer a concrete informational injury from an agency's refusal to disclose nonexempt documents, even if the plaintiff has no connection to the subject matter other than being an “interested citizen,” and therefore that the injury-in-fact requirement is satisfied. FOIA does not exist merely to satisfy curiosity—it is an important way to satisfy citizens' right to know what their democratically elected government is doing and to use that information to cast votes, protest,

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<sup>173</sup> *Id.* at 22.

<sup>174</sup> 574 F. Supp. 2d 509, 512 (E.D. Pa. 2008) (citing U.S. CONST. art. II, § 1, cl. 4), *aff'd*, 586 F.3d 234 (3d Cir. 2009).

<sup>175</sup> No. 11-1421, 2011 WL 4916936, at \*1 (D.D.C. Oct. 17, 2011), *aff'd*, No. 11-5306, 2012 WL 1922284 (D.C. Cir. 2012) (per curiam).

<sup>176</sup> 418 U.S. 166, 167–68, 170 (1974).

<sup>177</sup> *Akins*, 524 U.S. at 13–15, 20–21.

engage in political discourse, and so on. But is this asserted injury enough to confer standing when Congress has not acted?

For one thing, the Court in *Richardson* said no, such an interest is a generalized grievance. But even aside from *Richardson* and similar cases, this argument, taken to its logical extension in other situations, would not provide any principled distinction between “injury” and “not injury.” We readily agree that FOIA has an important policy role to play in our society. But this argument takes us down a philosophical rabbit hole of what, conceptually, can constitute concreteness or cognizability of injury. As Sunstein demonstrated, this discourse is intellectually incoherent. There can be no such concept as prepolitical or prelegal injury unless it is based on something like morality or religious doctrine, which surely cannot form the basis of standing doctrine.<sup>178</sup> Injury could be a cultural, political, or legal construct, or some combination of the three, but it is not etched in any nonreligious stone tablet. There simply is no Platonic form of injury available to use as a metric. What one person considers harm another may regard as not harm, or even as a benefit—for example, the construction of a subway station a block from one’s house, or the prohibition against taking distributions from one’s pension plan until a certain age, or being awakened at 3 AM by the police because they heard suspicious noises near one’s house and were concerned about the safety of the inhabitants. Out of context, none of these examples is an absolute harm or an absolute benefit—it just depends on the situation. Unless one has a universal metric that can tell us which of these three hypotheticals causes injury and which do not, then the conceptual approach goes nowhere.

Nor do we find compelling the argument that because Congress created the procedural right to the enforcement of FOIA requests, the plaintiff in such cases has an injury-in-fact merely by virtue of the violation of that right. This argument misses the crucial distinction between an injury-in-fact and an injury-at-law drawn above.<sup>179</sup> It conflates a legal harm (the deprivation of a legal right to the document that Congress created by statute) with injury-in-fact (which the Court has said must be a real-world harm above and beyond the mere deprivation of a legally created injury). Ever since the *Camp* decision in 1970, the mere violation of a legal right has been insufficient for standing—the plaintiff must also have an injury-in-fact, and the former does not always qualify as the latter. The question of legal harm goes to the merits of the plaintiff’s case in both FOIA and common law cases; there is no principled way to distinguish between them that would account for the different standing requirements.<sup>180</sup> Just as courts

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<sup>178</sup> See Sunstein, *supra* note 17, at 1436 n.18.

<sup>179</sup> See *supra* Part I.A; notes 31–35 and accompanying text.

<sup>180</sup> For this reason, we decline to conclude that litigants have a right to review in procedural rights cases because of some “due process” right. We do not see how there would be a due process right to



do not recognize *damnum absque injuria* (harm without violation of law), federal courts do not recognize a cause of action without an injury-in-fact—except, it seems, in procedural rights cases.

The informational injury cases simply cannot be squared with the precedents requiring concrete injury. Are they simply outliers? They give us the purest examples of how Congress has been permitted to alter what the Court describes as standing requirements mandated by Article III, but they are hardly outliers. Footnote seven of *Lujan* reminds us that the relaxation of imminence and redressability standards with relation to compelling the issuance of environmental impact statements is another example. And there are more.

### C. *The Chenery Doctrine*

The informational injury cases and the environmental impact statement cases are but two examples of how Congress has been permitted to alter Article III standing requirements with respect to review of agency action. The reason for their relative typicality is something known in administrative law circles as the *Chenery* doctrine.<sup>181</sup> The doctrine holds that reviewing courts may uphold agency decisions only on grounds specifically relied upon by the agency.<sup>182</sup> One basic corollary of this rule is that the only remedy a reviewing court can usually provide is to vacate the agency's decision and order the agency to reconsider it on other grounds.<sup>183</sup> Thus, when a petitioner is afforded judicial review of agency action, she rarely meets the usual requirement of redressability for she cannot demonstrate a likelihood that the prayed-for relief (vacatur for reconsideration) will redress her underlying injury-in-fact. As Justice Scalia pointed out in his *Lujan* footnote, the petitioner has a procedural right to review under circumstances where normal justiciability standards have not been met.<sup>184</sup>

In *INS v. Ventura*,<sup>185</sup> an immigration decision, the Court authoritatively restated this corollary to the *Chenery* doctrine:

No one disputes the basic legal principles that govern remand. Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. In such circumstances a “judicial judgment cannot be made to

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review in FOIA and other procedural rights cases but no due process right to review in any other case where the plaintiff files suit out of mere curiosity or a desire to make sure the government is doing its job. If there is no principled way to distinguish between the types of injury, then there is no principled way to distinguish between the types of injuries that would trigger a due process right to review and those that would not.

<sup>181</sup> The *Chenery* litigation actually went to the Supreme Court twice; we currently refer to the holding of *Chenery I*. See *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943).

<sup>182</sup> See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 362 (5th ed. 2009).

<sup>183</sup> See *id.* at 364.

<sup>184</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

<sup>185</sup> *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

do service for an administrative judgment.” Nor can an “appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency.” A court of appeals “is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.” Rather, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”

Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.<sup>186</sup>

This rule has been reaffirmed by the Supreme Court<sup>187</sup> and by the Court of Appeals for the District of Columbia Circuit.<sup>188</sup> Indeed, it has been codified in the Administrative Procedures Act, which specifies that a reviewing court shall “set aside” an agency decision unsupported on the grounds articulated.<sup>189</sup> It conspicuously does not say that the reviewing court can simply enter whatever judgment the agency should have reached, thereby providing the petitioner with redress of her grievance.

Although cases certainly exist where a petitioner does have a good chance of getting agency action reversed, whether by the agency on reconsideration or by the reviewing court itself on purely legal grounds, most petitioners have at most a slim chance their underlying injury will ever be redressed. This doctrine explains why footnote seven in *Lujan* says what it does. Justice Scalia chose judicial review to compel the filing of an EIS as an example of where Congress relaxed the redressability standard, but he had numerous examples from which to draw. Many, if not most, petitions for judicial review of agency action would fail the normal redressability requirements as they are expressed in *Linda R.S. v. Richard D.*<sup>190</sup> and *Allen v. Wright*,<sup>191</sup> and it is because of the *Chenery* doctrine and its corollary.

Likely no one would argue that *Chenery* and its progeny were wrongly decided on the grounds that they permit plaintiffs to seek review of agency action without any likelihood that their injury will be redressed on remand. To the contrary, it is expected that litigants will be able to seek judicial review of administrative action—our whole administrative state functions in concert with the judiciary. Even if courts do not recognize a bona fide due process right to judicial review of agency action (as some

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<sup>186</sup> *Id.* at 16 (alteration in original) (citing, inter alia, *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947); *Chenery I*, 318 U.S. at 88).

<sup>187</sup> See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

<sup>188</sup> See *Graceba Total Commc'ns, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997) (“As the Supreme Court has made clear [in *Chenery II*], we ‘may not accept appellate counsel’s *post hoc* rationalizations for agency action’ and are ‘powerless to affirm’ agency action on ‘grounds [that] are inadequate or improper.’” (alteration in original) (citation omitted)).

<sup>189</sup> 5 U.S.C. § 706 (2006).

<sup>190</sup> 410 U.S. 614 (1973).

<sup>191</sup> 468 U.S. 737 (1984).

commentators have argued they should),<sup>192</sup> the Administrative Procedures Act's explicit grant of judicial review rights<sup>193</sup> is elemental to the structure of our administrative state.

### III. CAN THE GAP BE CLOSED WITHIN EXISTING PRECEDENT?

Now that we see how the reality of much standing precedent does not line up with the orthodox rhetoric of Article III standing, we turn to possible resolutions. We first attempt to harmonize the procedural rights precedents with the absolutist Article III rhetoric without disturbing either line of cases. We turn to the Necessary and Proper Clause as it carries out Congress's various constitutional powers as one possible source of Congress's power to relax or eliminate Article III standing requirements.

Suppose that, under certain circumstances, Congress could use its constitutionally prescribed powers, as augmented by the Necessary and Proper Clause, to effectively expand federal court jurisdiction to include cases and controversies in which plaintiffs have not met the normal injury-in-fact, redressability, or imminence requirements. In most cases, federal courts would still be bound by the longstanding doctrine that the elements of standing are required by Article III. However, when Congress makes it clear that it is exercising its constitutional powers to authorize judicial enforcement of procedural rights without having to show the Article III minima, courts would be permitted to carry out the enforcement. This argument is grounded in two strains of Necessary and Proper Clause doctrine: first, the Court's holding in the 1949 case *National Mutual Insurance Co. v. Tidewater Transfer Co.*<sup>194</sup> that Congress may supplement Article III courts' jurisdiction if it would be necessary and proper to do so to carry out its Article I powers and second, the Supreme Court's recent expansion of Congress's power to act under the Necessary and Proper Clause in *United States v. Comstock*.<sup>195</sup>

#### A. *The Necessary and Proper Clause Doctrine*

The Necessary and Proper Clause states that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>196</sup> The Supreme Court's Necessary and Proper jurisprudence could fairly be described as fickle. At the turn of the century, the Clause was described in sweeping terms:

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<sup>192</sup> E.g., Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 401–06 (1958).

<sup>193</sup> See § 702 (2006) (judicial review).

<sup>194</sup> 337 U.S. 582 (1949).

<sup>195</sup> 130 S. Ct. 1949 (2010).

<sup>196</sup> U.S. CONST. art. I, § 8, cl. 18.

This clause is that which contains the germ of all the implication of powers under the Constitution. It is that which has built up the Congress of the United States into the most august and imposing legislative assembly in the world; and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its co-ordinate departments, as partitioned by that instrument.<sup>197</sup>

But the Court has also limited Congress's power under the Necessary and Proper Clause, requiring that congressional acts under the Clause be grounded in some other enumerated power of Congress.<sup>198</sup> Thus, there is no freestanding Necessary and Proper Clause "power." The question is, then, how closely linked must an act of Congress be to an enumerated Article I power? Historically, the Court required a relatively close connection but has recently relaxed the standard.

The first major case to apply the Necessary and Proper Clause was *McCulloch v. Maryland*, where the Supreme Court considered a challenge to Congress's establishment of the first Bank of the United States.<sup>199</sup> In *McCulloch*, the Court rejected the plaintiffs' invitation to declare the Bank unconstitutional under a literal reading of the Necessary and Proper Clause; namely, to limit the laws Congress could make to those strictly "necessary" to carrying out its constitutional duty.<sup>200</sup> Rather, the Court construed the Sweeping Clause to require only a minimal "fit" between legislatively chosen means and a valid governmental end, denying that a federal law must be "absolutely necessary" to the exercise of an enumerated power.<sup>201</sup> The Court stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>202</sup> Under this standard, the Court held the Bank constitutional under the Taxing and Spending Clause.<sup>203</sup>

Thus, what emerged was a two-part test: First, what enumerated power does the law carry into execution? And second, are the means "appropriate" and "plainly adapted" to the legitimate end? In addition, a preliminary inquiry can be added to the *McCulloch* test<sup>204</sup>—namely, whether the exercise of Congress's power violates some constitutional restriction, such

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<sup>197</sup> *In re Neagle*, 135 U.S. 1, 83 (1890) (Lamar, J., dissenting).

<sup>198</sup> See *infra* notes 204–06.

<sup>199</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>200</sup> *Id.* at 354–55.

<sup>201</sup> *Id.* at 387–88.

<sup>202</sup> *Id.* at 421.

<sup>203</sup> *Id.* at 325–26.

<sup>204</sup> In *McCulloch*, the only question was whether the act of Congress exceeded its Article I power even though it concededly did not violate any explicit constitutional prohibition. See *id.* at 421 (noting that an act of Congress must not be prohibited by the Constitution).

as the Tenth Amendment.<sup>205</sup> Over the next two centuries, the case law largely adhered to this formula.<sup>206</sup>

But in 2010, the Court dramatically changed course. That year, the Supreme Court decided *United States v. Comstock*,<sup>207</sup> which established a much more capacious test for applying the Necessary and Proper Clause. In *Comstock*, the Court upheld a Necessary and Proper challenge to a federal civil commitment statute. The plaintiffs contended that Congress lacked Article I authority to enact the federal civil commitment program<sup>208</sup> that allowed the government to detain sexually dangerous federal prisoners beyond the date the prisoner would otherwise be released.<sup>209</sup> The Court stated that for the Necessary and Proper Clause to grant Congress the legislative authority to enact a particular federal statute, the statute must constitute a means that is “rationally related” or “reasonably adapted” to the implementation of a constitutionally enumerated power.<sup>210</sup> Justice Breyer, writing for the Court, explained that the civil commitment statute was

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<sup>205</sup> *E.g.*, *United States v. Darby*, 312 U.S. 100 (1941); *see also* *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (striking down the Brady Act and holding that although the law carried into execution the Commerce Clause, it violated the principle of state sovereignty and was therefore not enforceable under the Necessary and Proper Clause); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572–73 (1997) (holding that an exemption statute singling out institutions that served mostly state residents for beneficial tax treatment and penalized those institutions that did principally interstate business was barred by the dormant implications of the Commerce Clause). *But see* *Camps Newfound/Owatonna*, 520 U.S. at 609 (Thomas, J., dissenting) (arguing that the majority impermissibly created a “dormant” Necessary and Proper Clause to supplement the “dormant” Commerce Clause).

<sup>206</sup> *E.g.*, *Gonzales v. Raich*, 545 U.S. 1, 5 (2005) (Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111, 118 (1942) (same); *Houston, E. & W. Tex. Ry. Co. v. United States (The Shreveport Case)*, 234 U.S. 342, 353–54 (1914) (same); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870) (upholding a federal tolling statute as to causes of action accrued during the Civil War on the basis of Congress’s war powers); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838) (holding that the Commerce Clause allowed Congress to pass federal law making it a felony to steal from stranded vessels). *But see, e.g.*, *Greenwood v. United States*, 350 U.S. 366, 375 (1956) (holding that a statute authorizing commitment of an accused who is found temporarily mentally incompetent or mentally disabled to stand trial is within congressional power to prosecute federal offenses under the Necessary and Proper Clause); *United States v. Barnow*, 239 U.S. 74, 78 (1915) (noting that the federal law prohibiting the fraudulent impersonation of a federal official was within the general power of Congress); *see also* *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (per curiam) (holding that the General Welfare Clause is not “a limitation upon congressional power,” but “rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause”).

<sup>207</sup> 130 S. Ct. 1949 (2010).

<sup>208</sup> 18 U.S.C. § 4248 (2006).

<sup>209</sup> *Comstock*, 130 S. Ct. at 1954.

<sup>210</sup> *Id.* at 1956–57 (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)) (describing *Sabri* as “using term ‘means-ends rationality’ to describe the necessary relationship” and “upholding Congress’s ‘authority under the Necessary and Proper Clause’ to enact a criminal statute in furtherance of the federal power granted by the Spending Clause”); *cf. id.* at 1967 (Kennedy, J., concurring) (arguing that the Court in *Sabri* did not intend to import a Due Process analysis by using the phrase “means-ends rationality”).

constitutional under the Necessary and Proper Clause due to five factors, which, “taken together,” militated in favor of the law.<sup>211</sup>

Most notable about *Comstock* is that the Court eschewed the traditional two-step *McCulloch* analysis<sup>212</sup> in favor of a more flexible test. Thus, what emerged was a five-factor test: (1) Whether the law carries out an express or implied Article I power, (2) Whether the law’s subject matter falls within a longstanding tradition of federal regulation, (3) Whether the law is “reasonably adapted” to an express or implied power of Congress, (4) Whether the law violates the states’ sovereign interests or the Tenth Amendment, and (5) Whether the links between the federal law and an enumerated Article I power are “not too attenuated.”<sup>213</sup>

Although there was a clear majority in *Comstock*, its application in the future is unclear. Among other things, it is less than certain how the five factors are to be applied in future cases.<sup>214</sup> Nonetheless, *Comstock* may be a bellwether for an upswing in Necessary and Proper jurisprudence and an expansion of what laws may validly be passed under the Clause.<sup>215</sup>

*B. The Necessary and Proper Clause and Federal Court Jurisdiction:  
Tidewater and Its Progeny*

Although courts have not addressed how the Court has approached expansions of the standing doctrine under the Necessary and Proper Clause specifically, the Necessary and Proper jurisdictional cases may provide insight into whether the Court would be willing to employ the Necessary and Proper Clause to allow Congress to relax the otherwise supposedly “irreducible” Article III minima of standing.<sup>216</sup> As we have just discussed,

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<sup>211</sup> *Id.* at 1965 (majority opinion).

<sup>212</sup> Namely, what enumerated power does the law carry into execution, and second, are the means “appropriate” and “plainly adapted” to the legitimate end? *See supra* notes 202–04 and accompanying text.

<sup>213</sup> *Comstock*, 130 S. Ct. at 1956–63.

<sup>214</sup> *See id.* at 1975 (Thomas, J., dissenting).

<sup>215</sup> *See, e.g.*, Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1, 31 (2010) (noting that *Comstock* reflects the Court’s recognition that Congress may desire increased power over such “troubling matters” as, inter alia, the financial crisis, terrorism, healthcare, drug addiction, domestic abuse, energy policy, and environmental threats); Ilya Somin, *Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power*, 2010 CATO SUP. CT. REV. 239, 239, 241 (contending that *Comstock* foreshadows the Court’s giving Congress a “virtual blank check . . . to regulate almost any activity it wants,” and mentioning the Health Care litigation as one such example then on the horizon).

<sup>216</sup> This jurisdictional body of law differs from the main corpus of Necessary and Proper cases in at least one important respect: rather than addressing the proper division of state and federal law, the procedural law cases tend to turn on the proper separation of powers within the federal government. To be sure, many of the cases carry on the theme of state sovereignty, *see, e.g.*, *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that the powers delegated to Congress under Article I and the Necessary and Proper Clause do not include the power to subject nonconsenting states to private suits for damages in state courts), but by and large the cases bear upon procedural issues internal to the federal government.

the increasing liberalization of the scope of the Necessary and Proper Clause is on the horizon, if not already upon us. *Comstock* suggests a more favorable environment for the argument that the Necessary and Proper Clause permits Congress to expand federal courts' jurisdiction to hear procedural rights cases with plaintiffs who do not meet the Article III minima of injury-in-fact, redressability, or imminence. For, as we have noted, the Article III standing requirements are considered jurisdictional.<sup>217</sup>

Generally speaking, it is "fundamental that Congress [can]not expand the jurisdiction of the federal courts beyond the bounds of Article III."<sup>218</sup> However, the Court arguably did just that in the 1949 case *National Mutual Insurance Co. v. Tidewater Transfer Co.*<sup>219</sup> In *Tidewater*, the Court addressed whether Congress could constitutionally expand diversity jurisdiction to open federal courts in the several states to actions by District of Columbia citizens against citizens of other states.<sup>220</sup> The plaintiff was a District of Columbia corporation that sued the defendant, an out-of-state corporation, in district court in Maryland for money damages arising out of an insurance contract.<sup>221</sup> The plaintiff's only cause of action was for the state breach of contract claim, so federal jurisdiction was predicated entirely on diversity of citizenship.<sup>222</sup> The plaintiff's argument for diversity was that it was a District of Columbia corporation and that the defendant was a corporation chartered by Virginia and subject to suit in Maryland by virtue of a license to do business there.<sup>223</sup>

This pleading of diversity met the statutory requirements, which at the time read in pertinent part:

The district courts shall have original jurisdiction as follows: . . . .

. . . .

. . . . Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and . . . is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory . . . .<sup>224</sup>

However, § 41(1) conferred federal jurisdiction in excess of Article III, which provides only that the judicial power of the United States extends to

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<sup>217</sup> See *supra* note 96 and accompanying text.

<sup>218</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 65 (1996) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

<sup>219</sup> 337 U.S. 582 (1949).

<sup>220</sup> *Id.* at 583 (Jackson, J.).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> 28 U.S.C. § 41(1) (1940) (footnote omitted). Today, the diversity statute can be found at 28 U.S.C. § 1332 (2006).

controversies “between Citizens of different States”<sup>225</sup> because the Supreme Court had long held that the District of Columbia was not a “state” within the meaning of this provision.<sup>226</sup> The defendant in *Tidewater* moved to dismiss for lack of subject matter jurisdiction on the theory that § 41(1) was an unconstitutional grant of federal jurisdiction in excess of Article III authority.<sup>227</sup> The district court agreed and dismissed the case, contributing to a deep split of authority among federal courts.<sup>228</sup> The court of appeals affirmed, and the Supreme Court granted certiorari.

The Court fractured badly. Justice Jackson, writing what today would be called a “principal opinion” on behalf of himself and Justices Black and Burton, reversed, holding that § 41(1) was a constitutional grant of authority.<sup>229</sup> In so holding, the principal opinion first reaffirmed that the District of Columbia is not a “state” within the meaning of Article III, Section 2 of the Constitution.<sup>230</sup> However, this was not the end of the story: “[t]his conclusion does not, however, determine that Congress lacks *power under other provisions of the Constitution* to enact this legislation.”<sup>231</sup> Specifically, the principal opinion stated that Congress may open Article III courts to persons who are subject to Congress’s Article I power, so long as the matter fits within the “traditional concept of the justiciable.”<sup>232</sup>

In the case of the diversity jurisdiction statute, the Court held it was a legitimate exercise of Congress’s broad power to govern the District of Columbia under Article I of the Constitution.<sup>233</sup> In Justice Jackson’s opinion, Congress could imbue federal courts with powers in excess of their Article III jurisdiction if necessary to effectuate Congress’s Article I powers: “It is too late to hold that judicial functions incidental to Art[icle] I powers of Congress cannot be conferred on courts existing under Art[icle] III . . . .”<sup>234</sup> He continued, “[A]lthough [Article III courts] are limited to the exercise of judicial power, *it may constitutionally be received from either Art[icle] III or Art[icle] I.*”<sup>235</sup> For Justice Jackson, both Congress’s power under Article I to govern the District of Columbia and the Necessary and Proper Clause provided the constitutional justification for § 41(1).<sup>236</sup>

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<sup>225</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>226</sup> See *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452–53 (1805).

<sup>227</sup> *Tidewater*, 337 U.S. at 583 (Jackson, J.).

<sup>228</sup> *Id.* at 583–84 nn.4–5 (citing cases).

<sup>229</sup> *Id.* at 591–92, 600.

<sup>230</sup> *Id.* at 588.

<sup>231</sup> *Id.* (emphasis added).

<sup>232</sup> *Id.* at 600.

<sup>233</sup> See U.S. CONST. art. I, § 8, cl. 17; *Tidewater*, 337 U.S. at 589 (Jackson, J.).

<sup>234</sup> *Tidewater*, 337 U.S. at 591–92 (citing *O’Donoghue v. United States*, 289 U.S. 516 (1933)).

<sup>235</sup> *Id.* at 592 (emphasis added).

<sup>236</sup> *Id.* at 588–89.



Indeed, Justice Jackson did not expressly limit this holding to the context of diversity jurisdiction. He observed:

Many powers of Congress other than its power to govern Columbia require for their intelligent and discriminating exercise determination of controversies of a justiciable character. In no instance has this Court yet held that jurisdiction of such cases could not be placed in the regular federal courts that Congress has been authorized to ordain and establish.<sup>237</sup>

Justice Jackson surveyed other instances in which the Court had upheld Congress's power to do so in other contexts. As examples, he named Congress's power to establish the federal Court of Claims,<sup>238</sup> to permit suits under the Federal Tort Claims Act,<sup>239</sup> and the power of federal courts to adjudicate bankruptcy suits.<sup>240</sup> Thus, Justice Jackson concluded, there was ample reason to affirm Congress's power to have federal courts hear matters not strictly within their Article III enumerated powers.

Most of the other Justices did not agree with Justice Jackson's precise rationale. Justice Rutledge, joined by Justice Murphy, concurred in the judgment but dissented from the plurality's reasoning.<sup>241</sup> They stated that "Article III courts in the several states cannot be vested, by virtue of other provisions of the Constitution, with powers specifically denied them by the terms of Article III."<sup>242</sup> Justice Rutledge pointed out that the cases relied on by the principal opinion involved Article I ("legislative") courts rather than Article III courts and therefore did not support a holding that Congress may circumvent the strictures of Article III and imbue Article III courts with extraconstitutional jurisdiction.<sup>243</sup> However, Justices Rutledge and Murphy concurred because they were of the opinion that *Hepburn* (holding that the District of Columbia is not a "State" for the purposes of the Diversity Clause) should be overruled. Because Justices Rutledge and Murphy construed the principal opinion as de facto undermining *Hepburn*, they joined the disposition.<sup>244</sup>

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<sup>237</sup> *Id.* at 592.

<sup>238</sup> *Id.* at 592–94 (citing *Williams v. United States*, 289 U.S. 553 (1933), *overruled on other grounds* by *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *United States v. Sherwood*, 312 U.S. 584, 591 (1941); *Pope v. United States*, 323 U.S. 1, 14 (1944)).

<sup>239</sup> *Id.* at 593–94 (citing *Brooks v. United States*, 337 U.S. 49 (1949)).

<sup>240</sup> *Id.* at 594–600 (citing, e.g., *Cont'l Ill. Nat'l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. Co.*, 294 U.S. 648 (1935); *Schumacher v. Beeler*, 293 U.S. 367 (1934); *Williams v. Austrian*, 331 U.S. 642, 657 (1947)).

<sup>241</sup> *Id.* at 604 (Rutledge, J., concurring).

<sup>242</sup> *Id.* at 607.

<sup>243</sup> *Id.* at 608–11 (citing, e.g., *O'Donoghue v. United States*, 289 U.S. 516 (1933); *Williams*, 289 U.S. 553; *Schumacher*, 293 U.S. 367).

<sup>244</sup> *See id.* at 625.

Justice Frankfurter, joined by Justice Reed, dissented on grounds similar to those of Rutledge and Murphy.<sup>245</sup> He stated:

[I]f courts established under Article III can exercise wider jurisdiction than that defined and confined by Article III, and if they are available to effectuate the various substantive powers of Congress, such as the power to legislate for the District of Columbia, what justification is there for interpreting Article III as imposing one restriction in the exercise of those other powers of the Congress—the restriction to the exercise of “judicial power”—yet not interpreting it as imposing the restrictions that are most explicit, namely, the particularization of the “cases” to which “the judicial Power shall extend”?<sup>246</sup>

Finally, Chief Justice Vinson, joined by Justice Douglas, wrote a separate dissent.<sup>247</sup> Chief Justice Vinson acknowledged that Congress should be able to establish inferior *legislative* courts (such as the federal Court of Claims and the bankruptcy courts) to address such matters as diversity suits involving District of Columbia citizens.<sup>248</sup> However, Chief Justice Vinson was concerned with the proper division of power between legislative (Article I) courts and Article III courts.<sup>249</sup> According to Justice Vinson, Congress could not use its Article I power to imbue Article III courts with extra jurisdiction. He concluded:

There is a certain surface appeal to the argument that, if Congress may create statutory courts to hear these cases, it should be able to adopt the less expensive and more practical expedient of vesting that jurisdiction in the existing and functioning federal courts throughout the country. No doubt a similar argument was pressed upon the judges in *Hayburn’s Case*. Unless expediency is to be the test of jurisdiction of the federal courts, however, the argument falls of its own weight. The framers unquestionably intended that the jurisdiction of inferior federal courts be limited to those cases and controversies enumerated in Art[icle] III. I would not sacrifice that principle on the altar of expediency.<sup>250</sup>

Given that *Tidewater* generated so many opinions, it is questionable how much precedential weight the principal opinion carries.<sup>251</sup> A true

<sup>245</sup> *Id.* at 646 (Frankfurter, J., dissenting).

<sup>246</sup> *Id.* at 648.

<sup>247</sup> *Id.* at 626 (Vinson, C.J., dissenting).

<sup>248</sup> *Id.* at 642–45.

<sup>249</sup> *Id.*; see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion) (holding that Article III jurisdiction could not be conferred on non-Article III courts, and holding unconstitutional 28 U.S.C. § 1471(c), which granted near-plenary jurisdiction to bankruptcy courts over matters related to the bankruptcy), *superseded by* 28 U.S.C. § 152 (2006); cf. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851–52 (1986) (upholding a similar grant of authority to the CFTC against a challenge that it violated Article III).

<sup>250</sup> *Tidewater*, 337 U.S. at 644–45 (Vinson, C.J., dissenting). On *Hayburn’s Case*, see *supra* note 94.

<sup>251</sup> It is not clear which of the *Tidewater* opinions is to be considered the holding of the case, but it is most probably the principal opinion. “When a fragmented Court decides a case and no single rationale

majority of five Justices signed on to the narrow disposition of upholding § 41(1) against its constitutional challenge, but only three found that Congress may imbue Article III courts with extra jurisdiction in support of Congress's exercise of its Article I powers. However, that is the reasoning most of the Justices employed to reach that result.<sup>252</sup>

### C. *The Viability of Extending Tidewater*

*Tidewater* is attractive because it holds so much explanatory potential. Justice Jackson's declaration is astonishing—it could have serious implications for the intersection between the Necessary and Proper Clause and federal court jurisdiction, which in turn would furnish support for the proposition that Congress may expand a different aspect of federal jurisdiction, the standing doctrine. But how viable is a solution grounded in such an idiosyncratic opinion?

Taking *Tidewater* to its logical extension, the Necessary and Proper Clause could be an avenue for courts to hear cases that would otherwise be outside of their Article III jurisdiction or which would otherwise fail to comply with the elements of Article III standing. Procedural rights cases, such as those involving FOIA and EIS requests, arise from Congress's Article I power to promulgate federal law that then may be applied by federal officials and administrative agencies. It would not take much of an extension of *Tidewater* to permit Congress to imbue federal courts with “extra” jurisdiction. So long as Congress acts pursuant to its constitutionally prescribed powers, under *Tidewater* it may endow Article III courts with the power to adjudicate disputes arising from federal law. In other words, implied in Congress's power to promulgate federal law is the need for courts to adjudicate disputes that arise in the course of the administration of procedural rights—for instance, when a government agency wrongfully refuses to honor a valid FOIA request.

In this respect, the procedural rights cases are similar to *Tidewater*: federal courts are needed to adjudicate disputes about congressionally bestowed procedural rights, just as they are needed to adjudicate disputes involving congressionally governed District of Columbia citizens. Thus, while common law cases (i.e., cases not involving procedural rights) within courts' traditional Article III jurisdiction must still adhere to the so-called Article III standing requirements, procedural rights cases, which may be

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explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” Marks v. United States, 430 U.S.188, 193 (1977) (internal quotation mark omitted). The *Tidewater* concurring opinion is not obviously narrower than the principal opinion, and, as one court noted of *Tidewater*, “the result is binding even when the Court fails to agree on reasoning.” King v. Palmer, 950 F.2d 771, 784 (D.C. Cir. 1991) (citing *Tidewater*, 337 U.S. at 655 (Frankfurter, J., dissenting)).

<sup>252</sup> See *supra* note 248.

heard in federal courts pursuant to the exercise of Congress's constitutional powers, need not meet the Article III standing requirements.

From a pragmatic perspective, the *Tidewater* solution seems desirable. The volume of federal law has increased almost exponentially over the last century.<sup>253</sup> Without a way for courts to both fulfill the intent of Congress and to provide an adequate forum for these cases, Congress's effectiveness in making and enforcing social policy would be seriously hamstrung. More than ever, *Tidewater's* observation rings true—that “[i]n mere mechanics of government and administration we should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of changing times.”<sup>254</sup> This resonates with Justice Kennedy's observation in *Lujan* that “[a]s Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common law tradition.”<sup>255</sup>

Moreover, in light of *Comstock*, the Court may be more amenable to finding Acts of Congress to be “necessary and proper” than it was in previous years—perhaps the Court's apparent flexibility in *Comstock* could extend to its analysis of congressional grants of standing in procedural rights cases. Of course, the Necessary and Proper Clause may only be used to carry out some existing power of Congress, but under the new rule in *Comstock*, the power need not be explicitly enumerated so long as the act of Congress is rationally related to an enumerated power. Applied in the standing context, procedural rights should meet this test: simply put, procedural rights arise when the federal government uses its power to establish the administrative state.<sup>256</sup>

However, we acknowledge the serious shortcomings of *Tidewater* as a potential solution to the standing dilemma. For one thing, the *Tidewater* principal opinion is distinguishable from the present case on the ground that

<sup>253</sup> Indeed, Justice Jackson characterized the rise of the administrative state as “probably . . . the most significant legal trend of the last century.” Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 1 & n.1 (1994) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)).

<sup>254</sup> *Tidewater*, 337 U.S. at 585–86 (Jackson, J.).

<sup>255</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment). *But see Tidewater*, 337 U.S. at 644–45 (Vinson, J., dissenting) (arguing that “expediency” should not be the test of federal jurisdiction).

<sup>256</sup> That is, the power of Congress and the Executive to legislate for and administer federal agencies. The question of whether the administrative state is a legitimate exercise of federal power has been exhaustively treated elsewhere, and we do not revisit it here other than to observe that it is in this day and age considered a well-established power of the federal government. But for a contrary view, see McCutchen, *supra* note 253, at 1–2 (“Current approaches to separation of powers problems [are] inadequate to the task of coping with the administrative state. . . . There is no room for a fourth branch within th[e] tripartite scheme of governance. In exercising executive, legislative, and judicial power, administrative agencies combine powers that the Constitution separates. . . . In short, the administrative state is unconstitutional.”).

*Tidewater* did not profoundly alter the balance of powers among the coordinate branches of the federal government. Moreover, the Court has avoided asserting so-called “protective jurisdiction” in cases where Congress sought to confer federal jurisdiction over matters not enumerated in Article III, such as state law matters.<sup>257</sup> In cases since *Tidewater*, the Court has appeared unwilling to relax the Article III limits of federal court jurisdiction and has rejected clever arguments designed to get around the constitutional limits.<sup>258</sup> Finally, it is undeniable that Justice Jackson’s opinion in *Tidewater* only attracted three votes—it was not even a plurality opinion.<sup>259</sup> *Tidewater* is almost certainly a *sui generis* opinion that bent the rules in order to give equal standing to residents of the District of Columbia. As a matter of realpolitik, it is probably foolish to think the Court would be willing to extend the decision beyond its facts.

#### IV. “OUT OF THE BOX” SOLUTIONS

Having failed to find solutions that require little or no disturbance to existing law, we now consider four options that would require changes. The first two are “nuclear options”: first, overruling the orthodox Article III standing cases from 1970 on or second, overruling the procedural rights cases that have either expressly or impliedly allowed Congress to relax or eliminate some or all of the Article III standing requirements. Finding the nuclear options unrealistic or unappealing, we turn to two additional possibilities that have their seeds in existing opinions but are not law. One is Justice Kennedy’s concurrence in *Lujan*, which we seriously consider recommending but ultimately conclude would not resolve the standing dilemma. The last option—which we endorse—finds its inspiration in a 2011 standing decision written by Justice Scalia but would extend the idea far beyond the doctrinal compass of that decision. Simply put, we think the most plausible way to reconcile the Court’s inconsistent approaches to standing is to admit that what constitutes a “case” or “controversy” depends on the context and that there are two tiers of the Case or Controversy Clause—one for procedural rights cases and one for traditional common law review. Before laying out why this is our preferred solution, we assess each of the options in turn.

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<sup>257</sup> See James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1423–24 & n.7 (2007) (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983); *Mesa v. California*, 489 U.S. 121 (1989)); see also, e.g., James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1927 (2004) (describing and discussing the problem of protective jurisdiction).

<sup>258</sup> See sources cited *supra* note 257.

<sup>259</sup> But see *supra* note 247 and accompanying text.

*A. Abandoning the Article III Orthodoxy*

Perhaps the most obvious—and least plausible—solution is simply to retract the rhetoric of cases like *Allen v. Wright* and the text of *Lujan* stating that Article III requires in every case imminent injury-in-fact, causation, and redressability. Of course, any such recommendation would be in the running for least original academic argument ever. Much, if not most, of the public law professoriat regards the Article III standing doctrine as intellectually bankrupt. In 1978, Professor Joseph Vining wrote that it is impossible to read the standing decisions “without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate.”<sup>260</sup> The Supreme Court itself recognized as much in its *Valley Forge* opinion where Justice Rehnquist, writing for the Court, admitted, “We need not mince words when we say that the concept of ‘Art[icle] III standing’ has not been defined with complete consistency in all of the various cases decided by this Court . . . .”<sup>261</sup> Justice Rehnquist’s comment was marvelous understatement.

A series of full-blown, devastating critiques by Professors Lee Albert,<sup>262</sup> Gene Nichol,<sup>263</sup> William Fletcher,<sup>264</sup> Susan Bandes,<sup>265</sup> Cass Sunstein,<sup>266</sup> Steven Winter,<sup>267</sup> and many others<sup>268</sup> demonstrated quite persuasively that the question of standing should be seen as nothing more than a question of whether the plaintiff in any given case has presented a good cause of action on the merits. Of course, if the Court were to take these critiques to heart, the problem we identify in this Article would disappear. For whatever reason, however, nothing close to a majority of the

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<sup>260</sup> JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW I* (1978).

<sup>261</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 475 (1982).

<sup>262</sup> Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

<sup>263</sup> Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68 (1984).

<sup>264</sup> Fletcher, *supra* note 28.

<sup>265</sup> Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990).

<sup>266</sup> Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613 (1999); Sunstein, *supra* note 17; Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

<sup>267</sup> Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

<sup>268</sup> E.g., Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315 (2001); Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Hessick, *supra* note 40; Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663 (2007); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

Justices has ever been persuaded by them.<sup>269</sup> Because the topic has been so thoroughly and expertly briefed elsewhere, this Article does not attempt to revisit the issue of whether the standing doctrine ought to be seen as nothing more than an actionability analysis or whether it ought to be “deconstitutionalized.”<sup>270</sup>

### B. Conforming the Procedural Rights Cases to the Article III Orthodoxy

The other nuclear option would be to flat-out overrule the procedural rights cases permitting relaxation of the Article III standing elements. In other words, overrule *Chenery*, the EIS cases, and the FOIA cases. But we see a significant unattractive feature in this course of action: these cases are important to the structural functioning of federal law. If Congress cannot supplement agency enforcement (expensive and resource intensive) with private attorneys general (cheap and plentiful), its ability to achieve the objectives of the enabling statute would be severely hampered.

Aside from these policy concerns, the EIS, FOIA, and other examples of the procedural rights exception are very well entrenched in the Court's jurisprudence. This course of action would require the overruling, or dramatic restructuring, of the instances in which Congress has heretofore been permitted to relax or eliminate the standing requirements. The Court would have to overrule *Massachusetts v. EPA*,<sup>271</sup> reconfigure FOIA such that, contrary to its text, a litigant must show an injury-in-fact<sup>272</sup> and overrule such cases as *NLRB v. Robbins Tire & Rubber Co.*,<sup>273</sup> *EPA v. Mink*,<sup>274</sup> and the birther cases;<sup>275</sup> and reconsider the application of the *Chenery* doctrine.<sup>276</sup> The impact on the future of judicial review would be unpredictable and extraordinarily wide reaching.

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<sup>269</sup> However, Judge Posner very recently acknowledged that the Court's asserted grounds for the standing doctrine are “tenuous” and have been subject to “strong criticisms by reputable scholars.” Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs, 650 F.3d 652, 655–56 (7th Cir. 2011) (recognizing, however, that the standing doctrine has undeniable prudential benefits).

<sup>270</sup> Cf. Lee, *Deconstitutionalizing Justiciability*, *supra* note 28 *passim* (arguing that the mootness doctrine should be seen as entirely prudential).

<sup>271</sup> 549 U.S. 497 (2007). That is, unless the Court were willing to retrospectively rest its decision in *Massachusetts v. EPA* entirely on *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907), in which Justice Holmes opined that a state “has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

<sup>272</sup> Cf. 5 U.S.C. § 552(a)(3)(A) (2006).

<sup>273</sup> 437 U.S. 214, 220–21 (1978) (making clear that in FOIA, “any person” really means “any person”).

<sup>274</sup> 410 U.S. 73, 80 (1973) (“[FOIA] create[s] a judicially enforceable public right to secure such information from possibly unwilling official hands.”); *see also, e.g.*, *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (same).

<sup>275</sup> *See, e.g.*, *Taitz v. Ruemmler*, No. 11-1421, 2011 WL 4916936 (D.D.C. Oct. 17, 2011), *aff'd*, No. 11-5306, 2012 WL 1922284 (D.C. Cir. 2012) (per curiam); *Strunk v. U.S. Dep't of State*, 770 F. Supp. 2d 10 (D.D.C. 2011).

<sup>276</sup> *See supra* Part II.C.

Perhaps the result would not have to be so extreme. Maybe all Congress would have to do would be to establish legislative courts to deal with these “Article I matters,” as suggested by Chief Justice Vinson in his *Tidewater* dissent.<sup>277</sup> However, we would be concerned, as Justice Vinson was, with the proper division of power between legislative (Article I) courts and traditional (Article III) courts. Surely, Chief Justice Vinson cautioned, Congress cannot constitutionally divert a significant number of cases and controversies over which Article III courts had jurisdiction to be heard instead by legislative courts.<sup>278</sup> For one thing, Congress might overstep its bounds by delegating too much of the Article III function to Article I courts—the inverse problem of Congress delegating Article I power to Article III courts. Moreover, decades after Chief Justice Vinson made this suggestion, the Court actually struck down Congress’s attempt to confer near-plenary jurisdiction on bankruptcy courts for this very reason—namely, that Congress imbued those legislative courts with too much Article III power to pass constitutional muster.<sup>279</sup> On the other hand, just a few years later, the Court upheld a similar delegation of power to the Commodity Futures Trading Commission.<sup>280</sup>

Nevertheless, it would be highly troubling for Congress to evade the limits imposed on Article III courts by simply shifting large classes of cases to Article I tribunals.<sup>281</sup> Even if certain claims are heard in Article I tribunals, their work is still subject to supervision of the Article III judiciary, a function the federal courts cannot perform if the power of the Article I tribunal lies outside the scope of the justiciable.<sup>282</sup> Indeed, the right

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<sup>277</sup> See *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 642–45 (1949) (Vinson, C.J., dissenting).

<sup>278</sup> See *id.* See generally Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988) (discussing the role of legislative courts in the Article III scheme).

<sup>279</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion) (holding that Article III jurisdiction could not be conferred on non-Article III courts, and holding unconstitutional 28 U.S.C. § 1471(c), which granted near-plenary jurisdiction to bankruptcy courts over matters related to the bankruptcy), *superseded on other grounds by* 28 U.S.C. § 152 (2006); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (holding that the bankruptcy court lacked authority under Article III to enter final judgment on a widow’s counterclaim).

<sup>280</sup> See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851–52 (1986). Congress may now delegate judicial authority so long as it does not delegate the “essential attributes of judicial power” reserved to Article III courts, the origins and importance of the right to be adjudicated make them conducive to adjudication by a non-Article III court, the concerns that drove Congress to depart from the requirements of Article III are significant, and the parties have had a chance to consent to a non-Article III decision-maker. *Id.* at 847–59.

<sup>281</sup> See Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 205–25 (2011); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 739 (2004).

<sup>282</sup> See *Schor*, 478 U.S. at 852–53 (holding that an Article I tribunal’s work must be reviewable by an Article III tribunal to pass constitutional muster); *N. Pipeline*, 458 U.S. at 85–86 (same). See generally Pfander, *supra* note 281, at 689–97 (doubting that Article I courts should be able to exercise



to Article III review is simply another example of a procedural rights case that poses a standing problem when it comes time to review it in federal court. In other words, the problem of reviewing the work of Article I tribunals takes us back to where we started—the standing dilemma.

If Congress were to create legislative courts for all of the statutes in which litigants would not meet the Article III standing requirements, to say that there would be a feasibility problem would be an understatement. And, as we have noted, there would also be the problem of Congress delegating too much judicial power to nonjudicial entities in controversies arising under the “Laws of the United States”<sup>283</sup>—to say nothing of the availability of Article III judicial review of such cases.

In sum, even if Chief Justice Vinson’s legislative courts suggestion could form part of the solution, it could not eradicate the problem. And overruling the procedural rights cases would create an administrative nightmare. In this Article, we are searching for a solution with the virtue of parsimony. We feel impelled to offer a recommendation that does the least violence to existing precedent while eradicating the basic contradiction that currently plagues it. Thus, we turn to less destructive possible ways of closing the gap between the Court’s rhetoric and its reality.

### C. *Justice Kennedy’s Concurrence in Lujan*

One possible solution is to adopt Justice Kennedy’s locution in his *Lujan* concurrence. He stated, in pertinent part:

As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court’s opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on “any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter,” it does not of its own force establish that there is an injury in “any person” by virtue of any “violation.”

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power exceeding the scope of Article III, because, among other reasons, Article I tribunals are subject to the supervision of the Article III judiciary).

<sup>283</sup> U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.<sup>284</sup>

There is a lot here to analyze. The first sentence is a welcome acknowledgement that the Framers could not have foreseen the administrative state and that there must be some flexibility in interpretation to maintain the checks and balances that separation of powers was in large part meant to establish. At first blush, the next sentence—"Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before"—seems quite radical. It could be misinterpreted as meaning that Congress has the authority to interpret the meaning of "injury" and "causation" within the Article III standing doctrine. But clearly Justice Kennedy meant nothing of the sort. In the last quoted sentence, he stated, "[T]he party bringing suit must show that the action injures him in a concrete and personal way." It is the Court and not Congress that Justice Kennedy envisioned as defining what is sufficiently "concrete" and "personal." Moreover, Justice Kennedy joined the majority in *Summers v. Earth Island Institute*<sup>285</sup> when it stated that injury—unlike redressability—forms a hard constitutional floor below which Congress may not go.<sup>286</sup> Instead, Justice Kennedy's sentence about being able to create a case or controversy where none existed before is simply his way of repeating the truism that the Court has stated for years—that Congress may create new rights, the violation of which might well constitute concrete injury-in-fact as judged by the Court. Examples cited in the *Lujan* majority opinion are *Trafficante v. Metropolitan Life Insurance Co.*,<sup>287</sup> in which Congress created a legal right for individuals to live in a racially integrated community, which the Court found to satisfy the concrete injury-in-fact requirement, and *Hardin v. Kentucky Utilities Co.*,<sup>288</sup> in which Congress, through the Tennessee Valley Authority, had created a legal right to a geographically bounded monopoly for a certain utility. In

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<sup>284</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted) (quoting 16 U.S.C. § 1540(g)(1)(A)).

<sup>285</sup> 555 U.S. 488 (2009).

<sup>286</sup> *Id.* at 497.

<sup>287</sup> 409 U.S. 205, 211–12 (1972).

<sup>288</sup> 390 U.S. 1, 8–10 (1968).

each of these cases, the plaintiff would not have had standing to sue but for the creation of the respective legal rights Congress had created.<sup>289</sup>

In order to exercise this power, under Justice Kennedy's *Lujan* opinion, Congress must affirmatively establish a nexus between the substantive harm being addressed and the class of persons permitted to sue. "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."<sup>290</sup>

Does FOIA meet this requirement? In its pertinent parts, it states:

Except with respect to [certain exempt documents] each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to *any person*.

. . . .

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.<sup>291</sup>

It is difficult to see where in this statute Congress identified any connection between the harm and the class of persons permitted to sue. "Any person" may bring a document request, and that person may act as a complainant if the agency wrongfully withholds records. The statute says nothing explicitly about any nexus between substantive harm and class of plaintiffs. It is safe to assume that the primary harm to be prevented by FOIA is undue secrecy in government and that the class of persons meant to be benefitted is the American public as a whole. But Congress did not connect the dots, and it is more than doubtful whether the public as a whole is a sufficiently discrete class to surmount Justice Kennedy's test.<sup>292</sup>

In *Massachusetts v. EPA*, petitioners sought judicial review of the EPA's refusal to regulate tailpipe emissions in newly manufactured American automobiles.<sup>293</sup> The Clean Air Act requires the federal government to take action to reduce emissions. It states:

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<sup>289</sup> Although it should be noted that in *Hardin*, which predated the *Camp* decision, the plaintiff presumably had standing simply by virtue of the fact that it satisfied the "legal right" test later replaced by the *Camp* "injury-in-fact" test.

<sup>290</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>291</sup> 5 U.S.C. § 552(a)(3)(A), (4)(B) (2006) (emphasis added).

<sup>292</sup> *Cf. Lujan*, 504 U.S. at 578 ("Individual rights, within the meaning of this [ESA] passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public.").

<sup>293</sup> 549 U.S. 497, 505 (2007).

The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.<sup>294</sup>

The applicable judicial review provision is very broad in scope; it states in pertinent part:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under [various rules and standards] or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under [various sections] may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.<sup>295</sup>

Again, there is no tracing of the harm to be prevented to the class of people who are permitted to sue. The targeted harm is made clear: to protect public health and welfare from air pollutants. But the statute does not connect the harm to the class of plaintiffs permitted to sue. This creates a bit of a mystery: on what basis did Justice Kennedy vote with the majority to find that Massachusetts had standing to seek judicial review of the EPA's refusal to regulate? He did not write separately in the case. Did he believe that Congress had impliedly made clear that the class of plaintiffs permitted to sue was anyone who breathes? It seems unlikely that this was his rationale given his vote in *Lujan* to find the citizen-suit provision insufficiently specific about tracing the consultation right to a proper class of plaintiffs. Surely it could be argued that we are all diminished when a species permanently disappears from the Earth. More likely, Justice Kennedy was persuaded by Justice Stevens's federalism argument based on Justice Holmes's 1907 decision in *Georgia v. Tennessee Copper*, finding that states have special standing to sue to protect interests that might otherwise have been protected by mechanisms ceded to the federal government in the plan of the Constitutional Convention.<sup>296</sup>

So acceptance of Justice Kennedy's *Lujan* concurrence might not require the overruling of *Massachusetts v. EPA* (if the other Justices in the

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<sup>294</sup> Clean Air Act, 42 U.S.C. § 7521(a)(1) (2006) (sometimes referred to by its public law section number, § 202(a)(1)).

<sup>295</sup> *Id.* § 7607(b)(1).

<sup>296</sup> See *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237–39 (1907); see also *Massachusetts v. EPA*, 549 U.S. at 518–20 & n.17 (citing *Tennessee Copper*).

majority would be willing to rest the decision entirely on *Tennessee Copper*). But what about the EIS cases, as Justice Scalia's footnote seven in *Lujan* acknowledged? The National Environmental Policy Act (NEPA) states its purpose as follows:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.<sup>297</sup>

NEPA is the statute that requires government agencies to produce Environmental Impact Statements under specified circumstances. If a government agency wrongfully fails to issue an EIS, someone who could potentially suffer injury-in-fact by the proposed development may file an action in federal district court under the Administrative Procedure Act to compel the issuance of an EIS. The judicial review provision of the APA states in pertinent part, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>298</sup> This provision, of course, provides a generic judicial review provision for many federal statutes that create rights. It is not tailored in any way to NEPA. Does the phrase "within the meaning of a relevant statute" satisfy Justice Kennedy's requirement that Congress "relate the injury to the class of persons entitled to bring suit"? If so, the requirement is so toothless that it is difficult to understand how the citizen-suit provision in the Endangered Species Act in *Lujan* could have failed the test.

Perhaps, though, Justice Kennedy's *Lujan* opinion is simply inapposite to the EIS problem. His opinion spoke of Congress creating "injuries" and recognizing "chains of causation" that otherwise would not satisfy the case or controversy requirement. Justice Scalia's footnote seven, by contrast, acknowledged only that the EIS cases illustrate Congress's ability to relax the imminence and redressability prongs in cases involving procedural rights. We can only speculate whether footnote seven would have implied the legitimacy of a statute that recognized an otherwise nonjusticiable causal chain, and *Summers v. Earth Island* makes it clear that the base injury requirement has a harder constitutional floor than the imminence and redressability requirements.

In the end, a fair reading of Justice Kennedy's *Lujan* concurrence fails to close most of the gap that we have identified in this Article between the Court's repeated insistence that injury, causation, and redressability are

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<sup>297</sup> § 4321.

<sup>298</sup> 5 U.S.C. § 702 (2006).

Article III minima, and its tolerance of so many procedural rights cases in which the Court accepts Congress's ability to alter the imminence and redressability standards. Justice Kennedy states repeatedly that every case must present concrete injury and that it is the Court, not Congress, who shall decide what injuries are concrete.<sup>299</sup> Nothing in Article III standing jurisprudence is as protean as the notion of concreteness in injury. Sometimes concrete means "cognizable," as aesthetic injury was found to be in *Sierra Club v. Morton*.<sup>300</sup> Sometimes concrete means the injury is "likely to arise," as in *Camreta v. Greene*.<sup>301</sup> Sometimes it means the plaintiff would have to be "directly affected" by the injury, as in *Sierra Club*.<sup>302</sup> Sometimes it means the injury must constitute "perceptible harm," as in *Lujan*.<sup>303</sup> It is beyond the scope of this Article to demonstrate the significant differences among these concepts—if, indeed, they even rise to the level of concepts. But as long as the Court refuses to give a fixed definition of concrete injury, it will continue to have the last word on the matter. Under Justice Kennedy's view, Congress would not truly be able to set lower statutory thresholds for standing. Thus, it would not explain why Congress has been permitted to do so: It would not resolve the standing dilemma.

As we turn to the option we endorse, however, it is worth noting that Justice Kennedy's *Lujan* concurrence makes at least one critical realization—that "cases or controversies" can mean different things in different contexts. That realization is critical to closing the gap between the Court's rhetoric and its actual decisions.

*D. A Two-Tier Solution: The Zone of Interests Test as a Secondary Interpretation of Cases and Controversies*

The Court should reconcile the contradiction in its standing jurisprudence. Its cases insist that imminent injury-in-fact and redressability are constitutionally required, but other of its cases openly acknowledge that Congress may relax or even eliminate such requirements in cases requesting judicial review of agency action. The best way to eliminate this

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<sup>299</sup> "This case would present different considerations if Congress had sought to provide redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009) (Kennedy, J. concurring) (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>300</sup> 405 U.S. 727, 734–35, 738 (1972).

<sup>301</sup> 131 S. Ct. 2020, 2029 n.4 (2011).

<sup>302</sup> The phrase "directly affected" is how the *Lujan* Court characterized this phrase from *Sierra Club*. See *Lujan*, 504 U.S. at 563; see also *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 345 (1977) ("[W]e note that the interests of the Commission itself may be adversely affected by the outcome of this litigation.").

<sup>303</sup> See *Lujan*, 504 U.S. at 566.

contradiction is to recognize openly that there are two different “tiers”<sup>304</sup> of the Case or Controversy Clause of Article III.<sup>305</sup> Which tier applies depends on the type of matter presented to the court—the Clause means one thing for most cases and something else for procedural rights cases in which Congress has clearly exercised its power to alter injury, causation, or redressability standards. This thesis reflects little more than what the Supreme Court has already said in cases like *Lujan* and *Massachusetts v. EPA*—that procedural rights cases are simply different.

In the *Camp* case, Justice Douglas replaced the old legal right test for standing in agency review cases with the injury-in-fact test,<sup>306</sup> which presumably was drawn in part from the idea that Article III generally requires a “personal stake in the outcome of the controversy.”<sup>307</sup> Under *Camp*, however, one seeking judicial review of agency action needed not only to allege injury-in-fact. One also needed to demonstrate that he or she “arguably [fell] within the zone of interests” that the enabling statute was meant to benefit.<sup>308</sup>

To this point, then, the zone of interests test has been an *additional* requirement for a plaintiff to surmount to obtain standing. (In fact, it has been treated as an additional *prudential* requirement.)<sup>309</sup> However, the zone of interests test has greater potential utility than merely as an adjunct to the injury, causation, and redressability requirements of Article III. The zone of interests test connects the statute’s objective to the class of plaintiffs permitted to sue. It accomplishes the goal of Justice Kennedy’s *Lujan* concurrence—to identify the nexus between the harm to be prevented and the plaintiffs—except the courts perform the analysis rather than Congress.

Indeed, the Court recently used the zone of interests test in a way that demonstrates the power of Congress to confer standing on “any aggrieved person” with the stroke of a pen. In *Thompson v. North American Stainless, LP*,<sup>310</sup> the plaintiff Thompson and his fiancée both worked for the defendant. After she filed a sex discrimination claim against the company,

<sup>304</sup> We use the term “tiers” here with apologies to Akhil Amar, who meant something entirely different when he wrote *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985), in which he argued that “cases” should be viewed as different from “controversies” and that Congress is only required to vest subject matter jurisdiction in federal courts over “cases” at any given time. Our “two-tier” argument has nothing to do with his other than using the same phraseology and the fact that both arguments have something to do with Article III.

<sup>305</sup> It should be noted that what is commonly referred to as the “Case or Controversy Clause” is not actually a “clause” at all. The term “cases” is used in conjunction with the first three heads of the judicial power, and the term “controversies” is used to describe the remaining six. See U.S. CONST. art. III, § 2, cl. 1.

<sup>306</sup> *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–53 (1970).

<sup>307</sup> See *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>308</sup> *Camp*, 397 U.S. at 153.

<sup>309</sup> *E.g.*, *Bennett v. Spear*, 520 U.S. 154, 162 (1997); see also *supra* note 97.

<sup>310</sup> 131 S. Ct. 863, 867 (2011).

Thompson was terminated. Following exhaustion of administrative remedies, he sued for retaliation under Title VII. That statute provides that “a civil action may be brought . . . by the person claiming to be aggrieved.”<sup>311</sup> The Sixth Circuit affirmed the grant of summary judgment against Thompson, reasoning that because Thompson did not “engage[] in any statutorily protected activity, either on his own behalf or on behalf of [his fiancée],” he was “not included in the class of persons for whom Congress created a retaliation cause of action.”<sup>312</sup>

The Supreme Court, in an opinion by Justice Scalia, reversed. Justice Scalia disapproved of the court of appeals’ application of the zone of interests test. For the Court, it was simple—a person “aggrieved” is one who suffers the injury the statute aims to protect by its text: here, employment retaliation. As the Court explained:

Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers’ unlawful actions. . . . Hurting him was the unlawful act by which the employer punished [his fiancée]. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. *He is a person aggrieved with standing to sue.*<sup>313</sup>

Thus, the Sixth Circuit was wrong to require the plaintiff to show a real-world harm (sexual discrimination directed at the plaintiff himself) not found in the text of the statute in order for him to come within the zone of interests of the statute. The correct approach, according to the Court, was to look to the zone of interests of the statute as revealed by its text alone—and Thompson was, literally, a person “aggrieved.” Likewise, a shareholder could not sue a company for “firing a valuable employee for racially discriminatory reasons” merely because the shareholder “could show that the value of his stock decreased as a consequence” because as a matter of statutory interpretation, Congress did not intend that result.<sup>314</sup> The zone of interests, as determined by the text of the statute and intent of Congress, is the last word on what injuries qualify.

The question is, what happens when Congress clearly did intend for *any* person to be able to enforce a statute, as in the procedural rights cases we identify in Part II? *Thompson* makes the intent of Congress and the text of a statute paramount. What we see in the procedural rights cases is that Congress may do such a thing—that plaintiffs suing pursuant to such statutes have standing because that was the express purpose of the statute.

Could the Court’s analysis in *Thompson* be extended to such a situation, and could it account for the differences in the standing doctrine

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<sup>311</sup> 42 U.S.C. § 2000e-5(f)(1) (2006).

<sup>312</sup> *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 807–08 (6th Cir. 2009), *rev’d*, 131 S.Ct. 863 (2011).

<sup>313</sup> *Thompson*, 131 S. Ct. at 870 (emphasis added).

<sup>314</sup> *Id.* at 869.



for procedural rights cases? Probably not, at least not literally. *Thompson* tacked the zone of interests test atop the usual Article III requisites for Title VII (*Thompson* clearly had an injury-in-fact, having lost his job). In the procedural rights cases, federal courts have effectively dispensed with the Article III standing elements and instead gone straight to the text of the statute. But *Thompson* illustrates the utmost importance of congressional purpose in the statutory standing context.

The Court should acknowledge the primacy of congressional intent and recognize that it may require a different set of standing rules in the procedural rights context. We propose that the Court openly recognize Congress's power to relax or eliminate any of the usual Article III requisites where standing to vindicate procedural rights is concerned and to replace those usual requirements with a "naked" zone of interests test. We propose that there are really two tiers to the standing doctrine: one tier for traditional common law review, in which the plaintiff must meet the usual requirements of injury, causation, and redressability, and another tier for procedural rights review, in which the plaintiff need only show that she is within the zone of interests that Congress had in mind when it drafted the statute in question. Thus, the zone of interests test would no longer be only a prudential requirement superimposed upon the Article III minima—rather, it would form the true constitutional baseline for justiciability in procedural rights cases.

Let us suppose that in enacting FOIA, Congress's main purposes were to restore and maintain public confidence in the transparency of government.<sup>315</sup> Let us further suppose that Congress wanted any member of the public to be able to sue to enforce a request for a nonexempt document for any reason, including pure curiosity, even if that person cannot surmount the usual tests of injury, causation, and redressability. We argue that such a plaintiff falls within the zone of interests arguably to be protected by the statute and therefore that the plaintiff has standing to sue.

Some would say that our proposal is unnecessary because, in our hypothetical enactment of FOIA, Congress intended to create a cause of action to enforce document requests for any reason, and the refusal to produce nonexempt documents causes the plaintiff injury-in-fact that would be redressed by an injunction ordering disclosure. But, as we have seen, this analysis is simply incorrect under existing law.<sup>316</sup> It applies the old legal right test discarded by the *Camp* decision. The frustration of one's curiosity about the workings of government by the denial of a document request does not cause concrete injury in the way that the Court has variously described it. Whether one says that the injury is not "cognizable," or because the plaintiff is not "directly affected," or because he suffers no "perceptible

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<sup>315</sup> A complete study of the origins and purposes of FOIA is beyond the scope of this Article.

<sup>316</sup> See *supra* Parts I.A, II.B.

harm,” it is not “concrete” under any of the Court’s existing precedents. In our “mere curiosity” FOIA hypothetical, the procedural injury is *in vacuo*. It is untethered to any concrete injury, and it does not itself constitute concrete injury—and that is okay. The only way to rationalize the fact that our hypothetically curious FOIA plaintiff has standing to sue under existing practice is to say that Congress has the power to eliminate the concrete injury requirement. At least, however, we can say that our hypothetical plaintiff falls within the zone of interests that is evident in the text and purpose of the statute.

A word should be said about FOIA and the elimination of the injury requirement. *Summers v. Earth Island Institute* stated clearly that injury occupies a different position in the Article III pantheon than imminence or redressability. “Unlike redressability, . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute,” Justice Scalia wrote for the majority.<sup>317</sup> With all respect, we cannot see the reasoning behind this statement. The injury–causation–redressability regime stems from the Court’s previous pronouncements in *Baker v. Carr* and *Flast v. Cohen* that Article III standing requires the plaintiff to have a “personal stake in the outcome of the controversy.”<sup>318</sup>

Assuming *arguendo* that this is an accurate statement of what Article III requires, a plaintiff must be able to allege sufficient injury, causation, and redressability in order to satisfy the requirement. If the plaintiff sues a utility for putting a nuclear power plant on line, allegedly without the requisite safety checks, and he adequately pleads that he has lung cancer, there is no doubt but that he has alleged concrete injury. But if the power plant is in Maine and he lives in Hawaii, or if he smoked three packs of cigarettes a day for forty years, he has no personal stake in the outcome of the controversy over whether the utility did or did not do the requisite safety checks. He will not recover in this lawsuit regardless. Or if the plaintiff sues for an injunction to reverse the effects of past governmentally aided housing discrimination but there is no remedy that a district court can legally order that would have that effect, then the plaintiff has no personal stake in the outcome of the controversy over whether the government did or did not illegally aid housing discrimination. The lawsuit cannot produce the result he seeks. Causation and redressability are just as essential to “personal stake” as is injury and therefore must occupy equal places in the pantheon of Article III standing requirements—whatever those places are.

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<sup>317</sup> 555 U.S. 488, 497 (2009).

<sup>318</sup> *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (“The ‘gist of the question of standing’ is whether the party seeking relief has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

It is beyond the scope of this Article to argue definitively whether NEPA and the APA, as currently constituted, ought to be construed as requiring normal injury and causation, even if Congress has relaxed the usual imminence and redressability standards. Should a resident of Maine be able to sue to require the issuance of an EIS for a development in Maui, even if the person never intends to go there? Clearly under existing law the answer is no, and that seems correct to us. We highly doubt that the combined purpose of NEPA and the APA meant to eliminate or relax the injury and causation standards for those who sue to force issuance of an EIS. Without making a foray into the matter, we will content ourselves with the statement that, if Congress were to make it clear that it did want anyone to be able to sue for the issuance of an EIS with respect to any development anywhere, even if she were unable to allege any concrete injury, causation, or redressability, then the plaintiff falls within the zone of interests meant to be protected by the statute and she ought to have standing. The same goes for the ESA. One can quibble with whether the affiants in *Lujan* had satisfied the normal requirements for imminence or concrete injury, but we will content ourselves with saying that Congress should be able to eliminate or relax those requirements under the citizen-suit provision of the ESA by making it sufficiently clear that it means to do so.

How can our proposal be consistent with the Case or Controversy Clause? It cannot if “case or controversy” inalterably means imminent and concrete injury-in-fact, causation, and redressability. But as we have said from the start, the Court’s actions betray the truth of this rhetoric, and in its candid moments (i.e., footnote seven of *Lujan*), the Court itself admits the untruth of it. We think the most plausible way to reconcile the Court’s actions with the Case or Controversy Clause is to admit that what constitutes a case or controversy depends on the context. In the procedural rights cases, when Congress has made it clear that it wants to dispense with one or more of the injury, causation, or redressability requirements, then the litigation still constitutes a case or controversy within the meaning of Article III so long as the plaintiff arguably falls within the zone of interests that Congress intended to protect by the statute. (This is what we mean by a “naked” zone of interests requirement—it is unburdened by injury, causation, or redressability.) Congress cannot eliminate the zone of interests requirement, but it would seldom need to. It may simply make it clear that it intends all persons to be beneficiaries of the procedural right created in the statute and that the normal Article III requisites are not to apply.

There is no a priori reason why a single provision in the Constitution cannot have multiple meanings depending on the context. “Due Process” in the Fourteenth Amendment sometimes means that government may not deprive a person of a liberty or property interest without a compelling justification (substantive due process); it sometimes means that government may not deprive a person of a liberty or property interest without adequate predeprivation notice and a hearing, even if it has a compelling justification

(procedural due process); and sometimes it means that government may not deprive a person of a liberty or property interest in violation of one of the provisions in the Bill of Rights (incorporation due process). “Equal Protection of the Laws” sometimes means that government may not use classifications without a compelling interest that is narrowly tailored to achieve its purpose (strict scrutiny); sometimes it means that government may not use a classification unless it can show an important governmental interest (intermediate scrutiny); and sometimes it means that government may use classifications so long as it can produce any kind of minimally plausible *ex post* reason for it (rational basis review). Viewing the Case or Controversy Clause as having two tiers depending on the context violates *no per se* rule that constitutional provisions can only have one meaning.

There is much to recommend the naked zone of interests approach where a plaintiff has standing to pursue a procedural rights case if Congress has authorized such an action with specificity. Justice Harlan said it best: If the politically accountable branches want to authorize “private attorneys-general” to help enforce a regulatory statute, then the federal courts should permit it.<sup>319</sup> The Court should defer to Congress regarding whether third parties who have little or no particularized connection to the subject matter ought to be permitted to sue because the statute is aimed at remedying a problem that affects us all—just as false claims against the government affect us all, however minutely. Far from the courts arrogating power to themselves in such cases, they are accepting the political judgment of the elected branches that the judicial power should be deployed to achieve such broad societal objectives, just as they do in all federal criminal cases.

#### V. HISTORICAL OBSERVATIONS ON A TWO-TIER INTERPRETATION OF CASES AND CONTROVERSIES

One objection to our two-tier proposal will be that it is inconsistent with the history behind Article III and, in particular, the Case or Controversy Clause. In this brief Part, we aim to show that the orthodox wisdom about the history behind this Clause is far less telling than most lawyers and judges suppose.<sup>320</sup> Many grandiose words have been said about

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<sup>319</sup> *See id.* at 116–33 (Harlan, J., dissenting). Congress has employed such private attorneys general since at least the end of the Civil War when it enacted the False Claims Act, which offers private individuals a bounty for “snitching” on those who lodge false claims against the government. *See* 31 U.S.C. §§ 3729–3733 (2006).

<sup>320</sup> For example, when interpreting constitutional jurisdiction and standing issues, it is often urged that the Court look to the “original intent of the framers,” *see, e.g., Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 688 (1838) (argument of Hazard, counsel for Rhode Island) (“[I]t is important for us to inquire, strictly, what was the meaning and intent of the framers of the constitution, [with] respect [to jurisdiction]? And here, fortunately, nothing is left to conjecture or tradition. The explicit, unequivocal intention of the framers of the constitution upon this subject[] is matter of authentic public record.”); *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 645 (1949) (Vinson, C.J., dissenting), as well as traditional English practice, *see, e.g., Vt. Agency of Natural Res. v. United States ex rel.*

this history, but in fact the Framers spent very little if any time thinking about what “cases or controversies” might mean.<sup>321</sup> Moreover, there were practices in preconstitutional English jurisprudence that undermine the claim that litigation in the nature of “public actions” was wholly foreign to the Framers.<sup>322</sup>

Let us be clear. In this Part, we do not claim that history compels or even strongly supports the claim that the Case or Controversy Clause accommodates litigation in the nature of public actions. We do claim that history is sufficiently ambiguous that it does not constitute a credible objection to our two-tier proposal. If our claim is to be defeated, it will have to be done on the basis of superior policy arguments.

*A. Procedural Rights Cases: Cognates of Jaffe and Berger's  
“Public Actions”?*

In advocating the two-tier reassessment of the standing doctrine, we are working off of the well-mooted debate over the historical origins and original meaning of the cases or controversies language in Article III. As Professors Raoul Berger and Louis Jaffe persuasively elucidated, the notion that a litigant must show a personal stake in a controversy to maintain public rights actions lacks support in English and early American preconstitutional legal practice.<sup>323</sup> Rather, the use of prerogative writs in public actions in England leading up to the American Constitutional Convention demonstrates that “one without a ‘personal stake,’ a mere stranger to the action complained of, was allowed to initiate and maintain an ‘adversary’ proceeding in the public interest.”<sup>324</sup> This was the case both for public actions to challenge “jurisdictional usurpation[s]” as well as review of administrative actions.<sup>325</sup> And arguably, similar suits were permitted in American courts during the Framing Era.<sup>326</sup>

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Stevens, 529 U.S. 765, 774 (2000) (“[T]he Constitution established that ‘judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’” (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J.) (alteration omitted))).

<sup>321</sup> See *infra* Part V.B.

<sup>322</sup> See *infra* Part V.A.

<sup>323</sup> Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269–82 (1961); cf. *Flast*, 392 U.S. at 101 (“[T]he question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis . . . is on . . . ‘a personal stake in the outcome of the controversy . . . .’” (emphasis added)).

<sup>324</sup> Berger, *supra* note 323, at 827.

<sup>325</sup> *Id.* at 821 & n.29, 824–25 & nn.44–45, 47, 827 (citing, e.g., *Regina v. Surrey*, (1870) 5 L.R. 466 (Q.B.) 466, 472–73 (distinguishing between an aggrieved party and “one who comes merely as a stranger,” and implying that both had some level of entitlement to seek judicial review); Anonymous, (1652) 82 Eng. Rep. 765, 765 (K.B.) (issuing writ of mandamus to parishioners and officers to make those “elected in that parish to serve the office”); *Case of the Borough of Bossiny*, (1735) 93 Eng. Rep.

The rationale, according to a later English commentator, was that “[e]very citizen has standing to invite the court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddling busybody but as a public benefactor.”<sup>327</sup> This history does much to explain why the Court has heretofore inexplicably insisted that the rules for standing in procedural rights cases are simply different than in suits between private parties.

There is at least one dissenter to this view,<sup>328</sup> but we do not find his response persuasive. Bradley Clanton has argued that in some of the English cases cited by Berger, the plaintiff had a special interest or relationship to the controversy that functioned as an analog to a personal stake.<sup>329</sup> However, this does not account for all of Jaffe and Berger’s examples, nor does it explain the contemporary view that “strangers” to a public action could pursue prerogative remedies in public actions. All it shows is that frequently strangers had some personal connection to the matter, perhaps because people with some connection were more likely to know of the matter than those who did not. In any event, as Professor Winter has pointed out, “the fact that ‘strangers’ *often* had some personal interest in the matter before the court does not establish that a personal stake was a *prerequisite* to suit.”<sup>330</sup> Professor Berger’s research contradicts this inference. And, as Berger explained, while review of cases brought by legal strangers with no personal interest in the matter was discretionary, review of strangers with a personal interest in the matter was mandatory.<sup>331</sup> Clanton’s logical mistake is that he

infers a negative (that a stranger who lacked a personal interest could not sue) solely from the discussion of a positive (the legal status of a party with an

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996, 996 (K.B.) (issuing writ requiring local election); Anonymous, (1733) 94 Eng. Rep. 471 (K.B.) (same); and Lidleston v. Mayor of Exeter, (1697) 90 Eng. Rep. 567 (K.B.) (issuing writ providing for certain “relief of the poor”); *see also* Berger, *supra* note 323, at 822 (noting it was “too clear” that this well-established power of courts to review public action suits brought by parties with no personal stake in the controversy extended to courts’ review of administrative action (quoting Church v. Inclosure Comm’rs, (1862) 142 Eng. Rep. 956, 964 (C.P.))).

<sup>326</sup> *See, e.g.*, Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 735 (2009) (describing legislatively authorized “informer” suits, by which “citizens could sue in order to vindicate the interests of the community at large”).

<sup>327</sup> Berger, *supra* note 323, at 821 n.31 (quoting H.W.R. WADE, ADMINISTRATIVE LAW 126 (2d ed. 1967) (referencing the English practice)).

<sup>328</sup> *See* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997).

<sup>329</sup> *See id.* at 1014–15.

<sup>330</sup> Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL’Y F. 155, 157 n.13 (2001) (emphasis added).

<sup>331</sup> *See* Berger, *supra* note 323, at 821.

interest in the matter); yet everyone agrees that the courts treated the former differently than the latter—i.e., one mandatory, the other discretionary.<sup>332</sup>

Clanton's objections do not undermine Professor Berger's thesis that a personal stake was not a prerequisite to a suit in the public interest.

Although the historical evidence may not be conclusive, the Supreme Court has often repeated that the Constitution must be interpreted in light of the common law and English practice at the time of its framing.<sup>333</sup> In our case, the common law practice of permitting nonparties with no particularized injury to pursue public actions is probative of whether Article III was intended to permit such litigants to do so today in American federal courts. Professors Berger and Jaffe furnish historical support that the cases and controversies language in Article III was understood differently in public rights cases as compared to run-of-the-mill civil cases between private parties. Public rights cases and controversies included actions by nonparties with no particularized interest in the matter.<sup>334</sup>

This account supports our proposed secondary meaning of cases and controversies in agency review cases. It provides a historical rationale for why courts have continued to treat procedural rights cases differently: procedural rights cases are a modern iteration of public rights cases. As one scholar put it, "procedural rights," within the meaning of Justice Scalia's *Lujan* footnote seven,<sup>335</sup> are "created by statute and implicated by a federal agency's action or failure to act."<sup>336</sup> Thus, like public rights cases, procedural rights cases arise when a government actor or administrative agency exceeds its jurisdiction (calling for a writ of prohibition) or fails to carry out its duty (calling for a writ of mandamus). While the two types of

<sup>332</sup> Winter, *supra* note 330, at 157 n.13.

<sup>333</sup> *E.g.*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 563 (1962) (Harlan, J.) ("[O]ne touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort 'recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems.'" (quoting *United Steelworkers v. United States*, 361 U.S. 39, 60 (1959) (Frankfurter & Harlan, JJ., concurring))); *Ex Parte Grossman*, 267 U.S. 87, 108–09 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); *see Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (noting that the terms "case" and "controversy" and "judicial power" "presuppose[] an historical content"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) (noting the meaning of "case" or "controversy" must be interpreted with reference to the "business of the . . . courts of Westminster when the Constitution was framed"); *see also Honig v. Doe*, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting) (arguing standing has "deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition").

<sup>334</sup> Berger, *supra* note 323, *passim*.

<sup>335</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

<sup>336</sup> Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 256 (2008) (arguing that after *Massachusetts v. EPA*, the justiciability of cases involving, among other factors, such "procedural rights" ought to be treated under different factors than the traditional injury-in-fact, causation, and redressability analysis).

cases may not be exact historical cognates,<sup>337</sup> Jaffe and Berger's analyses provide support for the recognition of different tiers of justiciability requirements in procedural rights cases and in private rights cases.

*B. Origins of Article III's Cases and Controversies Language*

The drafting history of the case and controversy language of Article III does not contradict Jaffe and Berger's account of what the Framers likely had in mind when they drafted the judiciary provision.<sup>338</sup> From what we can tell from the Constitutional Convention, its drafting was haphazard at best. As we noted above, we do not claim the language of Article III *compels* a two-tiered reading. But we do think that the drafting history of the cases and controversies language helps dispel the notion that the Framers intended Article III to imply the rigid standing requirements laid down in *Allen v. Wright* and *Lujan*.

There is scant evidence in the constitutional record regarding the drafting of what became the cases or controversies language of Article III.<sup>339</sup> The most heated deliberations had to do with the Madisonian Compromise and the creation of lower federal courts; the wording of "cases" or "controversies" seemed almost an afterthought. During the convention, Edmund Randolph and James Madison proposed the following language: "[T]he jurisdiction of the National Judiciary shall extend to cases, which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony," which was agreed to.<sup>340</sup> Madison later proposed amending that language to read "that the jurisdiction shall extend to all cases arising under the Nat[ional] laws: And to such other questions as may involve the Nat[ional] peace & harmony," which was agreed to unanimously and submitted to the Committee of Detail in similar form.<sup>341</sup>

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<sup>337</sup> We defer a more thorough discussion of whether they can be considered cognate doctrines, since the issue could very well take up another full article. On this point, however, Fallon's treatment of the public rights doctrine is highly instructive. See Fallon, *supra* note 278, at 951–70.

<sup>338</sup> Because of the notorious difficulty of proving a negative, we trace the drafting history in some detail to bolster our conclusion that it is inconclusive.

<sup>339</sup> For some of the most complete records available, see MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913); 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 196–250 (1971); THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (Jonathan Elliot ed., 2d ed. 1836); and THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

<sup>340</sup> JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 97 (Gaillard Hunt & James Brown Scott eds., 1920).

<sup>341</sup> *Id.* at 279, 336.



Once the Convention agreed on the broad elements of the new government, the Committee of Detail set to drafting the Constitution.<sup>342</sup> The Committee amended the judiciary language substantially. Rather than keep the rather vague language “questions . . . involv[ing] the national peace and harmony,”<sup>343</sup> the judiciary provision now enumerated more heads of jurisdiction. It now read:

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects.<sup>344</sup>

The reason for the dramatic change here likely had to do with the delegates' need for compromise over the extent of federal power; their solution was to propose specified heads of subject matter jurisdiction. These themes did not come up in the general Convention but were innovated by the Committee of Detail.<sup>345</sup> The Committee did not record its minutes, but the process can be pieced together from several documents: an incomplete initial outline by Wilson,<sup>346</sup> an outline by Randolph with edits by Rutledge, extensive notes and a second draft by Wilson with edits by Rutledge, and the final report presented to the Convention.<sup>347</sup> None of these documents reveals how or why the Committee members arrived at the case or controversy language. Randolph's early outline mirrors the language arrived at in the general convention.<sup>348</sup> Wilson's rough draft did not contain

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<sup>342</sup> On the Committee of Detail were Edmund Randolph, James Wilson, John Rutledge, Nathaniel Gorham, and Oliver Ellsworth. *Id.* at 317–18.

<sup>343</sup> *Id.* at 336.

<sup>344</sup> *Id.* at 344 (Report from the Committee of Detail, art. XI, § 3).

<sup>345</sup> See William Ewald & Lorianne Updike Toler, *Early Drafts of the U.S. Constitution*, 135 PA. MAG. HIST. & BIOGRAPHY 227, 233–34 (2011) (“[O]f the distinguishing features central to the American system of constitutional governance, many of the most fundamental make their first appearance in the drafts of the Committee of Detail. The first attempt at delineating an explicit enumeration of congressional powers (rather than accepting the amended Virginia Plan’s allowance that Congress ‘legislate in all cases for the general interests of the Union’); the necessary and proper clause; and much of the structure of the federal judicial power—these central elements were introduced in the committee and *not* in the convention.”).

<sup>346</sup> James Wilson, The Continuation of the Scheme (1787), in *Committee of Detail Documents*, 135 PA. MAG. HIST. & BIOGRAPHY 239, 290–93 (2011) [hereinafter *Committee of Detail Documents*].

<sup>347</sup> *E.g.*, DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 168 (2007); Ewald & Toler, *supra* note. 345, at 235–36.

<sup>348</sup> Edmund Randolph, Sketch of the Constitution ¶ 5, § 7 (1787), in *Committee of Detail Documents*, *supra* note 346, at 263, 279.

a description of the judicial power,<sup>349</sup> and Wilson's final draft, interspersed with Rutledge's handwriting, contained the version of the judiciary clause presented to the Committee of the Whole but did not contain markings or commentary regarding the "case or controversy" language revealing their thought process.<sup>350</sup> Once the Committee on Detail arrived at this agreement, they submitted a clean draft to the Committee of the Whole for consideration.

When debating the Committee on Detail's draft, the delegates disagreed as to whether federal jurisdiction should extend to cases "arising under the Constitution," as Johnson proposed, or whether that would give too much power to the judiciary, as Madison argued.<sup>351</sup> Madison was concerned that doing so would broaden federal jurisdiction beyond "cases of a Judiciary Nature."<sup>352</sup> Ultimately, Johnson's language was adopted and kept, since, according to Madison's notes, "it [was] generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature."<sup>353</sup> Ultimately, the Convention submitted the new draft to the Committee of Style, which presented a judiciary clause similar to that in the final version of Article III.<sup>354</sup> No further significant changes were made.

While the constitutional legislative record is scant, it is not obvious that the Framers intended to impose the now-orthodox standing requirements in all cases. The drafting of the judiciary provision shows little evidence of forethought. The sparse drafting history of Article III leaves ample room for our two-tier interpretation, and there is good cause for recognizing two distinct tiers of justiciability analysis in private rights cases and in procedural rights cases.

#### CONCLUSION

Standing is about separation of powers. But "[o]veremphasis of the 'separation of powers' . . . is apt to obscure the no less important system of

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<sup>349</sup> See James Wilson, Draft of the Constitution (1787), in *Committee of Detail Documents*, *supra* note 346, at 296–303, 312–19.

<sup>350</sup> See James Wilson, Final Draft of the Constitution ¶14 (1787), in *Committee of Detail Documents*, *supra* note 346, at 322, 356–59.

<sup>351</sup> MADISON, *supra* note 340, at 475.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* Some have argued that this exchange forms the basis of the Court's standing jurisprudence. *E.g.*, Sen. Orrin G. Hatch, *Modern Marbury Myths*, 57 U. CIN. L. REV. 891, 894–95 (1989). Regardless of the merits of this assertion, it is not cogent as to our two-tier proposal. Although the delegates' exchange on whether to add the phrase "cases arising under the Constitution" is relevant to the Framers' consideration of justiciability and the limits of Article III, it does not guide us in assessing whether Article III would support a two-tier interpretation. The question is whether history supports a two-tiered justiciability analysis—not whether the courts can dispense with justiciability requirements altogether in procedural rights cases. Thus, to argue that Madison's comment here forecloses the possibility of a two-tiered justiciability analysis would simply beg the question.

<sup>354</sup> See MADISON, *supra* note 340, at 545, 551 (Report from the Committee of Style, art. III, § 2).

‘checks and balances.’<sup>355</sup> While the Court has long insisted that the best—and only—way to ensure that federal courts do not exceed their constitutional powers is to insist on a strict regime of injury-in-fact, causation, and redressability, it is time for the Court to explain why its procedural rights cases sometimes stray from that regime.

In this Article, our chief aim has been to highlight the disconnect between the Court’s Article III rhetoric and the reality of its procedural rights precedents. We have tried to hold dear Ralph Waldo Emerson’s aphorism that “[a] foolish consistency is the hobgoblin of little minds,”<sup>356</sup> but not all insistence on consistency is foolish, and particularly not when it comes to constitutional adjudication. The standing doctrine is deployed as a potent constitutional avoidance mechanism; as such, the doctrine should be internally consistent and strongly justified. The inconsistency must be addressed, whether in the way we have suggested or in some other way. That will not happen unless the Court faces the problem head-on and considers some way to rationalize its practice.

We believe the best way to rationalize the practice is to recognize openly that the so-called Case or Controversy Clause has different requirements for private cases and for procedural rights cases in which Congress deliberately conferred a right of review on the general public. We recommend a two-tiered cases or controversies interpretation because it resolves the apparent disconnect and does so with a relative parsimony in terms of overruling existing cases. The two-tiered solution would, admittedly, require the Court to retract its rhetoric that injury-in-fact, causation, and redressability are required in every federal case—but if the statement is not true, the Court should not continue to say it. As the Court itself observed about the case or controversy doctrine: “[T]he strict, formalistic view of Art[icle] III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions.”<sup>357</sup> With procedural rights cases, it is not an isolated exception—it is a whole parallel universe in which the rules do not apply. The constraint for justiciability in procedural rights cases is the zone of interests test that courts have been using since the 1970s. To resolve the standing dilemma, courts need only recognize what they have been doing all along—to allow the zone of interests to be the baseline for justiciability in procedural rights cases, not the “Article III minima” that apply in cases of traditional common law review.

A fuller account of which cases may have to be reconsidered under our proposal is beyond the scope of this Article. So, too, do we defer further discussion of the extent of Congress’s control over which cases belong in which tier. For example, could Congress relax the case or controversy requirements (pursuant to Section Five of the Fourteenth Amendment or

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<sup>355</sup> Berger, *supra* note 323, at 828.

<sup>356</sup> R. W. EMERSON, *Self-Reliance*, in *ESSAYS: FIRST SERIES* 51, 64 (David McKay 1888) (1841).

<sup>357</sup> *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 404–05 n.11 (1980).

otherwise) in cases like *City of Los Angeles v. Lyons* to grant plaintiffs like Adolph Lyons standing to enjoin the Los Angeles Police Department from using that fatal chokehold?<sup>358</sup> We also note that the different tiers might include more than administrative procedural rights cases—as others have observed, there are also standing inconsistencies in certain cases where the interests of the federal government are asserted, such as in federal criminal cases,<sup>359</sup> False Claims Act (*qui tam*) actions,<sup>360</sup> and procedural rights cases outside the agency review context.<sup>361</sup> We certainly do not argue that any such examples would be unconstitutional, as we do not contend that the administrative state and the resulting procedural rights cases are unconstitutional. We merely defer discussion of how many subject areas could be implicated in our two-tier analysis.

The standing dilemma we identify in this Article is not susceptible to easy resolution; it will “not go gentle into that good night.”<sup>362</sup> But we hope we have begun the process of laying it to rest.

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<sup>358</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 97–99 (1983). We do note, however, that our analysis of Congress’s power to do so may be of future use on this point. See *supra* Part IV.D; text accompanying note 317.

<sup>359</sup> See Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking For Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2246 (1999) (asking why the United States has standing to prosecute even those federal crimes that do not injure the United States). If the asserted justification is that anything that affects an individual citizen affects the government (enough so to create standing in the government), then the justification would run afoul of the Court’s “fairly traceable” jurisprudence; the causal chain would be far too attenuated under the Court’s precedents. See *supra* Part I.B. Nevertheless, federal criminal law is a firmly entrenched feature of the federal government’s police power; if there is a standing problem, is the response merely that criminal prosecutions are different?

<sup>360</sup> That is, cases where the United States has suffered injury, but where the United States is not the plaintiff and has assigned its “injury” to an uninjured plaintiff who recovers some of the bounty. See False Claims Act, 31 U.S.C. § 3730(b)(1) (2006); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772–74 (2000) (acknowledging that the bounty cannot confer injury-in-fact, but upholding *qui tam* actions against a standing challenge on the basis that such actions are well-grounded in history). But as Thomas Lee aptly observed, “Standing is a modern game, and courts that uphold *qui tam* on historical grounds are playing by archaic rules.” Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 549 (1990). Could *qui tam* actions be an example of a procedural rights case outside the administrative agency context?

<sup>361</sup> See, e.g., *Geraghty*, 445 U.S. at 390. There, a federal prisoner purported to sue on behalf of a class to challenge the validity of parole release guidelines. *Id.* The district court refused to certify the class, and he appealed. *Id.* While the denial of class certification was pending on appeal, the plaintiff was released, thus mooting his personal claim. *Id.* The U.S. Supreme Court held that he nonetheless had standing to maintain his procedural claim because “the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met.” *Id.* at 403. Although this is not an agency review case, it is an example of the Court permitting Congress to relax the injury requirement by creating a cognizable interest (having the class certified for the benefit of others) out of a noncognizable one.

<sup>362</sup> See DYLAN THOMAS, *Do Not Go Gentle into That Good Night*, in *IN COUNTRY SLEEP* 18 (1952).