

ANOTHER SIGN FROM *HEIN*: DOES THE GENERALIZED
GRIEVANCE FAIL A CONSTITUTIONAL OR A PRUDENTIAL
TEST OF FEDERAL STANDING TO SUE?

by
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The Supreme Court seems to have shuttled the federal rule against hearing generalized grievances back and forth between a home in the Constitution and a home in the Court's prudence. Hein v. Freedom from Religion Foundation, Inc., stamped the latest forwarding address.

Where the generalized grievance finds its home orients the whole map to justiciability. The much controverted question of the sort of injury required for standing to sue may find answers in the location of the generalized grievance test. The prudential tests of standing focus upon the legal theory a party argues. The constitutional test of standing focuses upon the harm a party suffers. If the generalized grievance test retains its focus upon legal theory even as the test is drawn into constitutional standing doctrine, the injury-in-fact of that doctrine moves from simple harm towards the old invasion-of-legal-interest reminiscent of standing as a test of merits and not of justiciability.

This Article tracks the generalized grievance, exploring along the way the whole terrain of standing, ripeness, and mootness. In so doing, the Article finds that constitutional standing has more to do with the meaning of "judicial Power" than with the meaning of "Cases" and "Controversies."

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I. INTRODUCTION

Near the end of the October 2006 Term, the Supreme Court decided *Hein v. Freedom from Religion Foundation, Inc.*¹ *Hein* held that being a federal taxpayer does not license a plaintiff to challenge on Establishment Clause grounds a federal executive initiative expending federal funds.² Beyond this, *Hein* spoke to a fundamental question of more general interest and possibly greater importance. That question is how much of the law applied in *Hein* rests upon the Constitution, and how much of it rests upon something else.

Hein decided a question of standing to sue. Federal courts will not hear suits brought by parties that lack standing to sue.³ Though at first standing meant simply that the plaintiff actually held the cause of action in the suit,⁴ standing has come to mean something different.⁵ Whether a plaintiff holds a cause of action is an inquiry on the merits. It involves examining the law to determine whether the plaintiff's legal right has suffered some violation. Therefore, standing used to require that the plaintiff have a legal right violated by the defendant. Now standing requires something else, something apart from the merits. Now federal standing requires that the plaintiff bring a matter that is justiciable before the federal courts.⁶ Justiciability requires that "[a] plaintiff . . . allege personal injury fairly traceable to the defendant's allegedly

¹ 127 S. Ct. 2553 (2007).

² *Id.* at 2559.

³ See, e.g., Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1750 (1999) ("The 'black letter' law of standing can be stated in a single sentence. A plaintiff has standing if he has suffered a legally cognizable and judicially redressable injury caused by the allegedly illegal conduct of the defendant, and the plaintiff is attempting to further an interest that is arguably within the zone of interests to be protected or regulated by the statute or constitutional provision at issue." (footnote omitted)). The requirement of standing to sue is, strictly, a requirement only for civil actions. In federal criminal prosecutions, an analogous requirement is met by the injury the crime causes to federal sovereignty at the hands of the defendant who is to be punished. See Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 146 (2001) (citing *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-72 (2000)). But 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, 2246-51, 2256 (1999) (arguing that federal criminal prosecutions demonstrate that standing is an optional quality not required by Article III).

⁴ See *infra* notes 36-44 and accompanying text.

⁵ Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1451 (1988) (noting the turn to a Constitutional test of standing in *Baker v. Carr*, 369 U.S. 186 (1962), and *Flast v. Cohen*, 392 U.S. 83, 96 (1968), and attributing it in part to the earlier similar turn of Justice Frankfurter).

⁶ See *infra* notes 48-50 and accompanying text.

unlawful conduct and likely to be redressed by the requested relief.”⁷ The requirement bears some similarity to the old merits-based standing. After all, it inquires whether the plaintiff suffered some loss at the hands of the defendant, a loss the court is poised to set right.

But this justiciability-based standing differs from the merits-based in two respects. First, the second and third prongs of the test—the causation and redressability prongs—both harbor flexibility in the word “fairly” or the word “likely.”⁸ This first difference signals a second, more important difference. Whereas standing used to require that the plaintiff have suffered an injury that gave rise to a cause of action, an injury at law, the present standing is said to require only injury-in-fact, some harm to the plaintiff not necessarily tantamount to legal injury.⁹ *Damnum absque injuria* suffices for justiciability. So rather than involving a categorical determination at law whether a party brings a cause of action, a determination that used to be made as a matter of law on demurrer (or motion on Federal Rule of Civil Procedure 12(b)(6)), standing now involves a factual determination susceptible perhaps of only approximate resolution. Of course, the determination of contemporary standing often parallels or even duplicates the determination of whether the plaintiff holds a cause of action. Opinions of the Supreme Court have been criticized—sometimes by dissenters on the Court—for confusing the two determinations.¹⁰ But current doctrine takes them as distinct.

Beyond the requirements of standing that the federal plaintiff allege and prove injury-in-fact, fairly traceable to the act of the defendant, and likely to be redressed by the relief available from the federal court, other requirements of standing arise in some cases, sometimes applicable to defendants as well as to plaintiffs. These other requirements exist primarily in three doctrines.¹¹ First, litigants generally will not be heard to assert the right of a third party—a *jus tertii*—to support the litigant’s case.¹² Each party must generally assert its own rights. Only if (1) the party whose right it is has some difficulty in asserting it, and (2) the litigant bears the sort of relationship to the right-holder that portends vigorous prosecution of the right in the litigation, will the litigant be heard to assert a *jus tertii*.¹³ Second, parties may not assert a generalized grievance, a claim raising a violation of law to which they are no more subjected than many other persons.¹⁴ If the litigant is not somehow

⁷ *Hein*, 127 S. Ct. at 2562 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

⁸ *See id.*

⁹ *See infra* notes 67–72 and accompanying text.

¹⁰ *See, e.g., Allen*, 468 U.S. at 767 (Brennan, J., dissenting).

¹¹ *See infra* note 178 and accompanying text.

¹² *See infra* notes 179–83 and accompanying text.

¹³ *See infra* notes 181–83 and accompanying text.

¹⁴ *See infra* notes 217–21 and accompanying text.

distinguished by the claim, the litigant may not bring it. Third, if a party asserts a violation of a statute or constitution, the party or claim must fall within the zone of interests created by the statute or constitution.¹⁵ The legislation must have made this party a beneficiary of its terms and not simply provided a serendipitous windfall. To be justiciable in federal court, a claim must satisfy these qualifications.

The requirement of injury, causation, and redressability differs in important respects from the other three requirements. They differ first of all in respect of their source and authority. Injury, causation, and redressability are said to flow from the constitutional reach of federal judicial power only to “cases” and “controversies.”¹⁶ Without these three elements, a matter is not a case or controversy within the meaning of those words of Article III, and so the matter is not justiciable before a federal court. The test here is constitutional, not in the sense that the test passes muster under review against the provisions of the Constitution, but in the sense that the test is required by the Constitution and a creature of the Constitution. The three additional requirements of standing, those regarding *jus tertii*, generalized grievance, and the zone of interests, have been said to flow not from Article III but rather from what the Supreme Court has called “prudence.”¹⁷ Presumably as an exercise of its authority to prescribe rules for the federal judiciary, the Supreme Court has on its own authority crafted those three doctrines to establish standing requirements beyond those the Constitution establishes in Article III.

This Article will explain that, in creating the three prudential tests of standing, the Court did not simply make the Article III tests more rigorous. Rather, it created tests unconnected with injury, causation, and redressability. The three prudential tests evaluate the sort of legal theories parties may use, not whether they have as a matter of fact suffered a harm caused by the defendant and susceptible of judicial cure.¹⁸ The test against asserting *jus tertii* explicitly examines whether the party is asserting a right—an interest supported by legal theory—of the party’s own. That a party may sometimes actually assert a *jus tertii* supports the conclusion that this test looks to something other than the injury, causation, and redressability that are constitutionally required regarding the litigant’s own claim.¹⁹ The prudential test against asserting a generalized grievance examines whether the harm alleged is shared by so many that it is unlikely that the party has a legal right not to be subjected to it.²⁰ It is not that the harm falls below the Article III

¹⁵ See *infra* notes 184–88 and accompanying text.

¹⁶ See *infra* notes 56–59 and accompanying text.

¹⁷ See *infra* notes 175–78 and accompanying text.

¹⁸ See *infra* notes 189–97 and accompanying text.

¹⁹ See *infra* notes 179–83 and accompanying text.

²⁰ See *infra* note 217 and accompanying text.

requirement because it is so widely shared. It is rather that the harm falls into the category of ills for which the law offers no individual remedy. Misgovernment may be both harmful and unlawful without violating a legal right.²¹ Similarly, not every violation of a legislated standard gives rise to a right to judicial remedy. The zone-of-interest test assures that a party resting an argument upon legislation derives from that legislation some right against its violation, some basis to support the party's own claim and not simply a charge of unlawfulness.²² Because these three prudential tests measure legal theory rather than injury, causation, and redressability,²³ such tests may apply to any parties to litigation and not only to plaintiffs.²⁴ That they do measure legal theory and not the core Article III requirements is a fact often missed.²⁵ Inasmuch as the prudential tests of standing measure legal theory, they—even more than the constitutional test—approach a test of the merits and not justiciability. They determine whether the law supports the party's claim, not whether the claim is susceptible of federal judicial resolution at all.

Although the Supreme Court has categorized its standing tests into either constitutional or prudential, one standing test has migrated between these two categories. That test is the focus of this Article. The generalized grievance test appears sometimes as a constitutional doctrine, sometimes as prudential, and sometimes as a bit of both, repeatedly resisting stable classification.²⁶ *Hein* suggests a classification, but not without some equivocation.²⁷ This Article will suggest that, as constitutional, the test looks to the nature of an injury, and as prudential, to legal theory apart from injury. The categorization therefore entails not only whether Congress and the Court are free to alter the doctrine, but also whether the doctrine is a test of “case” or “controversy,” or rather of what legal theory is available to the litigant.

If the generalized grievance test of standing has migrated back and forth between the constitutional and prudential categories of tests for standing, this migration speaks to more than simply the nature of the generalized grievance. For the generalized grievance genuinely to fit within the constitutional category, that category must embrace a test of standing different in nature from the constitutional test that leaves the generalized grievance to be weeded out only by a prudential test.

²¹ See *infra* notes 32, 251 and accompanying text.

²² See *infra* notes 184–97 and accompanying text.

²³ See *infra* notes 189–97 and accompanying text.

²⁴ See, e.g., *Powers v. Ohio*, 499 U.S. 400, 401 (1991); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804–06 (1985); *Kamilche Co. v. United States*, 53 F.3d 1059, 1061 n.1 (9th Cir. 1995).

²⁵ See, e.g., MARTIN H. REDISH & SUZANNA SHERRY, *FEDERAL COURTS* 42 (6th ed. 2007).

²⁶ See *infra* notes 225–96 and accompanying text.

²⁷ See *infra* notes 289–95 and accompanying text.

Consequently, a constitutional test of standing that includes a test against generalized grievance is very different from one that does not. To see the generalized grievance test as constitutional rather than prudential suggests one—or perhaps a combination—of two options. The constitutional generalized grievance test could indeed specify a quantity of harm sufficient to supply injury-in-fact. It could bar standing where the litigant's own injury is an infinitesimal share in an injury suffered by a large number of people. On the other hand, the test could retain its focus on legal theory, but import that focus into the constitutional standing test regarding injury. Such an importation renders the constitutional test of injury not one of injury-in-fact, but rather one of the cognizability of the injury. The nature and quality of the injury—ultimately the character of the legal theory that sees the harm involved as true, cognizable injury—becomes an element of the constitutional test of standing. Such a move nudges the constitutional test towards an examination of the merits, towards the original inquiry as to whether the party asserting a claim holds the cause of action. In turn, this move fundamentally alters the political and legal landscape of constitutional law, especially regarding the role of the federal courts.²⁸

This Article examines the generalized grievance test of standing in the federal courts and the significance of its being classified as a constitutional or as a prudential test. Part II explains the development of constitutional tests of standing and suggests that those tests find their true basis in the Article III term “judicial Power.” Part III adds a discussion of prudential tests of standing, including a look at the relation of prudential to constitutional components within the doctrines of ripeness and mootness. Part IV focuses on the generalized grievance itself and the significance of its location within either the constitutional or the prudential standing doctrines. Part V draws conclusions, especially regarding the overall doctrine of standing in the federal courts.

II. CONSTITUTIONAL TESTS OF STANDING

“Standing” in the sense of the capacity of a person to be recognized as a participant in a judicial proceeding endures as a concept of ancient provenance.²⁹ Current doctrine regarding standing in the federal courts

²⁸ See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 45, 98–100 (5th ed. 2007) (observing that justiciability, and specifically the generalized grievance test of standing, raise fundamental questions regarding the role of the federal courts in the American polity).

²⁹ Neil H. Cogan, “*Standing*” before the Constitution: Membership in the Community, 7 *LAW & HIST. REV.* 1, 2–3 (1989) (tracing some of the history of standing through biblical and ancient Roman, English, and Scottish sources). Biblical references to the concept include those at *Exodus* 18:13, *Psalms* 1:5, and *Acts of the Apostles* 25:7, 10.

establishes limits on who may present claims to those courts.³⁰ The doctrine requires that one's standing, like any other fact, be asserted—in pleadings as appropriate—and proved.³¹ Appropriate standing of litigants must exist in every federal suit. Even suits challenging unconstitutional practices cannot be brought in federal courts³² when standing doctrine bars the way.³³

Though a notion of standing has long existed and remains a condition for the judicial vindication of rights, the notion of federal court standing as a condition imposed directly by the Constitution is a relative newcomer. Standing today is not what it was in 1789: “Notions of standing have changed in ways to induce apoplexy in an eighteenth

³⁰ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351–52 (2006) (requiring that standing be established regarding each claim, with no application of any supplemental or ancillary standing doctrine); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 646 (1973) (noting that the standing inquiry arises in at least three contexts: for plaintiffs seeking judicial review of governmental action, for defendants asserting claims against the government, and for parties in private litigation).

³¹ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688–90 (1973).

³² As Chief Justice John Marshall noted long ago, there may be violations of the Constitution of which courts take no cognizance. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821). For this phenomenon lack of standing is a frequent cause.

³³ Various purposes have been posited for assigning such a role to standing. *See, e.g.,* *People Organized for Welfare and Employment Rights v. Thompson*, 727 F.2d 167, 172–73 (7th Cir. 1984) (remarking that standing is not for securing vigorous advocacy but for rationing litigation, concentrating facts, and protecting right holders from having their rights compromised through the acts of others); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (listing the “numbingly familiar” purposes of standing as ensuring that parties are adverse so as to present the case well, that people most concerned with a matter are the ones to litigate it, that cases are concrete to assist the court’s understanding, and that federal courts not usurp the role of the popular branches); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1927 (1986) (suggesting that standing furthers instrumental gains for litigation in testing litigant incentive, the appearance of “concrete effects” of challenged action, the judicial nature of the claim, and whether the plaintiff is the best available); Scott, *supra* note 30, at 670–92 (discussing and criticizing “access standing” that rations courts and litigation, and “decision standing” that allocates policymaking to courts or to alternative authorities); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 320 (1995) (seeing in standing a fair and rational technique to regulate the order in which cases are litigated and thereby avoid untoward behavior by both courts and litigants). Commentators have named less principled aims also. *See, e.g.,* Fletcher, *supra*, at 223 (observing that courts discuss standing at a high level of generality that allows unarticulated considerations and so apparent lawlessness with wildly vacillating results); Pierce, *supra* note 3, at 1742 (arguing that standing cases are predictable by the politics of judges in light of the type of plaintiff).

century lawyer.”³⁴ One way in which they have changed is their transformation into an explicitly constitutional test.³⁵

Before this transformation, standing was not so much a matter of the constitutional limits upon what cases were justiciable; it was rather a matter of the merits of the claim. For most of American history under the Constitution, standing was simply a question of whether a plaintiff had a cause of action,³⁶ testing thereby the relation of the party to meritorious claims.³⁷ Said differently, standing existed for the party with a legal interest or legal right to lay before the court, an interest or right granted or secured by common law, Constitution, or statute.³⁸ Standing, then, fundamentally entailed no inquiry apart from the merits.³⁹

³⁴ *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 990 (7th Cir. 2006); see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 126–27 (5th ed. 2003) (1953) (finding the current use of the standing notion a new development of the mid twentieth century from (1) the growth of the administrative state and broader interests secured by statute; and (2) the growth of constitutional rights beyond those secured at common law).

³⁵ See Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 97–98 (1996) (locating the arrival of standing as a test of injury and derived from Article III of the Constitution in the 1937–1954 “Holmesian” era of judicial decisionmaking that followed the natural law and formalist eras and preceded the instrumentalist and post-instrumentalist); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen’s Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 169 (1992) (finding the first use by the United States Supreme Court of standing as an Article III requirement in *Stark v. Wickard*, 321 U.S. 288 (1944)); Winter, *supra* note 5, at 1452–57 (arguing that the constitutional test of standing emerged recently from: (1) the increase of federal jurisdiction, (2) the rise of the administrative state, (3) the desuetude of the doctrine of *damnum absque injuria*, (4) liberalism (in both its individualistic and process focus), and (5) the need to limit the reach of the doctrine of substantive due process).

³⁶ Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988).

³⁷ Winter, *supra* note 5, at 1418–19.

³⁸ Scott, *supra* note 30, at 649–50.

³⁹ *But see* Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850) (deciding that a real dispute—and so implicitly not an advisory opinion—is necessary in order for a court to determine a matter); Hayburn’s Case, 2 U.S. (2 Dall.) 409, 409 (1792) (suggesting that an interested party supplies the standing needed to support a suit by the Attorney General on the party’s behalf); Winter, *supra* note 5, at 1420–25 (stating that, from the nineteenth century on, courts looked beyond the merits and who held a cause of action to determine standing for diversity cases, especially for plaintiffs in equity); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 692 (2004) (opining that by the nineteenth century the Supreme Court did consider standing a constitutional matter apart from whether a legislature had granted the plaintiff a cause of action).

For the most part, consequently, the common law determined who had standing before the federal courts.⁴⁰ For example, the typical scenario for the judicial challenge to administrative action went something like this: The plaintiff would bring a common law cause of action against the official actor, for trespass or replevin for example. The defendant would assert in defense that the challenged act was lawful by virtue of his office. The plaintiff would counter that the act was unlawful notwithstanding, for violation of some constitutional limitation perhaps. Such was the traditional litigation technique for assuring the rule of law over executive power within the Anglo-American legal system up through the first half of the twentieth century.⁴¹ Even when the standing question was posed as whether the court had before it a “case” or “controversy,”⁴² it was understood to pose whether the party held a cause of action or a vested litigable legal right.⁴³ Not that federal courts were hearing matters in which plaintiffs had suffered no “injury.” A colorable claim of direct injury was subsumed within the cause of action.⁴⁴ The point is that injury-in-fact, injury outside the context of a legal injury, would not supply standing apart from a cause of action.

The twentieth century would see a change from this longstanding approach rooted in the Anglo-American legal tradition. The New Deal,⁴⁵ the desire for a “more pervasive constitutional oversight” of administrative authority,⁴⁶ and the welcome given to more “ethereal claims” than those at common law,⁴⁷ would lead federal courts to

⁴⁰ See Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1144–45 (1977); cf. Winter, *supra* note 5, at 1395 (remarking that justiciability used to be a matter of forms of action until the mid twentieth century).

⁴¹ Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 433–36 (1974).

⁴² Article III, Section 2 extends the “judicial Power” vested in the federal courts only to “Cases” and “Controversies.”

⁴³ Albert, *supra* note 41, at 427 n.7 (tracing this view back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–66 (1973) (same); Sunstein, *supra* note 35, at 170 (finding this to be the understanding from the Founding to about 1920). But see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 398–99 (1996) (understanding early notions of justiciability to consider whether what was before the court was indeed a lawsuit, whether the matter was committed by the Constitution to Congress or to the President, and whether the judgment could be reversed by the political branches).

⁴⁴ See Kelso & Kelso, *supra* note 35, at 117.

⁴⁵ See James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 15–17 (2001).

⁴⁶ Nichol, *supra* note 33, at 1920–21.

⁴⁷ See Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 817–18, 826–27 (2004) (suggesting that “standing” proper arose after the abolition of

entertain cases without looking to the sort of legal interest sufficient to support a traditional cause of action. Departing from a cause-of-action test for standing to sue based upon the common law forms of action begged the question of which legal rules give rise to the sort of legal interest that would support a justiciable claim, a question that reduced to asking simply which claims ought to be justiciable.⁴⁸ All this led to viewing “standing” proper as something independent and different from the merits,⁴⁹ often something required for public law matters to correspond to the cause-of-action test for private law matters.⁵⁰

But there is more to the tale. The New Deal led not only to an enlargement of the role of the federal courts along with the role of the federal government generally,⁵¹ it led also in some respects to a restriction of the role of the federal courts. The traditional operation of common law theories of relief was poised to limit the operation of New Deal programs. Parties regulated by those programs had available to them remedies that might protect traditional rights at the expense of the beneficiaries of the regulation.⁵² A federal judiciary sympathetic to the New Deal was loath to allow that. A newly cultivated notion of standing to sue as well as traditional common law doctrine was at hand to limit the use of the federal courts to attack regulation.⁵³ It appears that Justices

forms of pleading and the merger of law and equity in the Federal Rules of Civil Procedure).

⁴⁸ See Scott, *supra* note 30, at 651–52. Now that the old system of causes of action has by and large fallen into desuetude, a restored understanding of standing as founded upon the cause of action may be beyond reach. See Bellia, *supra* note 47, at 818.

⁴⁹ Abram Chayes, *Foreward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 8–9 (1982) (observing that standing proper is a new concept making an appearance in court opinions not earlier than the mid twentieth century); Leonard & Brant, *supra* note 45, at 7 (claiming that the first Supreme Court use of “standing” as a term to construe Article III occurred in *Stark*).

⁵⁰ See Albert, *supra* note 41, at 428. Professor Albert advocates a return to something like the cause-of-action inquiry on the merits to replace the contemporary test of standing. See *id.* at 425–26, 492. He is not alone. See, e.g., Fletcher, *supra* note 33, at 223–24; Sunstein, *supra* note 35, at 166. Interestingly, the United States Supreme Court has approvingly cited Alexis d’Tocqueville’s observation that judicial review is effective because it lies only for injury, a remark speaking of the old cause-of-action test. *Sierra Club v. Morton*, 405 U.S. 727, 740–41 n.16 (1972).

⁵¹ Fletcher, *supra* note 33, at 225–28 (noting the development from the 1930s towards litigation spawned by the administrative state in order to reinforce public values, a development to burgeon in the 1960s and 1970s).

⁵² Sunstein, *supra* note 35, at 187–88 (observing that the New Deal sought to displace the common law system with an administrative state, and therefore, could not advance common law protection of the regulated over the interests of beneficiaries of the regulation).

⁵³ Sunstein, *supra* note 36, at 1437–38; see generally Pushaw, *supra* note 43, at 455–56 (arguing that the New Deal distorted the notion of popular sovereignty to elevate the “democratic” political branches over the courts, and that in this respect it was

Brandeis and Frankfurter spearheaded an altered doctrine of standing to this end, perhaps especially to constrict the jurisdiction of lower federal courts, courts less sympathetic to the New Deal, without having to jettison precedent on substantive protections in the Constitution.⁵⁴ Anticipating this move as early as 1922, Justice Brandeis discussed standing as a matter determined by Article III.⁵⁵ In 1939, Justice Frankfurter filed an opinion for four justices to explain their conclusion that a plaintiff lacked standing to sue, drawing upon the Article III rule that judicial power extends to “cases” and “controversies” and drawing upon the English tradition to lend a limited definition to those two terms.⁵⁶ His 1951 concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*⁵⁷ again rooted standing in the concept of judicial power extending to cases and controversies, concepts to be understood as they were in the practice of the Westminster and colonial courts, albeit with an eye cast towards legal interests and legal injury.⁵⁸ The Frankfurter opinions especially would influence the Court both towards testing standing as an explicitly constitutional requirement⁵⁹ and towards the narrowing of standing in the 1980s.⁶⁰

The impulse to restrict the role of the federal courts fostered an understanding of standing as something other than the common law concept supplied by the cause of action. Once the connection between standing and the cause of action was severed, standing became available to broaden the role of federal courts as well as to restrict it.⁶¹ In the

anticipated by Woodrow Wilson’s “monistic democracy” model in which the legislature follows the lead of the executive without interference from the judiciary).

⁵⁴ Stearns, *supra* note 33, at 397–400; *see also* Pushaw, *supra* note 43, at 458–63 (suggesting that Brandeis and Frankfurter falsified history in doing so); Sunstein, *supra* note 35, at 179–81 (noting that Brandeis and Frankfurter developed this standing doctrine without using the word “standing” but rather by using the concept of “legal right” inherent in the cause-of-action approach of the common law).

⁵⁵ *See* *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922). *But see* *Leser v. Garnett*, 258 U.S. 130 (1922) (companion case to *Fairchild* in which Brandeis seems to ignore questions of standing); Leonard & Brant, *supra* note 45, at 9 (noting that the Brandeis concurring opinion in *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936), embraces personal injury as a prudential standing test rather than as an Article III standing test).

⁵⁶ *Coleman v. Miller*, 307 U.S. 433, 460 (1939). The earlier case of *Muskra v. United States*, 219 U.S. 346, 361–62 (1911), had held that the limitation of federal judicial power in Article III to cases and controversies constrained the exercise of judicial review in the context of an action brought by special bill and therefore not subject to ordinary constraints on justiciability.

⁵⁷ 341 U.S. 123, 149–74 (1951) (Frankfurter, J., concurring).

⁵⁸ *See* Albert, *supra* note 41, at 428 n.10.

⁵⁹ *See* Winter, *supra* note 5, at 1451.

⁶⁰ *See* Leonard & Brant, *supra* note 45, at 12–13.

⁶¹ There is some measure of irony in this development. If the Frankfurter approach to standing as a matter of Article III case and controversy fails to convince,

1960s, the enlargement of the federal administrative state provoked an enlargement of standing.⁶² Instead of vindicating the private rights protected by common law, federal courts sought to vindicate “broad and diffuse interests.”⁶³ To the general approval of commentators,⁶⁴ enlarged standing permitted judicial supervision of administrative regulation not only in the interests of the regulated as under the common law model, but also in the interests of the beneficiaries of the regulation.⁶⁵

The landmark case in this development was *Ass’n of Data Processing Service Organizations, Inc. v. Camp (Data Processing)*.⁶⁶ When the common law cause of action defined standing, standing allowed access to the court to anyone with a legal interest to vindicate, an interest that had suffered some injury. Such injury is known as a legal wrong because it was injury for which the law granted a remedy. But injury might be taken to mean something else. It might mean harm, some setback or hurt, apart from whether that harm triggers a cause of action, a remedy at law. To decide that standing could be satisfied by such a harm, an injury-in-fact, would significantly enlarge standing beyond the test of legal interest.⁶⁷ That was the decision of the *Data Processing* Court. It held legal interest to be a matter of the merits, not standing. Standing instead was a matter of injury-in-fact and a diluted legal interest test for some cases, a “zone-of-

his departure from the common law approach might remain, leading to a very broad role for the federal courts as, say, the authoritative interpreters of the Constitution. See, e.g., Monaghan, *supra* note 43, at 1368–71.

⁶² The present doctrine of standing is an artifact of the transformation of federal courts from tribunals primarily dedicated to adjudicating disputes into tribunals primarily dedicated to developing constitutional law and other checks on government power. See Chayes, *supra* note 49, at 4. As the federal courts, and especially the Supreme Court, abandoned the classical understanding of judicial review of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the revisionist understanding of *Cooper v. Aaron*, 358 U.S. 1 (1958), Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 403–07 (2005), and abandoned the paradigm of *Exodus* 18, Craig A. Stern, *What’s a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1053 (1998), and as civil government as a whole abandoned more and more the paradigm of *Genesis* 9, CRAIG A. STERN, *GOD’S CAESAR: A BIBLICAL UNDERSTANDING OF THE LIMITS OF CIVIL GOVERNMENT* (forthcoming), to develop courts into lawmaking organs of the welfare state, the courts found it helpful to free themselves from the strictures of rigorous tests for both the merits and their judicial power. Standing became loosed from the merits and causes of action and instead became a malleable and flexible standard to enable the courts to hear cases they thought good to hear, and to reject cases they thought not good to hear.

⁶³ Monaghan, *supra* note 43, at 1380–82 (observing that such a move led the courts to adopt “confused and trivialized” criteria of standing).

⁶⁴ See Scott, *supra* note 30, at 645–46.

⁶⁵ Sunstein, *supra* note 36, at 1442–45.

⁶⁶ 397 U.S. 150 (1970); Sunstein, *supra* note 36, at 1445.

⁶⁷ Chayes, *supra* note 49, at 9–10, 60; Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 255–56 (1961).

interest” test.⁶⁸ Injury-in-fact allowed a broader range of challenges to government regulation than would have been permitted under the legal interest test,⁶⁹ and led, with congressional cooperation,⁷⁰ to the opening of the federal courthouse to claims against all sorts of harms, some very loosely defined, intangible, and subjective.⁷¹ *Data Processing* worked a revolution in standing doctrine, albeit not without criticism.⁷²

The fruit of that revolution has proved long lived. The Court adhered to the *Data Processing* doctrine of injury-in-fact,⁷³ though jettisoning and then reconfiguring the zone-of-interest analysis.⁷⁴ To injury-in-fact were added the requirements that this injury be caused by the defendant and redressable by the court.⁷⁵ These two inquiries, of course, depend upon the identification of the injury and of the relief sought by the action.⁷⁶ And so the Court came to adopt the tripartite test

⁶⁸ *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153 n.1., 153–55; Albert, *supra* note 41, at 494–96; Scott, *supra* note 30, at 662–63. The analysis of *Data Processing* was complemented by that of its companion case, *Barlow v. Collins*, 397 U.S. 159 (1970), in which the Court first used the term “injury-in-fact.” Sunstein, *supra* note 35, at 169.

⁶⁹ Leonard & Brant, *supra* note 45, at 18–19.

⁷⁰ Sunstein, *supra* note 35, at 192–93 (remarking that Congress took *Data Processing* as inviting the creation of “a wide range of citizens’ suits” to promote vigorous administrative regulation).

⁷¹ Nichol, *supra* note 33, at 1921–22.

⁷² The case, “an unfortunate innovation in standing law by Justice William O. Douglas,” Sunstein, *supra* note 35, at 166, generated “near universal condemnation . . . among academics.” Stearns, *supra* note 33, at 386. The inspiration for the injury-in-fact test seems to have been yet another questionable legal development, a misreading by Professor Kenneth Culp Davis of the judicial review provisions of the Administrative Procedure Act. Stearns, *supra* note 33, at 400–03; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 887–89 (1983); Sunstein, *supra* note 35, at 183–86. Davis took the Act to grant standing to sue to anyone in fact “aggrieved by agency action,” a standard he also took to be generally the only proper test of standing to sue. Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 457–58, 465–68, 471–73 (1970); Albert, *supra* note 41, at 440–42 (describing and criticizing Davis’s views). In doing so he was likely mistaken. See Fletcher, *supra* note 33, at 256–61; Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 344–45 (2004); Sunstein, *supra* note 35, at 181–82. Not surprisingly, Professor Davis approved *Data Processing* to the extent it adopted the injury-in-fact test of standing, and criticized its selective zone-of-interest test. Davis, *supra*, at 457–68.

⁷³ See Nichol, *supra* note 33, at 1924.

⁷⁴ See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19; Scott, *supra* note 30, at 666 n.98.

⁷⁵ *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–18 (1973) (adding these two inquires); Stearns, *supra* note 33, at 404; see also *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (taking the two as required by Article III).

⁷⁶ See *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 161–62 (1981) (suggesting that redressability is to be assessed according to the precise relief prayed for); Sunstein, *supra* note 36, at 1463–69 (observing that the causation analysis is

of standing that it has repeated as a “litany”⁷⁷—injury-in-fact, fairly traceable to the action of the defendant, likely to be redressed by the requested judicial relief.⁷⁸ Furthermore, the Court found this tripartite test of standing in the Article III limitation of federal judicial power to cases and controversies.⁷⁹ According to the Court, the Article III test of standing is to assure that the court considers matters in light of the concrete facts of an actual case, respects the autonomy of persons and the separation of powers, and minimizes unseemly confrontation.⁸⁰ The Court also has observed that the injury requirement fosters concrete adverseness—real opposition between parties—but that this adverseness itself is not sufficient to supply standing.⁸¹ Commentators have supplied more cynical purposes for the injury-causation-redressability test, including that it enables the Supreme Court to avoid constitutional issues it would rather not decide.⁸²

easily manipulable by recharacterization of the injury and so serviceable as a surrogate for the discarded legal interest test).

⁷⁷ Chayes, *supra* note 49, at 22.

⁷⁸ See, e.g., *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.* 528 U.S. 167, 180–81 (2000); *Simon*, 426 U.S. at 38–39.

⁷⁹ See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007); *Lance*, 127 S. Ct. at 1196; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (adding that the cases and controversies must be “of a Judiciary Nature,” in the words of James Madison); *Vt. Agency*, 529 U.S. at 771; *Friends of the Earth, Inc.*, 528 U.S. at 180–81; *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102–04 n.5 (1998) (asserting that the test reflects the core of the Article III case and controversy requirement and that it, in so many words, has been the test for a long time, whatever the “package”); *Simon*, 426 U.S. at 38–39. Dean Nichol argues that the Burger Court “constitutionalize[d]” justiciability standards that before the 1970s were of unclear source, rather than based definitely upon the Article III case or controversy requirement. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 153–55 (1987). Professor Sunstein argues that it was unknown to our law until the 1970s that Article III requires that actions in federal court meet the test of injury, causation, and redressability. See Sunstein, *supra* note 35, at 168. Whether the injury-in-fact test actually does reflect the Framers’ design in another question. Cf. Leonard & Brant, *supra* note 45, at 104 (asserting that the test by and large has carried out the Framers’ plan as to separation of powers).

⁸⁰ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472–74 (1982).

⁸¹ *Id.* at 486. The court also notes that standing is not simply to guarantee to federal litigation “important issues and able litigants.” *Id.* at 489. This seems to differ from the earlier understanding of the Court. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (opining that the purpose of standing is to secure effective litigation, with the personal stake expected to sharpen the presentation of issues for the illumination of the court).

⁸² See, e.g., Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 301–02 (1979) (suggesting both that the Court has used standing to escape litigation regarding the Constitution and that

As to the nature of the injury demanded by the injury-in-fact prong of its test of standing, the Court has adopted such descriptors as “actual,” “imminent,” “concrete,” “particularized,”⁸³ and “distinct and palpable.”⁸⁴ Noneconomic harm suffices, and even a trifle if identifiable.⁸⁵ Furthermore, the injury that supplies standing need not be the legal injury that supplies the cause of action. A case remarkable for the degree to which these two injuries were dissociated⁸⁶ is *Duke Power Co. v. Carolina Environmental Study Group, Inc. (Duke Power)*.⁸⁷ In *Duke Power*, the Court appeared eager to certify as constitutional the Price-Anderson Act limiting liability for catastrophic disasters at nuclear power plants. Without the Act—and, more to the point, without a certifiably valid Act—limiting liability, nuclear power would remain largely untapped. The challenge to its constitutionality rested upon a denial of property without due process in its severe limitation of damages. Of course, before such a catastrophe threatened, let alone before the invocation of the limitation supplied by the Act, it would appear difficult for a federal court to reach this issue of the constitutionality of the Act. But the Court held that the present harm caused to fishermen by the thermal pollution of water gave standing for the suit. Harm satisfied the injury-in-fact prong, though not at all the injury of the taking without due process that the plaintiff claimed (unsuccessfully of course) to be the constitutional defect of the Act. No “nexus” between these two types of injury is necessary.⁸⁸

standing furthers principled purposes in regulating federal courts as agents of social reform); Chayes, *supra* note 49, at 4–8, 16 (arguing that the Court’s standing doctrine is an inappropriate holdover from the bygone times of traditional litigation); Nichol, *supra* note 79, at 160 (stating that the doctrine enables the Court to dispense with cases without needing to become embroiled in substantive claims); Nichol, *supra* note 33, at 1917 (asserting that the Court has manipulated the injury inquiry to fence out disfavored claims); Stearns, *supra* note 33, at 350–67 (arguing that standing enabled the Burger Court to negotiate a path between Warren Court extravagances and restraint by avoiding decisions on the merits through controlling the dockets of lower federal courts); Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 274–75, 308 (1980) (adding to the Court’s asserted purposes for justiciability doctrines such as standing the purpose of enabling the Court to decide questions on the merits without having to announce its reasons). *But see* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 651–54 (1992) (disputing Professor Brilmayer’s analysis).

⁸³ See, e.g., *Vt. Agency*, 529 U.S. at 771; *Friends of the Earth, Inc.*, 528 U.S. at 180–81; *Steel Co.*, 523 U.S. at 102–03.

⁸⁴ *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 114 (1979) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

⁸⁵ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686–89 (1973).

⁸⁶ *Leonard & Brant*, *supra* note 45, at 109–10.

⁸⁷ 438 U.S. 59 (1978).

⁸⁸ *Id.* at 78–79.

On the other hand, the Court sometimes has insisted upon “judicially cognizable injury” rather than simply any injury-in-fact.⁸⁹ This version of the injury prong of standing appears to approximate injury as a violation of legal right triggering a judicial remedy: injury at law, not injury-in-fact. Justice O’Connor’s use of this interpretation of injury for Article III standing in *Allen v. Wright*⁹⁰ enabled the Court to hold that the plaintiffs lacked standing, much to the chagrin of the dissenting Justice Brennan, who saw in the revamped interpretation an illicit test of the merits rather than justiciability.⁹¹ It may be that after expanding the federal judicial role in racial integration beyond that required to cure illegal segregation, the Court had reason to halt its expansion. Instead of retrenching on the merits and marking a departure from the halcyon days of its integrationist rhetoric,⁹² it manipulated standing to discard the case. Injury became once again injury at law rather than injury-in-fact. The other two prongs of the standing test underwent similar transformations. Causation left the “fairly traceable” test to become so strict as to require more certainty than that offered by the laws of elementary economics.⁹³ Redressability left the “likely to be redressed” test to become more like “very likely to be redressed.”⁹⁴ The test of justiciability enabled the Court to dodge the merits, or at least to appear to dodge the merits as Justice Brennan claimed.⁹⁵ When standing looks to the nature of injury and more closely examines causation and remedy, it may resemble standing of old—the standing established when a party held a cause of action.

Actually, a grave conceptual difficulty exists in taking the injury for standing to be injury “in fact” apart from an assessment of the legal quality of that injury. Strictly, injury-in-fact could be supplied by any harm, any humanly caused happening against the preference of any other human. Some legal order—some order beyond that of “fact”—is necessary to evaluate such happenings, or few actions would fail for lack of standing. Injury purely in fact is an idle fiction.⁹⁶ Either injury-in-fact

⁸⁹ See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 n.16 (1974).

⁹⁰ 468 U.S. 737 (1984).

⁹¹ See *id.* at 775.

⁹² That rhetoric lingers in *Allen*. See *id.* at 756 (“The injury [respondents] identify—their children’s diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but . . . one of the most serious injuries recognized in our legal system.”).

⁹³ See *id.* at 788 (Stevens, J., dissenting).

⁹⁴ See *id.* at 758.

⁹⁵ See *supra* note 10 and accompanying text.

⁹⁶ Albert, *supra* note 40, at 1148, 1152 (arguing that injury alone is not functional or intelligible); William Burnham, *Injury for Standing Purposes When Constitutional Rights are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57, 110–12 (1985) (arguing that injury-in-fact disguises necessary value

actually reflects some pre-positive natural law ordering⁹⁷ or it stands for the arbitrary power of the court to pick and choose cases to hear and cases to reject.⁹⁸ Actually, as observed above,⁹⁹ “injury-in-fact” is sometimes taken explicitly by the Court itself to mean “cognizable injury.” A test of cognizable injury, injury of a nature that the courts are prepared to vindicate, makes sense of an injury inquiry for standing.¹⁰⁰ It also could explain why many have interpreted the injury test for standing actually to be a test of the merits.¹⁰¹ Though propelled by the desire to leave behind the merits-based cause-of-action test for standing, a cogent injury-in-fact test necessarily relies upon distinctions rooted in the merits or something very like the merits. Some legal theory capable of valuing harms beyond their existence “in fact” must lie behind injury-in-fact.

judgment); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 639–41 (1999) (arguing that injury-in-fact is not a coherent concept); Sunstein, *supra* note 35, at 167, 188–92 (arguing that injury-in-fact is nonsense that ignores the necessary value component of the injury question); Fletcher, *supra* note 33, at 229–34 (arguing that injury-in-fact is nonsense); Winter, *supra* note 5, at 1379–80 (arguing that injury-in-fact must be qualified by more than fact to be noncircular).

⁹⁷ See Woolhandler & Nelson, *supra* note 39, at 724 n.166 (suggesting that earlier, prepositivist times held such a view).

⁹⁸ See Fletcher, *supra* note 33, at 228–29; Nichol, *supra* note 33, at 1941; Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (arguing also that the unworkable injury-in-fact inquiry “favors the powerful over the powerless”).

⁹⁹ See *supra* notes 89–90 and accompanying text.

¹⁰⁰ See *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1177–80 (D.C. Cir. 1983) (Bork, J., concurring); Albert, *supra* note 40, at 1152; Burnham, *supra* note 96, at 57; Nichol, *supra* note 33, at 1918, 1929–32, 1934, 1936, 1945–50; Sunstein, *supra* note 96, at 639–41; *cf.* Albert, *supra* note 40, at 1144 (arguing that standing must mean a combination of injury meeting the test of Article III and also injury to a “legally protected or cognizable interest”).

¹⁰¹ For commentators who have seen such a merits-based approach in the injury test for standing see, e.g., Albert, *supra* note 40, at 1143, 1153–54, 1173–77; Albert, *supra* note 41, at 484–96; Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 597–99 (1987); Scott, *supra* note 30, at 652–54; *cf.* Fletcher, *supra* note 33, at 263–64 (remarking that *Clarke v. Securities Industry, Ass’n*, 479 U.S. 388 (1987), helps correct the injury-in-fact error of *Data Processing* by focusing on the merits of an APA claim as determined by whether the statute to which the APA is being applied grants rights to the plaintiff to challenge agency action). Others have located the evaluation necessary for a coherent test of injury for standing in distinctions retained from the common law, *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 171; Sunstein, *supra* note 35, at 188–92; developed from social values, Burnham, *supra* note 96, at 58, 60–63; or based upon a comparative measure of the harm suffered by the plaintiff relative to that suffered by others, Leonard & Brant, *supra* note 45, at 106–07, 113.

But at the same time, legal theory severed from any sort of mark of actual existent harm cannot alone provide injury-in-fact.¹⁰² Such, at least, is the lesson of *Lujan v. Defenders of Wildlife*.¹⁰³ By statute, Congress had granted standing to nearly everyone inclined to bring suit against federal agencies to enforce certain environmental regulations. It did this by creating a broad legal right against violation of those regulations, so that the violation was deemed to injure anyone who might bring suit.¹⁰⁴ For the Court, Justice Scalia explained that the Article III standard for standing to sue could not fall to such legerdemain. Though Congress indeed may create rights and, consequentially, establish a predicate for injury, it may not create rights against an injury unaccompanied by actual harm.¹⁰⁵ Nominalism here does not work. Some real harm to the party must exist for that party to have an injury to satisfy the Article III test of standing. And so *Lujan* is in a sense the converse of *Duke Power*: If *Duke Power* permits harm without true legal injury to supply standing, *Lujan* prohibits injury without harm.¹⁰⁶ Though very controversial when decided,¹⁰⁷ *Lujan* seems well supported¹⁰⁸ and the Court has adhered to it.¹⁰⁹

¹⁰² One commentator has questioned whether even the concept of "actual existent harm" makes sense apart from legally cognizable injury. Gene R. Nichol, *The Impossibility of Lujan's Project*, 11 DUKE ENVTL. L. & POL'Y F. 193, 203-04 (2001).

¹⁰³ 504 U.S. 555 (1992).

¹⁰⁴ See *id.* at 576-77.

¹⁰⁵ See *id.* at 578. But see Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1157-60 (1993) (questioning the validity of such a "de facto" injury concept); Sunstein, *supra* note 35, at 236 (same).

¹⁰⁶ See Fletcher, *supra* note 33, at 249 (noting that *Lujan* denies standing to "*injuria absque damno*").

¹⁰⁷ Compare Harold Feld, *Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141 (1994) (criticizing *Lujan*), Nichol, *supra* note 105 (same), Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993) (same), and Sunstein, *supra* note 35 (same), with Marshall J. Breger, *Defending Defenders: Remarks on Nichol and Pierce*, 42 DUKE L.J. 1202 (1993) (supporting *Lujan*), and Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993) (largely supporting *Lujan*).

¹⁰⁸ See Leonard & Brant, *supra* note 45, at 26-29 (discussing precedent and political theory); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993) (discussing precedents as viewed by present Chief Justice, successful litigator of *Lujan*); Woolhandler & Nelson, *supra* note 39, at 719-25 (discussing English, Early American, and more recent American precedent).

¹⁰⁹ Leonard & Bryant, *supra* note 45, at 30-33 (showing that the separation of powers doctrine of *Lujan* seems to have the support of all justices in six cases following); see Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 331 n.97 (2001) (arguing that later cases that seem to depart from *Lujan* actually reflect only factual and not doctrinal variance). But see *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122,

An implication of *Lujan* supports the conclusion that the expression “injury-in-fact” cannot be taken literally. It is well established that Congress can create standing where none would otherwise exist.¹¹⁰ Legislation may grant legal interests, and injury to those interests may provide standing to sue. But *Lujan* determines that legislation cannot supply standing in the absence of actual harm to the litigant. In light of *Lujan*, therefore, injury-in-fact stands for something other than actual harm. Otherwise, actual harm itself would supply standing without any need for legislation. Injury-in-fact therefore must actually be judicially cognizable injury and not some strictly material, “value-free” harm.¹¹¹

With standing no longer tethered to the cause of action but instead a doctrine to be developed and modified by the Court for unexpressed ulterior ends and without much coherent explicit analysis, commentators began to attack the very notion that the Constitution requires standing for federal litigation at all.¹¹² Consequently, they challenged the wisdom of limiting federal civil litigation to actions presenting plaintiffs meeting the test of standing.¹¹³ Others, to the contrary, have noted facts that support some link between standing and the Constitution.¹¹⁴ Much of the

253–63 (1998) (noting a Supreme Court decision that might indicate some retreat from *Lujan*).

¹¹⁰ Sunstein, *supra* note 35, at 235; Sunstein, *supra* note 36, at 1476; Kevin A. Coyle, Comment, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CAL. L. REV. 1061, 1084 (1988).

¹¹¹ Cf. Leonard & Brant, *supra* note 45, at 110–11 (suggesting that after *Lujan* law regulates injury-in-fact so as to establish legally protected interests and cognizable injury).

¹¹² See, e.g., Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 318–19 (1990); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 827–28 (1969); Nichol, *supra* note 105, at 1150–53, 1168–69; Winter, *supra* note 5, at 1374.

¹¹³ See, e.g., Lee, *supra* note 82, at 626–31; Sunstein, *supra* note 36, at 1480–81; Winter, *supra* note 5, at 1374–75; see also Bandes, *supra* note 112, at 276 (suggesting that the question of standing raises an open value judgment on the role of the federal courts rather than a matter for mechanical application of the Constitution.); Jaffe, *supra* note 67, at 304–05 (proposing standing as a sensible but not absolute factor in determining whether an action should be litigable in the federal courts).

¹¹⁴ See, e.g., Brilmayer, *supra* note 82, at 300 (suggesting a loose historical connection between Article III case and controversy and standing); Leonard & Brant, *supra* note 45, at 5–6, 33, 40, 42–43 (arguing that an Article III standing doctrine preserves the view of the Framers); Pierce, *supra* note 3, at 1763–64 (observing that the only evidence from the Framers regarding the meaning of Article III case or controversy is Madison’s remark in the Convention that the federal courts would be limited to matters of a “[j]udiciary [n]ature,” quoting from 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 430 (Max Farrand ed., rev. ed. 1966)); Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 447–50 (1994) (distinguishing between “case” and “controversy” and understanding the former to embrace matters involving legal exposition beyond the narrow range of dispute resolution meant by the latter);

dispute has proceeded from differing understandings of the English practice that must have influenced the Framers.¹¹⁵ Three elements of that practice have received the most attention. One of these is the ancient *qui tam* action, a type of action brought by a private person to correct a public wrong. Another is the prerogative writs, to the extent they were available to persons who themselves were uninjured. The third is the English—and early American—use of judges as advisors to other officials of civil government. The argument based upon these three practices holds that no standing involving injury to a plaintiff is necessary for presenting a case or controversy to a federal court.

The first practice is entertaining *qui tam* actions, actions brought by private parties to recover for civil government some loss it—and not the parties—has suffered. Permitting such actions—and others like them, for instance, informer's actions—would seem to present difficulties for a doctrine requiring of parties standing supplied by injury to themselves, caused by defendants, and likely to be redressed by the court.¹¹⁶ Nevertheless, these actions have long been a feature of Anglo-American law.¹¹⁷ How to harmonize this continuing practice of such pedigree with the accepted Article III test for standing presented some challenge, and invited several approaches.¹¹⁸ Then, in 2000, the Supreme Court spoke to

Woolhandler & Nelson, *supra* note 39, at 691 (supporting standing as a doctrine of the Constitution).

¹¹⁵ See, e.g., Berger, *supra* note 112, at 817–18, 840 (arguing that standing in the English practice did not require injury); Winter, *supra* note 5, at 1399–1400 (stating that the English practice of causes of action brought without meeting the present test of standing was familiar to the Framers).

¹¹⁶ See Berger, *supra* note 112, at 825–26; Winter, *supra* note 5, at 1406–09.

¹¹⁷ Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341–42, 388 (1989) (observing the long history of *qui tam* actions in England and from the beginning of the United States, including such celebrated cases as *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819)); Sunstein, *supra* note 35, at 175–76 (noting congressional authorization of such actions since early times and without question as to any challenge from the case and controversy limitation of Article III); Winter, *supra* note 5, at 1398–99; Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155, 156 (2001); cf. *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805) (entertaining, per Marshall, C.J., a *qui tam* action).

¹¹⁸ One approach harmonized *qui tam* and similar actions with the standing requirement by emphasizing an agency relationship between the party bringing suit and the Crown or the parties whose interest the suit was to advance. See, e.g., Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1041–43 (1997); Gilles, *supra* note 109, at 348–55. This approach might draw upon Crown suits brought on behalf of the people of the realm, see 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (Univ. of Chicago Press 1979) (1768), or perhaps upon criminal prosecutions, see *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); Woolhandler & Nelson, *supra* note 39, at 695–701. Such an approach might be susceptible to the answer that an agency relationship does not establish that the agent actually bringing

the question. As to harmonizing *qui tam* actions with the Article III standing requirement,¹¹⁹ the Court rejected the theory that granting the party an interest in the lawsuit itself by providing a bounty satisfied the test of injury.¹²⁰ How could deciding that any gain from a lawsuit itself satisfies the test of injury do anything but eliminate the test of injury? Instead, the Court saw *qui tam* actions as depending upon an assignment to the party bringing suit of the assignor's injury, an assignment the Court saw as confirmed by the history of *qui tam* actions since the thirteenth century.¹²¹ Once assigned an injury done to the government, a party may meet the Article III standing requirement. Consequently, *qui tam* and similar actions appear not to violate standing doctrine, nor to draw that doctrine into question.

The second traditional practice thought to present difficulties for the Article III standing doctrine is that of granting prerogative writs to uninjured parties. Several scholars have argued the English courts, including those at the time of the Framing of the Constitution, granted at least some such writs to applicants who were strangers to the matter at hand and therefore would have suffered no injury to support standing.¹²²

suit suffered injury sufficient to supply the agent's standing to sue. Hartnett, *supra* note 3, at 2241 n.15. Another approach rested upon the bounty that a successful *qui tam* or informer's action might produce for the party bringing suit. To recover a bounty would be to secure a payment owing to the party, a payment not to secure which would be tantamount to an injury. See Caminker, *supra* note 117, at 345–46, 348, 381–84; Clanton, *supra* at 1038–40; Hartnett, *supra* note 3, at 2242–45; Leonard & Brant, *supra* note 45, at 45–47; Sunstein, *supra* note 35, at 177 n.70. Then again, perhaps these actions were flukes, that is to say special categories of cases or controversies, see Woolhandler & Nelson, *supra* note 39, at 725–32, or unconstitutional, James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701 (1993); cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 209–10 (2000) (Scalia, J., dissenting) (suggesting that Article III limits are threatened by private suits for public remedies).

¹¹⁹ The Court left open the question whether *qui tam* actions run afoul of Article II, see *Vt. Agency*, 529 U.S. at 778 n.8, though Justice Stevens in dissent was confident Article II presented no problem, see *id.* at 801 (Stevens, J., dissenting). Justice Stevens is not alone in his confidence. See, e.g., Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383, 404–05 (2001).

¹²⁰ *Vt. Agency*, 529 U.S. at 772–73.

¹²¹ See *id.* at 773–74.

¹²² See, e.g., Berger, *supra* note 112, at 819–25, 837–39; Jaffe, *supra* note 67, at 260–62 (noting for the period 1870 to 1952 a broader “grievance” theory applied to certiorari than the legal wrong theory applied then to mandamus); Sunstein, *supra* note 35, at 171–72 (asserting that prohibition would issue without requiring injury, citing 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 602 (photo. reprint 1979) (1797), and that certiorari would issue at the court's discretion for a stranger to the subject proceedings). Some writs seem to have required injury if they were sought to be granted as of right for private wrong but not if sought to be granted by discretion for public wrong. Jaffe, *supra* note 67, at 286; cf. 3 BLACKSTONE, *supra* note 118, at 111 (discussing writ of mandamus “by the oath of the party injured”); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 65 (Garland Publishing 1978) (1721)

This argument has not gone unanswered.¹²³ Early cases appear to go either way.¹²⁴ But whatever might have been the practice in England and

(discussing writ of mandamus “upon the Complaint of any Person apprehending himself to be unjustly aggrieved”).

¹²³ Clanton, *supra* note 118, at 1008 (arguing that prerogative writs issued for those with some interest to protect, though perhaps strangers to the proceedings that were the subject of the prerogative writ); *see* Leonard & Brant, *supra* note 45, at 42–43 (declaring Clanton victorious over Berger and Jaffe on this score). *But see* Winter, *supra* note 117, at 156 n.13 (opposing Clanton). Similar efforts have gone towards showing that plaintiffs in other actions to vindicate public rights had to possess standing of their own to sue. *See* Gilles, *supra* note 109, at 361 n.241; Woolhandler & Nelson, *supra* note 39, at 710–12 nn. 101–07; *cf.* Georgetown & Alexandria Canal Co., 37 U.S. (12 Pet.) 91, 99 (1838) (declaring that private suits brought against a public nuisance require interested plaintiffs with special injury to themselves).

¹²⁴ *Compare* County Comm’r v. People *ex rel.* Metz, 11 Ill. 202, 208–09 (1848) (stating that any citizen, even without interest, may bring a mandamus to enforce a public right), People *ex rel.* Case v. Collins, 19 Wend. 56, 6465 (N.Y. 1837) (same), Berger, *supra* note 112, at 834–35 (discussing 1795 New Jersey case in which court ignored objection that applicant for certiorari lacked an interest sufficient for standing), Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1275–77 (1961) (arguing that some late eighteenth and early nineteenth century state cases appear to allow certiorari or mandamus to applicants without distinctive injury), *and* Winter, *supra* note 5, at 1401–03 (noting that some but not all early state cases follow the English practice in allowing prerogative writs to those without standing), *with* Kendall v. United States, 37 U.S. (12 Pet.) 524, 609, 611, 618, 620–21 (1838) (deciding that mandamus to an officer of the United States is within the judicial power of the federal courts for an interested relator to vindicate his individual right for which there is no other remedy), Weston v. City Council, 27 U.S. (2 Pet.) 449, 450, 464 (1829) (reviewing case on prohibition with writ issued to parties aggrieved by challenged ordinance), S.S. MERRILL, LAW OF MANDAMUS 63 (1892) (discussing early Iowa case in which mandamus was refused “because the relator showed no interest whatever in the matter . . .”), HORACE G. WOOD, A TREATISE ON THE LEGAL REMEDIES OF MANDAMUS AND PROHIBITION, HABEAS CORPUS, CERTIORARI, AND QUO WARRANTO 1 (Fred B. Rothman & Co. 1997) (1896) (summarizing the law of mandamus to conclude that “[t]he legal right of the party to that which he demands in the writ must be clearly established”), Jaffe, *supra*, at 1271–72 (noting that standing was required for mandamus in nineteenth century cases), *and* Pushaw, *supra* note 43, at 445 (remarking that the *Marbury* Court appears to depart from English practice by presupposing that mandamus would lie only for one whose legal right had been violated). Sometimes one and the same case is construed alternatively to point in both directions. *Compare* Winter, *supra* note 5, at 1399–1401 (construing Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1792), to support justiciability in mandamus without injury for standing because the Attorney General brought suit to represent a private individual) *with* Leonard & Brant, *supra* note 45, at 43–44, 69 (construing same case to require standing because the Attorney General bothered to provide an interested party to represent); *compare* Winter, *supra* note 5, at 1404–05 (construing Union Pacific Railroad Co. v. Hall, 91 U.S. 343 (1875), to permit, like old English cases, mandamus for parties with no injury of their own) *with* Union Pac. R.R. Co. v. Hall, 91 U.S. 343 (1875) (without directly deciding the question or citing American cases on it, permitting mandamus liberally and in general terms to any party, but in fact to a party in this case that had an interest) *and* Leonard & Brant,

sometimes in some state courts, it seems that early federal courts, on the rare occasions when prerogative writs would issue,¹²⁵ required the applicant to have an interest:¹²⁶ a “particularized injury.”¹²⁷ Here again then, there appears little evidence to suggest that Article III must permit federal court adjudication of actions brought by those without injury or otherwise lacking standing to sue.¹²⁸ Like the practice of *qui tam* actions, the practice of prerogative writs may present no difficulty for an Article III doctrine of standing requiring injury.

The practice of judicial advisory opinions may be more difficult to harmonize with an Article III that requires standing to sue. If the Constitution empowers federal courts to advise government officials outside the context of actions brought to remedy injury, then standing to sue as presently understood cannot be a requirement of Article III. And if the Constitution empowers federal courts to do whatever the Crown courts of England contemporaneous with the Framing were empowered to do, they are likely empowered so to advise government officials. Traditionally, the judges of English Crown courts issued advisory opinions to the Crown and to the House of Lords.¹²⁹ A similar practice extended also to colonial judges.¹³⁰ Furthermore, though the Convention refused to include in the Constitution a Council of Revision or a Council of State to institutionalize certain advisory opinions,¹³¹ it apparently was assumed that federal judges would advise the executive and legislative branches, and they did so—especially in the person of the Chief Justice.¹³² The rejection of authority to issue advisory opinions¹³³ supposedly had nothing to do with the limitation of federal judicial power to cases and controversies, the limitation that has yielded the

supra note 45, at 44–45 (construing *Hall* to disregard the issue of injury and minimizing its value for discerning the Framers’ view).

¹²⁵ Leonard & Brant, *supra* note 45, at 43; see Pushaw, *supra* note 43, at 438 n.197.

¹²⁶ Woolhandler & Nelson, *supra* note 39, at 709; *cf. id.* at 714–16 (noting that in exercise of its original jurisdiction the Supreme Court has required that parties assert their rights of person or property).

¹²⁷ Bellia, *supra* note 47, at 818.

¹²⁸ Even if a practice of granting prerogative writs to uninjured parties did affect the Framers’ concept of federal judicial power, *but see* Leonard & Brant, *supra* note 45, at 43, whether it would have led to extending judicial power to other actions for uninjured parties is another matter altogether, *see* Bellia, *supra* note 47, at 820–35.

¹²⁹ *See* STEWART JAY, *MOST HUMBLE SERVANTS* 12–14 (1997); Lee, *supra* note 82, at 639 n.204.

¹³⁰ *See* JAY, *supra* note 129, at 52.

¹³¹ Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 127–28 (1973).

¹³² *Id.* at 145–46.

¹³³ *See* Lee, *supra* note 82, at 644–45 (describing the range of advisory opinions federal courts refuse to issue).

standing doctrine.¹³⁴ Instead, Justices of the Supreme Court, for reasons of prudence, determined that they would not as a court render advisory opinions.¹³⁵ Reasons other than lack of standing, then, would bar federal judicial advisory opinions. Standing to sue, so it would seem, is not required by the Constitution at all for a case or controversy.

But beyond any support a doctrine of standing might garner from the case and controversy limitation of Article III, standing may rest upon other constitutional support. The constitutional separation of powers, emphasizing a role for the federal judiciary distinct from that of the President and Congress, may well entail a doctrine of standing.¹³⁶ If standing is necessary to the exercise of judicial power—apart from whether in a “case” or “controversy”—a lawsuit brought by one without standing invites the federal courts to exercise authority they lack and that coordinate branches may possess instead. To the extent the distinction between the coordinate branches is served by standing, adverting to that distinction should enlighten standing. Therefore, although the effect on

¹³⁴ Berger, *supra* note 112, at 830–32 (arguing that the rejection had to do with avoiding hearing cases already heard as advisors and not with some incapacity by virtue of the case and controversy limitation); Fletcher, *supra* note 33, at 247–50 (arguing the same and noting that advisory opinions were rejected before development of current standing doctrine); Pushaw, *supra* note 114, at 513–17 (arguing that application for an advisory opinion was indeed a “case”); *see also* Hayburn’s Case, 2 U.S. (2 Dall.) 409, 411 (1792) (setting forth the opinions of federal circuit courts on the question before the Court, two of which opinions were given in letters to the President). *But see* CHEMERINSKY, *supra* note 28, at 50 (suggesting that Justices declined to advise Washington on separation of powers grounds).

¹³⁵ Leonard & Brant, *supra* note 45, at 69–81 (interpreting the Correspondence of the Justices to stand against official Court advisory opinions, whatever individual Justices might do); Pushaw, *supra* note 43, at 442–43 (noting both that the Correspondence, for reasons other than those to be found in Article III, held against “extra-judicial[]” opinions and that the Correspondence has been taken to support an Article III rule against advisory opinions); Wheeler, *supra* note 131, at 145, 150–58 (taking the Correspondence itself simply to reduce the nonjudicial role of federal judges especially as to ongoing counsel but granting that Justice Story’s later version of the Correspondence led to reading it as prohibiting advisory opinions generally).

¹³⁶ Leonard & Brant, *supra* note 45, at 25 (noting that *Allen v. Wright*, 468 U.S. 737, 752 (1984), rested standing upon the single idea of separation of powers); Roberts, *supra* note 108, at 1229–30 (suggesting that *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), on standing was intended to require the coordinate branches to perform their own roles without general federal court oversight); Scalia, *supra* note 72, at 891–92 (arguing that standing is crucial for separation of powers and is not, despite *Flast v. Cohen*, 392 U.S. 83 (1968), a doctrine designed to assure sound advocacy); Sunstein, *supra* note 36, at 1459–61, 1469 (reviewing possible links between separation of powers theories and standing); *cf.* Sunstein, *supra* note 35, at 179 n.79 (contemplating a possible separation of powers limit on the set of cases and controversies of Article III). *But see* Berger, *supra* note 112, at 817–18, 840 (arguing that separation of powers does not require standing to sue); Burnham, *supra* note 96, at 110 (arguing that the injury inquiry for standing should have nothing to do with separation of powers).

a coordinate branch from a judgment may be the same whether the plaintiff has necessary standing or not, whether the plaintiff has necessary standing may mark the judgment as one within judicial authority rather than unauthorized meddling in the affairs of a coordinate branch.¹³⁷

One approach to standing from the aspect of separation of powers has focused upon the Take Care Clause: The President “shall take Care that the Laws be faithfully executed.”¹³⁸ The Clause has been graced with a broad range of interpretations of late.¹³⁹ Some have insisted that the Clause does nothing but impose a duty upon the President,¹⁴⁰ the implication being that it cannot also impose a limit upon the federal judiciary. Others have found in the Clause provision for a unitary executive, entrusting ultimately to the President alone the power to execute federal law.¹⁴¹ If understood this way, the Take Care Clause forbids judicial exercise of executive power. So again, if injury and other incidents of standing are necessary to judicial power, judicial involvement in matters occupying the executive branch when the court lacks a plaintiff with standing could run afoul of the Clause. If not exercising truly judicial authority, a court could actually be usurping executive power when directing how the law is to be carried out.¹⁴²

¹³⁷ Some seem to have ignored this consideration. See Berger, *supra* note 112, at 829; Nichol, *supra* note 98, at 316–17; Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131, 135–37 (1993).

¹³⁸ U.S. CONST. art. II, § 3, cl. 4.

¹³⁹ Leonard & Brant, *supra* note 45, at 54.

¹⁴⁰ Caminker, *supra* note 117, at 356; Pushaw, *supra* note 43, at 417 n.110; Sunstein, *supra* note 36, at 1471.

¹⁴¹ Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550, 582–84, 617, 619 (1994); Krent & Shenkman, *supra* note 107, at 1799; see also Leonard & Brant, *supra* note 45, at 55 (remarking that the Clause could not have meant that the judiciary would have a corrective or supervisory role over the President).

¹⁴² *Lewis v. Casey*, 518 U.S. 343, 349–50 (1996) (declaring that granting relief for harm is a necessary distinction for courts to keep them from obtruding upon the political branches); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610, 612–14 (1838) (deciding that granting a writ of mandamus for a relator with a right to money did not run afoul of the Take Care Clause); Craig, *supra* note 3, at 122–24 (citing *Bowsher v. Synar*, 478 U.S. 714, 732–33 (1986), and *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), to distinguish executive power as interpreting law to implement it and judicial power as remedying a breach of law); Roberts, *supra* note 108, at 1230 (arguing that standing to sue is necessary to avoiding judicial violation of the Take Care Clause by ensuring that courts exercise judicial power only). But see Nichol, *supra* note 105, at 1163–65 (asserting that standing to sue is irrelevant to the application of the Take Care Clause and other Article II considerations); Nichol, *supra* note 102, at 205 (doubting that the purchase of a ticket by the *Lujan* plaintiffs so as to provide standing should affect Article II analysis); Sunstein, *supra* note 35, at 212–13 (same). See generally Craig, *supra* note 3, at 105–08, 159–67, 171 (arguing that citizen suits by injured plaintiffs enforce, but do not execute the law so as to violate Article II); Woolhandler & Nelson, *supra* note 39, at 713 (noting that nineteenth

Article II may have another role to play regarding injury for standing to sue beyond the role it holds in separation-of-powers analysis. In the separation-of-powers analysis, the Article forbids federal courts from obtruding into executive power. If standing is a touchstone of judicial power, actions brought by plaintiffs with standing call forth judicial and not executive power. But Article II forbids private exercise of federal executive power as much as judicial exercise of federal executive power. If an uninjured plaintiff were to bring an action that rightfully must be brought only by the executive power, the court would be countenancing a violation of Article II. In this context, injury for standing to sue would qualify plaintiffs rather than courts.

Article II prevents Congress from delegating to private individuals the regulation or vindication of the general public interest.¹⁴³ This rule constrains the investing of private parties with the authority to bring suit in federal court if that suit is really to represent the United States rather than to give relief for an injury to the private parties. In this context, standing may be considered a creature of Article II.¹⁴⁴ So, for example, though *qui tam* actions survived Supreme Court challenge under Article III,¹⁴⁵ they have yet to clear Supreme Court challenge under Article II, a challenge that might prove fatal.¹⁴⁶ Unless actions brought by private parties to enforce the public interest are under some control ultimately vested in the President,¹⁴⁷ Article II may present a bar. In fact, it may be that Article II is dominating Article III in the analysis of standing.¹⁴⁸

century mandamus practice in the Supreme Court was limited by separation-of-powers considerations that looked for individual injury to individual rights, as in *Marbury*).

¹⁴³ Krent & Shenkman, *supra* note 107, at 1794, 1806. *But see* Sunstein, *supra* note 137, at 134.

¹⁴⁴ *See* Hartnett, *supra* note 3, at 2258–62; *see also* Gilles, *supra* note 109, at 341–48 (discussing limitations, including those from the Take Care Clause, on representational standing of government interests).

¹⁴⁵ *See supra* notes 119–21 and accompanying text.

¹⁴⁶ *See* Calabresi & Prakash, *supra* note 141, at 660–61; Craig, *supra* note 3, at 148–55; Krent & Shenkman, *supra* note 107, at 1820–21; *see also* Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957, 1959 (1995) (questioning the constitutionality of citizen suits under both Articles II and III); *cf.* Craig, *supra* note 3, at 169 (opining that Article II presents no difficulties for punitive damages because they arise in a private suit).

¹⁴⁷ Calabresi & Prakash, *supra* note 141, at 595, 599, 659–60 (discussing Presidential authority over inferior officers); Johnson, *supra* note 119, at 392–93, 408–09 (discussing same and state enforcement of federal law). *But see* Sunstein, *supra* note 137, at 134–35 (arguing that citizen suits are not inconsistent with the unitary executive and that the President does not control even all federal prosecutions). At the time of the Framing, English prosecutions for almost all offenses were brought by unofficial parties. Abell, *supra* note 146, at 1960–61; George Fisher, *Making Sense of English Law Enforcement in the Eighteenth Century: A Response*, 2 U. CHI. L. SCH. ROUNDTABLE 507, 508–12 (1995); David D. Friedman, *Making Sense of English Law*

There exists another constitutional source for an injury test of standing, one perhaps that has gone lacking in deserved attention. Rehearsed here so far have been the case and controversy limitation of Article III and limitations derived from Article II, limitations embracing both separation-of-powers and constraints on the private wielding of federal executive authority. In addition to these limitations, the other constitutional source of the standing doctrine lies in the concept of judicial power itself.

Though the Constitution provides that “[t]he judicial Power shall extend to . . . Cases [and] Controversies,”¹⁴⁹ it does not thereby provide *what* “judicial Power” actually *is*. We know the reach of the power from this clause, but not its essence. Nowhere does the Constitution give its essence. Consequently, simply because a court handles something that happens to be a case or controversy is no guarantee that the court is exercising judicial power.

It is this last observation that holds most significance for standing. If “case” and “controversy” were the only words determinative of the content of “judicial Power,” that content would be broad indeed. “Every criminal investigation conducted by the Executive is a ‘case,’ and every policy issue resolved by congressional legislation involves a ‘controversy.’”¹⁵⁰ Cases and controversies need not be judicial matters at all.¹⁵¹ In context then, they must be taken in a much more limited meaning, a meaning dependent on what is appropriate to courts,¹⁵² on what is truly “judicial Power.” The only direct evidence of what the Framers meant by the phrase is James Madison’s remark at the Convention that he supposed the term to represent cases of a “Judiciary Nature.”¹⁵³ The “case” or “controversy” limitation is actually a “judicial Power” limitation.

Enforcement in the Eighteenth Century, 2 U. CHI. L. SCH. ROUNDTABLE 475, 475–76; Johnson, *supra* note 119, at 404. This practice seems to have been rejected in America and was never used for federal prosecutions. Woolhandler & Nelson, *supra* note 39, at 697–701; *cf. id.* at 691, 712, 723–25 (discussing the American practice of requiring public officers to bring actions for public rights).

¹⁴⁸ See Sunstein, *supra* note 35, at 193–95; *see also* Leonard & Brant, *supra* note 45, at 30 (examining *Lujan* for the unitary executive principle). *But see* Johnson, *supra* note 119, at 392–97 (noting the lack of a clear test for Take Care Clause cases).

¹⁴⁹ U.S. CONST. art. III, § 2, cl. 1.

¹⁵⁰ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998). *See* JAY, *supra* note 129, at 62, 228–29 n.15 (remarking how broad these two terms are, even from usage in the text of the Constitution).

¹⁵¹ McCormack, *supra* note 101, at 626 n.153.

¹⁵² *See Steel Co.*, 523 U.S. at 102.

¹⁵³ RECORDS OF THE FEDERAL CONVENTION, *supra* note 114, at 430; *see* Leonard & Brant, *supra* note 45, at 38–39 (observing that Madison’s remark went undiscussed before unanimous adoption of the provision and that therefore it must have been understood and agreed to). *But see* Lee, *supra* note 82, at 640–41 (arguing that the

But is whatever Anglo-American judges performed in the late eighteenth century an exercise of judicial power? “Anglo-American judges exercised multiple executive and legislative functions.”¹⁵⁴ English judges traditionally were the king’s surrogates, dispensing justice as his servants but also pursuing his interests and rights.¹⁵⁵ They performed frankly executive and legislative tasks, and fulfilled administrative duties.¹⁵⁶ In some respects, English judges were part of the executive, even managing litigation as if for the Crown’s behalf.¹⁵⁷ This English practice in large measure became the practice in the American colonies.¹⁵⁸

So, for example, that English or early American judges rendered advisory opinions¹⁵⁹ does not signal that activity as an exercise of judicial power.¹⁶⁰ Likewise, the granting by judges of prerogative writs is not in every instance an exercise of judicial power. Prerogative writs were brought in the name of the crown¹⁶¹ and “gradually supplanted the old personal command of the sovereign.”¹⁶² The prerogative writs traditionally have been at heart supervisory, more than adjudicatory.¹⁶³

remark is not determinative of the meaning of Article III and that it cannot have meant what is understood as “justiciable” now because that concept did not appear until the mid nineteenth century).

¹⁵⁴ Pushaw, *supra* note 114, at 482.

¹⁵⁵ See JAY, *supra* note 129, at 6, 10, 191 n.1.

¹⁵⁶ See *id.* at 5, 11, 49, 191–92 n.2, 194 n.8.

¹⁵⁷ See *id.* at 25, 211 n.62.

¹⁵⁸ See *id.* at 52.

¹⁵⁹ MASS. CONST. of 1780, pt. II, ch. 3, art. 2; WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE FOURTH, act 5, sc. 2, ll. 118–21, 134–40, (1600); Pushaw, *supra* note 114, at 481.

¹⁶⁰ Of course, not everything a judge does, even officially, is necessarily judging. Supreme Court justices helped draft the Judiciary Act of 1801. See Wythe Holt, *Separation of Powers?*, in NEITHER SEPARATE NOR EQUAL: CONGRESS IN THE 1790s 183, 184–85 (Kenneth R. Bowling & Donald R. Kennan eds., 2000). Early federal judges investigated and certified matters, and performed other duties apart from deciding cases and controversies. Wheeler, *supra* note 131, at 132–35, 139. Judicial behavior, then, is no infallible touchstone of judicial power.

¹⁶¹ Jaffe, *supra* note 124, at 1269.

¹⁶² 1 CHESTER JAMES ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES 291 (1987) (referring to mandamus specifically). Indeed, Holdsworth ventured that “prerogative [is] the source of . . . executive power.” 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 341 (1938).

¹⁶³ See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 629–30 (1838) (Taney, J., dissenting) (observing that mandamus is supervisory and not originally judicial at all); *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 470 (1829) (Johnson, J., dissenting) (essaying that a prohibition is not really a judgment at all); 3 BLACKSTONE, *supra* note 118, at 111–13 (discussing supervisory role of mandamus and prohibition); Jaffe, *supra* note 124, at 1269–70 (casting prerogative writs as tantamount to the King’s supervision of his courts); Leonard & Brant, *supra* note 45, at 45 (stating the purpose of prerogative writs as to supervise courts and officials); Pushaw, *supra* note 43, at 402

They enabled the English court to discharge its duty to guard against “encroachment of jurisdiction” or “refusal or neglect of justice.”¹⁶⁴ That prerogative writs could serve as executive instruments of supervision would explain why injury for standing was sometimes dispensed with¹⁶⁵ and why granting the writs was discretionary with the court, especially when individual rights were not directly at stake.¹⁶⁶ When the writs raised the rights of applicants, they may have been vehicles for judicial power; when they did not, they remained simply executive.

The “judicial Power” vested by Article III in the federal courts, then, is not described adequately solely by reference to “cases” and “controversies,” even as those terms were understood in Anglo-American law of the late eighteenth century.¹⁶⁷ Instead, Article III departed from Anglo-American practice in serving a new regime of separation of powers,¹⁶⁸ a regime more rigorous than in the earlier Anglo-American experience.¹⁶⁹ As to standing, then, English and early American practice does not determine the requirements established by Article III and its concept of “judicial Power.”¹⁷⁰ More reliable sources are Framer James

(stating that “executive power extended to judicial processes . . .” such as the discretionary issue of prerogative writs); Winter, *supra* note 5, at 1396–98 (stating that prerogative writs were means of royal supervision, including to superintend local government authorities).

¹⁶⁴ See Winter, *supra* note 5, at 1397 (quoting 3 BLACKSTONE, *supra* note 118, at 111); Berger, *supra* note 112, at 838 n.108.

¹⁶⁵ See Jaffe, *supra* note 124, at 1271; Winter, *supra* note 5, at 1396–97.

¹⁶⁶ Winter, *supra* note 5, at 1445–46; see Jaffe, *supra* note 124, at 1274–75; Leonard & Brant, *supra* note 45, at 81–85. The same could be said of much of the equity power generally, thereby answering the claim that standing should be broad enough to reach whatever equity reached. For such a claim see Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 GREEN BAG 2d 17 Autumn (2002) and Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1 (2001).

¹⁶⁷ But see *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting); Pushaw, *supra* note 114, at 490; Pushaw, *supra* note 43, at 426 n.153.

¹⁶⁸ See *JAY*, *supra* note 129, at 59; cf. *Flast v. Cohen*, 392 U.S. 83, 95–97 (1968) (opining that English practice is no sure touchstone of case and controversy, these categories deriving more from separation of powers).

¹⁶⁹ Leonard & Brant, *supra* note 45, at 45; Pushaw, *supra* note 43, at 402; Roberts, *supra* note 108, at 1221–22 n.20; see also Leonard & Brant, *supra* note 45, at 58–63 (remarking the rejected proposals to have the Supreme Court or its justices pass upon constitutional questions outside of litigation, and opining these rejections suggest disfavor towards abstract evaluations of law).

¹⁷⁰ See Bellia, *supra* note 47, at 837. Like “judicial Power,” the constitutional terms “legislative Powers,” U.S. CONST. art. I, § 1, and “executive Power,” U.S. CONST. art. II, § 1, cl. 1, carry their own limiting force. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 386 (1989) (“[T]he separation of powers ‘left to each [Branch] power to exercise, in some respects, functions in their nature executive, legislative and judicial.’”) (quoting *Myers v. United States*, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting)); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (finding the Comptroller General’s actions executive in nature); *Union Bridge Co. v. United States*, 204 U.S.

Wilson and master of separation of powers, Montesquieu.¹⁷¹ Wilson lectured that judicial power involved “applying . . . laws to facts and transactions in cases . . . disputed by the parties interested in them,”¹⁷² and Montesquieu wrote, “By the [judicial power, the prince or magistrate] punishes criminals, or determines the disputes that arise between individuals.”¹⁷³ Standing to sue, with its injury component, reflects this concept of judicial power. Without an injured party, the courts may have a case or controversy, but they have no occasion to exercise judicial power. Contemporary arguments to remove or dilute the standing requirement sometimes explicitly look back to a supervisory role for courts reminiscent of old English practice.¹⁷⁴

Whatever its source, however, the constitutional requirement of standing that came into its own upon the departure from standing based simply upon cause of action seems to require at its core that the plaintiff to a federal action have suffered an injury caused by the defendant and remediable by the court. Without these elements, the Constitution prevents the federal court from hearing the suit. Less clear, however, is what is meant by “injury” in this context. On this question the nonconstitutional doctrine of standing sheds some light.

III. PRUDENTIAL TESTS OF STANDING

Whatever requirement of standing the Constitution imposes for federal litigation is not alone. There are, beyond this, requirements of standing that are creatures of prudence.¹⁷⁵ As creatures of prudence and

364, 385 (1907) (distinguishing powers executive in their nature from powers exclusively legislative or judicial in their nature); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (stating the nature and ends of legislative power will limit its exercise); *THE FEDERALIST* NO. 48, at 256 (James Madison) (E.H. Scott ed., 2002) (“After discriminating . . . in theory, the several classes of power, as they may in their nature be Legislative, Executive, or Judiciary, the next and most difficult task, [was] to provide some practical security for each, against the invasion of the others.”).

¹⁷¹ See JAY, *supra* note 129, at 64.

¹⁷² James Wilson, *Government Lectures on Law* (1791), *reprinted in* 4 *FOUNDERS’ CONSTITUTION* 162 (Phillip B. Kurland & Ralph Lerner eds., 1987).

¹⁷³ 1 *BARON DE MONTESQUIEU, THE SPIRIT OF LAWS* 151 (Thomas Nugent trans., P.F. Collier & Son, rev. ed. 1900) (1748).

¹⁷⁴ See, e.g., Chayes, *supra* note 49, at 60; Jaffe, *supra* note 124, at 1281–82, 1284; see also Scalia, *supra* note 72, at 883–85 (describing a change from a classic to a new role of courts as from supervision of the executive with an interested plaintiff to simply supervision of the executive despite the lack of interested plaintiff); cf. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 72–78 (1867) (casting the role of the court as one involving person or property and not merely political rights).

¹⁷⁵ To those like Alexander Bickel, even the requirement of standing purportedly required by the Constitution is functionally a creature of prudence. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 113–27 (Yale Univ. Press. 1986) (1962); see also Albert, *supra* note 40, at 1141–42; Varat, *supra* note 82, at 275–77.

not of the Constitution, they are susceptible to change by court or Congress.¹⁷⁶ Notwithstanding, some have remarked a difficulty in distinguishing prudential from constitutional requirements of standing, some noting that the requirements share similar policies and concerns.¹⁷⁷

The typical list of prudential standing doctrines encompasses three: the rule against allowing a party to assert a generalized grievance; the rule against ordinarily allowing a party to assert the rights of others; and the rule that a party be arguably within the zone of interest of the statutory or constitutional provision the party raises in support of its position.¹⁷⁸ The rule against the generalized grievance receives closer attention below, in part because it seems to migrate between constitutional and prudential categories. Here, however, is an examination of the other two listed doctrines, and of the principle behind the prudential standing limits generally.

The rule against allowing a party to assert the right of a third party, the “*jus tertii*,” forbids a plaintiff with injury sufficient to establish standing under the constitutional test to bring the claim that this injury entailed the violation of another’s right.¹⁷⁹ The rule both reduces unnecessary adjudication and applies the wisdom that the best advocate usually is one asserting rights belonging to that very advocate.¹⁸⁰ Exceptions to the rule apparently take these purposes into account. If a plaintiff meets the constitutional test of standing, the rule against *jus tertii* will also present no obstacle to the action if the court finds some close relationship between the plaintiff and the right holder, and also some hindrance the right holder faces in vindicating the right.¹⁸¹ Any broader

¹⁷⁶ See Fed. Election Comm’n v. Akins, 524 U.S. 11, 20 (1998); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 84–85 (6th ed. 2002); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1066–67, 1119–20 (1994); see also Albert, *supra* note 40, at 1142 (noting that prudential standing limits seem contrary to the notion of judicial review as required by the court’s duty to decide cases).

¹⁷⁷ CHEMERINSKY, *supra* note 28, at 44–45; Gilles, *supra* note 109, at 320–22; Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievance as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1875–76 (1996); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 625 (2004).

¹⁷⁸ See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–17 (2004) (adding to the typical list, however, a new prudential doctrine involving domestic relations).

¹⁷⁹ See CHEMERINSKY, *supra* note 28, at 84; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327 (2000).

¹⁸⁰ Singleton v. Wulff, 428 U.S. 106, 113–18 (1976). The rule may have developed from statutory rules and from mandamus and equity practices. See Winter, *supra* note 5, at 1425–36.

¹⁸¹ Kowalski v. Tesmer, 543 U.S. 125, 129–30 (2004); Powers v. Ohio, 499 U.S. 400, 410–11 (1991); Singleton, 428 U.S. at 113–18. Distinguished from the application of such an exception is the practice of permitting suits by “next friend,” a person who does not become a party to the action but only prosecutes it for another who cannot prosecute for himself. See, e.g., Whitmore v. Arkansas, 495 U.S. 149, 161–66 (1990).

exception would threaten to license private attorneys general to pursue litigation in the public interest apart from any legal claim to relief of the plaintiff's own.¹⁸² The rule against *jus tertii*¹⁸³ generally limits actions to those brought to vindicate the plaintiff's rights.¹⁸³

The third prudential standing doctrine usually listed requires that claimants of statutory or constitutional rights arguably be within the zone-of-interest created by the cited statutory or constitutional provision.¹⁸⁴ The zone-of-interest test first appeared in *Data Processing* along with injury-in-fact, without much explanation.¹⁸⁵ Though some commentators have suggested that the test is best understood as a gloss on the Administrative Procedure Act¹⁸⁶ or as otherwise a creature of statute rather than of judicial prudence,¹⁸⁷ the Court does appear to consider it a general prudential test of standing.¹⁸⁸

The three tests of standing usually listed as prudential share an important difference from the test of standing usually given as required by the Constitution, a difference other than the obvious regarding the authority for the tests. This other difference has to do with the nature of the tests and with what the tests measure. The prudential tests do not simply raise the bar of the constitutional test, elevating in certain cases the rigor of the injury-in-fact, causation, or redressability standards. Instead, the prudential tests measure a very different thing. They measure whether the party is a proper proponent of the asserted

¹⁸² See Albert, *supra* note 41, at 465–68; Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282 (1984).

¹⁸³ Similar rules include those based upon statutes, see David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 45–56 (1981) (discussing 42 U.S.C. § 1983 and the Declaratory Judgment Act), and doctrines similar to the exceptions to the rule are also to be found, see Albert, *supra* note 41, at 468–69 (discussing judicial review for vagueness and overbreadth).

¹⁸⁴ See CHEMERINSKY, *supra* note 28, at 100–05. There seems to have been some question in the courts as to whether it is the claimant or the claimant's interest that must arguably be within the pertinent zone of interest, and as to how particular or general those interests are to be taken. See Siegel, *supra* note 72, at 322. Justice Scalia seems to have answered the first of these questions. See *Wyoming v. Oklahoma*, 502 U.S. 437, 472 (1992) (Scalia, J., dissenting) (writing that the prudential zone-of-interest test applicable to constitutional claims generally examines the type of interest asserted).

¹⁸⁵ Siegel, *supra* note 72, at 320–22.

¹⁸⁶ See Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the "Zone of Interests" Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23, 36–37 (2006).

¹⁸⁷ See Siegel, *supra* note 72, at 319.

¹⁸⁸ Mank, *supra* note 186, at 41–42 (citing *Bennett v. Spear*, 520 U.S. 154, 163–72 (1997)); Siegel, *supra* note 72, at 328. *But see* Kelso & Kelso, *supra* note 35, at 146 (suggesting that the prudential test has grown moribund, with few cases applying it and uncertainty in its meaning in the context of a constitutional claim).

“rights,”¹⁸⁹ “issues,”¹⁹⁰ “claim[s],”¹⁹¹ or “substantive principles.”¹⁹² No surprise then that at least one commentator has argued that prudential standing tests actually examine whether a plaintiff has a federal cause of action.¹⁹³ If injury-in-fact is supposed to look to harm, to some loss without respect to its legal quality, prudential tests look only to the legal quality of the party’s claims.¹⁹⁴ The prudential rule against the *jus tertii* requires of a plaintiff a legal injury as well as the injury-in-fact required by the Constitution. Some legal theory, some rule of law, must be available to advance the plaintiff’s own legal claim.¹⁹⁵ In other words, the plaintiff must have suffered an infringement of legal right, an injury at law. For example, the plaintiff must have suffered some unlawful discrimination and not merely have been set back because another has suffered unlawful discrimination. And so here prudential standing has recovered the older meaning of standing, a meaning tantamount to the notion that the plaintiff must have a cause of action, a notion rooted in the merits and not directly in the justiciability of the action.¹⁹⁶ Likewise with the zone-of-

¹⁸⁹ Singleton v. Wulff, 428 U.S.106, 112 (1976); Mank, *supra* note 186, at 34.

¹⁹⁰ Singleton, 428 U.S. at 122–24 (Powell, J., concurring and dissenting); cf. Monaghan, *supra* note 182, at 278 n.6 (describing standing as going both to “access to the courts” and to “the range of issues to be litigated”).

¹⁹¹ Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979).

¹⁹² See Nichol, *supra* note 79, at 160.

¹⁹³ Fletcher, *supra* note 33, at 252.

¹⁹⁴ This essential distinction between constitutional and prudential standing doctrine seems often to be missed. See, e.g., Kowalski v. Tesmer, 543 U.S. 125, 135 (2004) (Thomas, J., concurring) (likely analyzing the *jus tertii* rule as if it went to the injury); Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900) (apparently disallowing the assertion of a *jus tertii* for lack of injury); Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 991 (7th Cir. 2006) (opining that the courts developed prudential standing for cases in which “maybe . . . someone has been injured more seriously and should be allowed to control the litigation”); Krent & Shenkman, *supra* note 107, at 1815, 1817–18 (considering that *jus tertii* governs when a party may raise the injury of another rather than the party’s own); see also Gottlieb, *supra* note 176, at 1063 (ignoring this distinction in a comparative analysis of Article III and prudential standing). To be sure, confusion on this distinction receives a boost from loose usage of the term “injury,” a term that may import injury-in-fact or injury at law, a harm pure and simple, or an infringement of a legal right. Constitutional standing is said to involve the former, prudential the latter.

¹⁹⁵ Cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80–81 (1978) (understanding the *jus tertii* rule to require a nexus between injury and legal theory supporting recovery, a nexus lacking in *Duke* itself, but relegating that rule only to limited situations where the *jus tertii* rule is applicable); Leonard & Brant, *supra* note 45, at 109–10 (describing *Duke* as dissociating injury-in-fact from substantive law).

¹⁹⁶ Fletcher, *supra* note 33, at 243–47; Stearns, *supra* note 33, at 410–11. Consequently, opponents of the *jus tertii* limitation have cast their opposition as advocacy for a broad legal right not to be subject to an invalid rule of law, regardless of the source of its invalidity. See, e.g., Fallon, *supra* note 179, at 1327, 1359–63, 1369; McCormack, *supra* note 101, at 607–10; see also Matthew D. Adler, *Rights, Rules, and the*

interest test, for the test measures whether the legal interest asserted is actually supported by the cited law. For example, the plaintiff must have suffered some violation of a right granted by a statute and not merely have been set back because the statute has not been followed. This inquiry is difficult to distinguish from testing the merits of the claim.¹⁹⁷ Whether this relationship of prudential standing to the merits applies equally to generalized grievance is a subject of the next major section of this Article.

Before that section, however, a short investigation of two other justiciability doctrines, ripeness and mootness. Both ripeness and mootness, like standing, have constitutional origins.¹⁹⁸ Ripeness is the justiciability doctrine that, in effect, measures whether a plaintiff has yet attained standing.¹⁹⁹ It supplies therefore a specialized test of standing for situations at the cusp of full-blown standing anticipated to arrive at some future time. Like standing, it comprises both constitutional and prudential elements.²⁰⁰ The two prongs of the test for ripeness are hardship to the parties from withholding court consideration and fitness of the issue for judicial decision.²⁰¹ In the first prong lives something like

Structure of Constitutional Adjudication: A Response to Professor Fallon, 113 HARV. L. REV. 1371, 1375 n.26 (2000) (arguing against such a right).

¹⁹⁷ See Albert, *supra* note 41, at 497; Albert, *supra* note 40, at 1147; Fletcher, *supra* note 33, at 234–39.

¹⁹⁸ See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

¹⁹⁹ But see *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 225–26 (2003) (treating remoteness in time as a standing and not a ripeness question); *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812–17 (2003) (Stevens, J., concurring) (comparing standing and ripeness as applied to the same case); *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (treating temporal concreteness of injury as inquiry for standing and not ripeness); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 51–52 (1984) (positing a case in which standing would exist but not ripeness); Nichol, *supra* note 79, at 172–74 (noting that the Court in the 1970s and 1980s sometimes used standing and not ripeness to analyze cases temporally).

²⁰⁰ See *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808; Varat, *supra* note 82, at 299–300. Ripeness, apparently an invention of the twentieth century, had earlier been cast as an inquiry sometimes on the merits, or on whether a constitutional requirement for justiciability had been met, or as a prudential concern. Nichol, *supra* note 79, at 162–63; Pushaw, *supra* note 43, at 493–96. Also like standing, in defining judicial power, ripeness protects executive power. See *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807–08.

²⁰¹ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). See generally CHEMERINSKY, *supra* note 28, at 117–29 (summarizing law of ripeness). This test seems to have roots in Justice Frankfurter's general analysis of justiciability in 1951. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring). Though sometimes understood as a test in which these two considerations are balanced out against the other, see Nichol, *supra* note 79, at 177 (suggesting that “the judiciary is to ‘balance its interest in deciding the issue in a more concrete setting against the hardship the parties cause by delaying review’” (quoting *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984))), this understanding is likely amiss, see *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808–12.

the Article III test for injury-in-fact, causation, and redressability.²⁰² In the second, something like the prudential test of appropriate legal theory.²⁰³

Similarly, mootness doctrine offers a shadow of full-blown standing doctrine, but at the time of the loss of standing rather than of its acquisition.²⁰⁴ Standing disappears when there is no longer a live controversy between the parties.²⁰⁵ Mootness, again like standing and ripeness, comprises both constitutional and prudential considerations.²⁰⁶

But mootness doctrine recognizes exceptions. These exceptions themselves also resemble standing doctrine.²⁰⁷ If a case is “capable of repetition, yet evading review,” the case is not moot.²⁰⁸ Perhaps the exception is best understood as a recovery of standing, somewhat like the ripening of another case. (If standing is in part a requirement of Article III, true exceptions to mootness—the loss of standing—would be hard to come by. Some have answered this argument by asserting mootness is not a doctrine rooted in Article III standing at all,²⁰⁹ but this assertion is difficult to credit.²¹⁰) “Capable of repetition” approximates hardship to the parties. Until recently, “capable of repetition”—repetition, that is, against this very same plaintiff—was taken to mean that there existed a “demonstrated probability” of repetition.²¹¹ Now, the Court has explained that it means only that the defendant cannot prove the challenged

²⁰² See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80–81 (1978); Varat, *supra* note 82, at 279 (understanding *Duke*, but suggesting a different analysis).

²⁰³ See *Duke Power Co.*, 438 U.S. at 81–82.

²⁰⁴ Lee, *supra* note 82, at 610 (citing *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting *Monaghan*, *supra* note 43, at 1384)). But see *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189–92 (2000); Fallon, *supra* note 199, at 25–30.

²⁰⁵ See *CHEMERINSKY*, *supra* note 28, at 129–30.

²⁰⁶ Lee, *supra* note 82, at 610–11, 623. Though it may be that the constitutional aspect of mootness is difficult to discern and to distinguish from the prudential, see *Bandes*, *supra* note 112, at 246, and that mootness is more manipulable and less principled even than the other justiciability doctrines, see *Albert*, *supra* note 40, at 1171 n.130, mootness does embody an Article III consideration in its test for “ongoing controversies,” *Honig v. Doe*, 484 U.S. 305, 317 (1988). And though early mootness cases neglected to mention Article III, they did actually test the matter as one governed by the Article. See *id.* at 340 (Scalia, J., dissenting); see also *California v. San Pablo & Tulane R.R. Co.*, 149 U.S. 308, 314 (1893) (considering a case moot for lack of controverted rights and therefore beyond a “judicial tribunal”); *Cleveland v. Chamberlain*, 66 U.S. (1 Black) 419, 426 (1861) (regarding a mooted case as seeking an advisory opinion). Mootness, like standing, reflects Article III concerns generally. See *Friends of the Earth, Inc.*, 528 U.S. at 212–15 (Scalia, J., dissenting).

²⁰⁷ See *Friends of the Earth, Inc.*, 528 U.S. at 213–14 (Scalia, J., dissenting).

²⁰⁸ See *Honig*, 484 U.S. at 318 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).

²⁰⁹ See *id.* at 329–31 (Rehnquist, J., concurring); *Pushaw*, *supra* note 43, at 490.

²¹⁰ See *Honig*, 484 U.S. at 339–42 (Scalia, J., dissenting).

²¹¹ *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

conduct will not happen again.²¹² Although the connection to hardship to the parties—and likewise to the Article III requirements of injury, causation, and redressability—is tighter under the earlier formulation of the test, “capable of repetition” reflects something like this core standing requirement. The “evading review” prong of this exception may speak to the legal theory at issue. The evasion of review prong not only permits the court to protect the plaintiff, but also permits the court to resolve a legal question that would otherwise escape its attention. This aspect of this prong invites the court to consider the legal theory asserted in the mooted case when deciding whether the case fits this exception. And so the prongs of this exception taken together approximate the combined constitutional and prudential tests of standing.²¹³ A second exception, that for the “voluntary cessation” of illegal activity,²¹⁴ probably also embraces both Article III and prudential standing elements. As with the first exception, the court is to examine both the threat of a repeated challenge to the plaintiff’s rights (Article III)²¹⁵ and the propriety of resolving the legal question (prudential). And so not just standing proper, but also the related justiciability doctrines of ripeness and mootness—the doctrines of “standing in time”²¹⁶—embrace the Article III injury–causation–redressability inquiry and the prudential legal theory inquiry.

Adding the prudential aspects of standing to the constitutional yields a partial recovery of a legal-interest test of standing, the test reflected in the old approach to standing as the question of whether a party held a cause of action. In the three settings where the three prudential tests are to be applied, standing requires more than injury-in-fact. In addition, it requires an inquiry into the legal theory supporting the plaintiff’s suit. Maintaining this additional inquiry as a matter of prudence and not viewing it as required by the Constitution allows the Court the power to calibrate standing after its own lights, determining that harm suffices for some cases, while others must meet a more rigorous test involving legal interest. On the other hand, were the Constitution understood to incorporate a test of standing after the fashion of a prudential test, it would be understood to have adopted itself something very like the legal-interest test. With the test for the generalized grievance, the Court may be embracing this very understanding.

²¹² *Friends of the Earth, Inc.*, 528 U.S. at 189.

²¹³ See *id.* at 210–15 (Scalia, J., dissenting); Bandes, *supra* note 112, at 247–48.

²¹⁴ *Friends of the Earth, Inc.*, 528 U.S. at 189.

²¹⁵ *Id.*

²¹⁶ See Monaghan, *supra* note 43, at 1365. But see Nichol, *supra* note 102, at 199–200.

IV. THE GENERALIZED GRIEVANCE

Having examined both constitutional and prudential aspects of standing doctrine, specific consideration of the rule against the generalized grievance remains. The generalized grievance has been taken variously to mean a claim raised by virtue of the status of citizen or taxpayer only, or a claim shared by many, or a claim only that the law be properly applied, or a claim for benefits due to many and not to the claimant directly.²¹⁷ Professor Chemerinsky considers a claim one for a generalized grievance when the only injury suffered by the claimant is that “as a citizen or a taxpayer concerned with having the government follow the law.”²¹⁸ Frustrating to those who see the Supreme Court as both the ultimate and the universal guarantor for society against governmental lawlessness,²¹⁹ the rule against entertaining generalized grievance bars a more widespread licensure of private attorneys general²²⁰ who could sue as “non-Hohfeldian plaintiffs” to enforce legal principles when offended in their moral or ideological sense of right.²²¹

The history of the rule against federal court adjudication of generalized grievances is an uncertain tale of competing provenances and alternative interpretations. As one might expect from the history of standing recounted above,²²² cases into the early twentieth century discussed standing for a generalized grievance, if they discussed it at all, as a matter for the merits. A typical context for treating the generalized grievance, even today, has been the taxpayer’s suit. In this suit, a person sues a government to challenge its action for alleged unlawfulness, asserting essentially that the unlawfulness injures the person’s interest that the taxes he has paid not be misspent. Until the 1920s, it seems, federal courts considered the standing of plaintiffs to bring taxpayers’ suits as a question on the merits: Did the plaintiff have such a cause of action or not? The courts may have entertained or ignored this question, but never did they seem to treat the generalized grievance issue as a matter purely of justiciability apart from the merits.²²³

²¹⁷ Guilds, *supra* note 177, at 1884–85. Mr. Guilds remarks that the generalized grievance has not been a focus of “critical commentary” and by the end of October 1995 had received mention by the Supreme Court seventeen times, about half of those occurring since 1980. *Id.* at 1864–65 n.11.

²¹⁸ See CHEMERINSKY, *supra* note 28, at 91.

²¹⁹ See, e.g., Donald L. Doernberg, “We the People”: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CAL. L. REV. 52, 56, 93–94, 96, 98 (1985).

²²⁰ See Gilles, *supra* note 109, at 361–64.

²²¹ See Fallon, *supra* note 199, at 3–4.

²²² See *supra* notes 34–44 and accompanying text.

²²³ See, e.g., *Millard v. Roberts*, 202 U.S. 429, 438 (1906) (assuming presence of jurisdiction for the action); *Wilson v. Shaw*, 204 U.S. 24 (1907) (treating taxpayer’s suit as exceeding federal judicial power for failure to state a cause of action);

In the 1920s, the Supreme Court appeared to take a different tack. In 1920 it considered a successful state taxpayer's suit much as it had considered earlier taxpayer's suits, with no mention of justiciability.²²⁴ But in 1922 it decided that a plaintiff bringing a citizen's suit, a suit asserting a right, like that of "every citizen, to require that the Government be administered according to law and that the public moneys be not wasted," lacked standing for failing to bring an Article III case.²²⁵ The Court held, seemingly for the first time, that a generalized grievance falls outside the judicial power conferred on the federal courts by Article III.²²⁶

But the Supreme Court generalized grievance case often considered the fountainhead of the whole of standing as a justiciability doctrine was to come the next year.²²⁷ *Frothingham* as a federal taxpayer challenged as unconstitutional a federal program for spending federal funds in a manner unauthorized by the Constitution.²²⁸ Taking her asserted injury as suffered in common with the people generally, the Court found jurisdiction wanting. The Court seemed to discuss the jurisdictional question in terms of Article III, commenting that judicial review is available only as needed to decide real cases or controversies.²²⁹ This would suggest that the generalized grievance is not justiciable on account of some constitutional bar. But whether *Frothingham* actually stands for

Bradfield v. Roberts, 175 U.S. 291, 300 (1899) (deciding taxpayer's suit fails to state a cause of action); *see also* Gilles, *supra* note 109, at 319 n.21 (claiming that cases before *Frothingham v. Mellon*, 262 U.S. 472 (1923), treated standing as a non-constitutional question and reached the merits); Jaffe, *supra* note 67, at 302 (arguing that English and American legal history show that taxpayer's actions are cases or controversies); Jaffe, *supra* note 124, at 1277–81 (discussing successful nineteenth century taxpayer's rights, especially for local taxpayers); Winter, *supra* note 5, at 1376 n.25, 1442 (finding that the five taxpayer's actions considered by the Supreme Court before *Frothingham* were considered on the merits); Woolhandler & Nelson, *supra* note 39, at 716–18 (observing that nineteenth century Supreme Court cases on standing focused on the rights of the party bringing suit).

²²⁴ *See* *Hawke v. Smith*, 253 U.S. 221 (1920).

²²⁵ *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922).

²²⁶ *See* *Lance v. Coffman*, 127 S. Ct. 1194 (2007).

²²⁷ Raoul Berger stated that the standing doctrine entered our law in *Frothingham*. Berger, *supra* note 112, at 818–19; *cf.* Flast v. Cohen, 392 U.S. 83, 107 (1968) (Douglas J., concurring) (opining that the *Frothingham* Court arrived at a doctrine of standing to limit the reach of substantive due process, standing being a pragmatic tool crafted for the times to protect the Court from itself); Albert, *supra* note 40, at 1144 n.21 (noting that *Frothingham* does not itself discuss standing (or case or controversy), but that the "seedling of the concept" is present in the case); Jaffe, *supra* note 124, at 1307–09 (seeing *Frothingham* as wrong for departing from precedent).

²²⁸ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

²²⁹ *Id.* at 487–89.

such a bar is considered unclear.²³⁰ Later, the Supreme Court, though confessing the question as difficult to answer, described the *Frothingham* rule as prudential only.²³¹ (A few commentators have described it as continuing in the vein of older cases that decided against generalized grievances on the merits, holding that the Constitution gives no such cause of action as *Frothingham* asserted or that equity doctrine grants no such relief.²³²) *Frothingham*, then, is a landmark not only in seeming to find a justiciability bar to generalized grievance, but also in disguising the source of the bar.

Soon after *Frothingham*, the Court relied explicitly upon the description of the generalized grievance—a grievance against a “general interest common to all members of the public”²³³—to test the justiciability of claims.²³⁴ Also, two opinions of Justice Frankfurter treated the generalized grievance explicitly as an aspect of the case or controversy limitation of Article III judicial power.²³⁵ Then in 1968 came perhaps the most celebrated and controversial taxpayer’s suit of all, *Flast v. Cohen*.²³⁶ *Flast* sued as a federal taxpayer to block federal funding of parochial school instructional materials. Remarking on the complexities, vagaries, and other subtleties of standing,²³⁷ the Court distinguished *Frothingham* and its unjusticiable generalized grievance.²³⁸ Unlike *Frothingham*, *Flast* involved a claim that a supposed exercise of the Taxing and Standing Clause power exceeded a specific limitation on that power in the Establishment Clause. This “nexus” between the power challenged and the basis of the challenge rendered the action justiciable and not an illicit generalized grievance. The use of this nexus in *Flast* and later cases

²³⁰ See Varat, *supra* note 82, at 320–324 (mentioning a United States Senate hearing in 1966 on whether *Frothingham* stands for a constitutional or for a prudential bar); Winter, *supra* note 5, at 1378–79.

²³¹ *Flast*, 392 U.S. at 92–94, 97–99; see also *Freedom from Religion Foundation Inc. v. Chao*, 433 F.3d 989, 991 (7th Cir. 2006).

²³² Bellia, *supra* note 47, at 826–27; Pierce, *supra* note 3, at 1768; Winter, *supra* note 5, at 1444–47.

²³³ *Ex parte Lévit*, 302 U.S. 633, 634 (1937).

²³⁴ See *id.* (holding standing absent because the suit fell within this description of generalized grievance and therefore beyond judicial power for lack of direct injury); see also *Stark v. Wickard*, 321 U.S. 288, 304–06 (holding standing present because the plaintiff had more than the interest of people generally in proper execution of the laws); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125, 127–30 (1940) (holding no standing in absence of an injury to a legal right rather than simply to a general interest in having law obeyed).

²³⁵ *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting for four Justices); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150–51 (1951) (Frankfurter, J., concurring).

²³⁶ 392 U.S. 83 (1968).

²³⁷ *Id.* at 98–99.

²³⁸ *Id.* at 106.

is widely regarded as nonsense.²³⁹ For the purposes of this Article the more important matter is the authority the *Flast* Court used for its nonsense. The Court discussed separation of powers and the case or controversy requirement, observing that Article III raises no absolute bar against particular parties but rather a bar against certain issues.²⁴⁰ This discussion may be what has led the Court on later occasions to view the *Flast* nexus rules as founded upon Article III.²⁴¹ To the contrary, however, the *Flast* opinion for the Court itself casts the rule against hearing generalized grievances as prudential and not demanded by Article III.²⁴² Two other opinions in *Flast* agree,²⁴³ and other authorities have so understood the *Flast* Court.²⁴⁴ Elsewhere in *Flast* the Court calls

²³⁹ See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2582–84 (2007) (Scalia, J., concurring in judgment); *Flast*, 392 U.S. at 121–30 (Harlan, J., dissenting); *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006); Scott, *supra* note 30, at 661–62. The nonsense provided an occasion for levity in the Court:

JUSTICE ALITO: General Clement, are you— are arguing that these lines that you’re drawing make a lot of sense in an abstract sense? Or are you just arguing that this is the best that can be done within the body of precedent that the Court has handed down in this area?

GENERAL CLEMENT: The latter, Justice Alito.

(Laughter).

GENERAL CLEMENT: And I appreciate—I appreciate the question.

JUSTICE SCALIA: Why didn’t you say so?

(Laughter.)

JUSTICE SCALIA: I—I’ve been trying to make sense out of what you’re saying.

(Laughter.)

GENERAL CLEMENT: Well, and I’ve been trying to make sense out of this Court’s precedents.

(Laughter.)

GENERAL CLEMENT: And the best that I can do—the best that I can do, when I put together *Flast*—

JUSTICE STEVENS: Do we think have a duty to follow precedents that don’t make any sense?

GENERAL CLEMENT: Well, I think—as a matter of first course, the Court tries.

Transcript of Oral Argument at 20–21, *Hein v. Freedom From Religion Found.*, 127 S. Ct. 2553 (2007) (No. 06-157), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-157.pdf.

²⁴⁰ *Flast*, 392 U.S. at 101.

²⁴¹ *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982); *United States v. Richardson*, 418 U.S. 166, 172–73 (1974).

²⁴² See *Flast*, 392 U.S. at 101.

²⁴³ See *id.* at 115–16 (Fortas, J., concurring) (implicitly considering the rule prudential); *id.* at 118–20, 130–33 (Harlan, J., dissenting) (explicitly considering the rule prudential).

²⁴⁴ See, e.g., *Richardson*, 418 U.S. at 196 n.18 (Powell, J. concurring) (though professing uncertainty on the question, considering *Flast* to pronounce possibly a prudential rule); Gilles, *supra* note 109, at 321–22.

justiciability and the case or controversy doctrine a “blend of constitutional requirements and policy considerations,” a doctrine therefore “of uncertain and shifting contours.”²⁴⁵ On at least one later occasion the Supreme Court itself confessed ignorance as to whether *Flast* stated a constitutional or prudential rule for generalized grievances.²⁴⁶ *Flast*, like *Frothingham*, assigns no clear authority for its decision.

Applying *Frothingham* and *Flast*, the Court held plaintiffs lacked standing in two cases decided the same day in 1974. In one, the plaintiffs as taxpayers sought an injunction ordering an accounting by the Central Intelligence Agency.²⁴⁷ In the other, the plaintiff as citizen sought an injunction against the practice of simultaneously serving in Congress and as officer in the armed forces reserve.²⁴⁸ Both cases asserted violations of express constitutional limitations. Both ran afoul of the nexus requirement that *Flast* established for justiciable generalized grievances. The *Richardson* Court explained that to entertain a generalized grievance regarding the conduct of government would violate the Article III rule of standing.²⁴⁹ The alleged injury, not particular or concrete but rather undifferentiated and common to all, was a matter for politics and not courts.²⁵⁰ Likewise, the *Reservists* Court understood the plaintiffs to have asserted as a generalized grievance an “abstract injury” to their interest in constitutional governance rather than an authentic violation of some right.²⁵¹ Because the Constitution serves the interests of all it cannot on that ground provide standing to all or it would distort the relationship among the three branches by establishing “government by injunction.”²⁵² Nor does the Constitution grant a plaintiff standing in a case just because no one else would have it.²⁵³ What is required instead is that the plaintiff have a “judicially cognizable” interest at stake,²⁵⁴ the sort of interest a plaintiff would have if a statute gave a right against the sort of conduct

²⁴⁵ *Flast*, 392 U.S. at 97.

²⁴⁶ *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 79 n.25 (1978).

²⁴⁷ *Richardson*, 418 U.S. at 166.

²⁴⁸ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

²⁴⁹ *Richardson*, 418 U.S. at 175–80. Justice Powell, concurring, thought the question one of prudential standing instead (limiting the Article III inquiry to the question of adverseness), *see id.* at 188–97 (Powell, J., concurring), and Justice Stewart, dissenting, thought it one on the merits instead, *see id.* at 202–07 (Stewart, J., dissenting).

²⁵⁰ *Id.* at 179.

²⁵¹ *Reservists*, 418 U.S. at 217.

²⁵² *Id.* at 222, 226–27.

²⁵³ *Id.* at 226–27. *But see* Pushaw, *supra* note 43, at 485–87 (arguing that every provision of the Constitution must be enforceable by at least one person with standing).

²⁵⁴ *Reservists*, 418 U.S. at 225.

challenged in *Reservists*.²⁵⁵ This analysis, though perhaps less clearly than that of *Richardson*, seems to locate the rule against generalized grievances in the Constitution.²⁵⁶

The next year, the Court treated the generalized grievance standing doctrine as prudential, with Justice Powell writing for the Court that a generalized grievance “normally does not warrant exercise of jurisdiction.”²⁵⁷ The generalized grievance is characterized here simply as a harm shared by a large class.²⁵⁸ Three years later, the Court again listed the generalized grievance as a prudential doctrine.²⁵⁹ By the end of the 1970s, it seemed that the Court had confidently tagged the generalized grievance doctrine as one of prudence.²⁶⁰

The Court was less sure by 1982. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the Court distinguished *Flast* and held the taxpayer plaintiffs lacked standing to raise an Establishment Clause challenge against the gratis transfer of property by the federal executive to a Christian organization.²⁶¹ The Court also confessed that it had been unclear sometimes on whether standing doctrines were creatures of Article III of the Constitution or of the Court’s prudence.²⁶² Now, however, the Court plainly listed the standing doctrines regarding *jus tertii*, generalized grievance, and zone of interest as prudential, though related to the policies of Article III.²⁶³ So, though a plaintiff might meet the requirement of Article III standing, if the claim presents an abstract question of law, the prudential doctrine against generalized grievances will bar the claim.²⁶⁴ This clear categorization was to last but a few pages, however. Later in the opinion, describing the generalized grievance as a claim that the government

²⁵⁵ *Id.* at 224 n.14.

²⁵⁶ So to conclude is not to suggest that the Court neglected to mention principles of prudence underlying the constitutional requirement of standing. *See id.* at 217–18 (requirement fosters adverseness to sharpen issues), *id.* at 221–22 (requirement of concrete injury both fosters authoritative presentation of issues that assists the Court in developing rules of law and also prevents unnecessary exercise of judicial review and overbroad relief leading to conflict among the branches).

²⁵⁷ *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also* *Guilds*, *supra* note 177, at 1901–02; *Nichol*, *supra* note 33, at 1923. *But see* *Gilles*, *supra* note 109, at 323–24 (discerning an Article III generalized grievance rule in *Warth*).

²⁵⁸ *Warth*, 422 U.S. at 499; *Currie*, *supra* note 183, at 42.

²⁵⁹ *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978); *Varat*, *supra* note 82, at 278 (arguing that the *Duke* Court altered justiciability doctrine in order to decide the merits.)

²⁶⁰ *See Chayes*, *supra* note 49, at 13; *Guilds*, *supra* note 177, at 1879–80.

²⁶¹ *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Burnham*, *supra* note 96, at 102–04.

²⁶² *Valley Forge*, 454 U.S. at 471.

²⁶³ *Id.* at 474–75.

²⁶⁴ *Id.* at 475.

follow the law, the Court suggested that such a claim lies beyond Article III judicial power.²⁶⁵ It also stated that a Constitutional violation, alone and of itself, supplies the plaintiff with no injury of any kind sufficient for standing, a statement based on its discussion of Article III.²⁶⁶ The generalized grievance, then, seemed to run afoul of both Article III and prudential standing doctrines, and that in the very same case.

Before the next important case regarding standing and the generalized grievance doctrine, the Court once labeled the doctrine prudential,²⁶⁷ once constitutional.²⁶⁸ Then came *Lujan*.²⁶⁹ *Lujan* held that Congress lacked authority to create rights that could confer standing to sue if the infringement of those rights caused no actual harm to the plaintiff.²⁷⁰ Specifically, one's interest only in having the federal government obey the law is a generalized grievance notwithstanding any specific statutory right to have the government obey the law. Since Congress has authority to set aside any merely prudential rule of standing,²⁷¹ some constitutional rule must be at work. Therefore, the Constitution itself must forbid federal adjudication of a generalized grievance.²⁷²

After *Lujan*, lower courts continued to treat the generalized grievance doctrine as prudential, perhaps sensing that the doctrine shared both a constitutional and a prudential origin,²⁷³ although a 1995 Supreme Court case did consider the generalized grievance question to be an aspect of the injury-in-fact inquiry for Article III standing.²⁷⁴ The

²⁶⁵ *Id.* at 482–84, 489 n.26 (citing *Flast v. Cohen*, 392 U.S. 83 (1968), and *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974)).

²⁶⁶ *Id.* at 485–86.

²⁶⁷ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

²⁶⁸ See *Whitmore v. Arkansas*, 495 U.S. 149, 160–61 (1990) (opining that an interest in the government's adhering to the law cannot suffice for injury wholly apart from any prudential consideration).

²⁶⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). See *supra* notes 102–111 and accompanying text.

²⁷⁰ *Id.* at 577–78.

²⁷¹ See Stearns, *supra* note 33, at 435–36.

²⁷² See Pushaw, *supra* note 43, at 483–84 (criticizing *Lujan* for finding barriers to standing in Article II); Sunstein, *supra* note 96, at 633 (claiming *Lujan* appeared to merge the injury-in-fact inquiry with the generalized grievance test); Sunstein, *supra* note 35, at 211–14 (criticizing *Lujan* for using the Article II Take Care Clause to create a standing doctrine beyond the power of Congress to overcome); Guilds, *supra* note 177, at 1880–82 (calling *Lujan* a watershed case establishing the rule against hearing the generalized grievance as a rule of Article III).

²⁷³ Guilds, *supra* note 177, at 1883–84, 1904–05; cf. CHEMERINSKY, *supra* note 28, at 98 (suggesting a role for a prudential test of generalized grievance after *Lujan*).

²⁷⁴ *United States v. Hays*, 515 U.S. 737, 742–47 (1995) (holding standing to be lacking and deciding that injury-in-fact rather than a generalized grievance would be present were there a concrete and particularized invasion of a legally protected interest); see also Guilds, *supra* note 177, at 1892–98.

next important Supreme Court case on the generalized grievance, *Federal Election Commission v. Akins*, contemplated both constitutional and prudential origins as possibilities,²⁷⁵ but focused not on how many persons suffered a similar harm but instead on the concrete specificity of the harm, a consideration the Court seemed to locate in Article III.²⁷⁶ Injury-in-fact exists to support standing in the context of congressional creation of a widely shared right so long as the injury is concrete rather than abstract and indefinite.²⁷⁷ The author of the *Lujan* opinion, Justice Scalia, dissented in *Akins*, arguing that the Court had failed to adhere to *Lujan*.²⁷⁸ For Scalia, the question of generalized grievance is not whether the injury is abstract or concrete or whether it is shared by many, but rather whether it is, on the one hand, undifferentiated and common or, on the other, particularized and individual.²⁷⁹ Because the courts are not to supervise the executive branch, only particularized differentiated harm should trigger the exercise of judicial authority as a constitutional matter of separation of powers.²⁸⁰ The nature of the loss is key, not so much the legal right at stake.²⁸¹ For all their differences, both the Court and the dissent treat the generalized grievance question before them as one of constitutional law. The Court seems to accomplish this by relegating the aspect of the generalized grievance indicated by the wide sharing of an injury by many to a prudential rule against standing, while preserving as a constitutional rule the aspect indicated by abstract and indefinite injury as opposed to concrete.²⁸² Such a generalized grievance doctrine appears to be really two doctrines, one prudential and one constitutional.²⁸³

²⁷⁵ 524 U.S. 11 (1998).

²⁷⁶ *Id.* at 23–25.

²⁷⁷ *Id.* at 24; CHEMERINSKY, *supra* note 28, at 98.

²⁷⁸ See *Akins*, 524 U.S. at 29–37. But see Johnson, *supra* note 119, at 391, 412–413 (concluding that *Akins* follows *Lujan*).

²⁷⁹ *Akins*, 524 U.S. at 34–37.

²⁸⁰ *Id.* at 36.

²⁸¹ See *id.* at 31–32; cf. Nichol, *supra* note 102, at 197, 204 (noting that *Akins*, unlike *Lujan*, rightly focused on the statute creating the legal right supporting the action); Sunstein, *supra* note 96, at 642–43 (arguing that *Akins* focused on the legal interest of the plaintiffs in assessing injury).

²⁸² Hartnett, *supra* note 3, at 2240–41; Sunstein, *supra* note 96, at 616, 636, 643–47.

²⁸³ The Court continued on the path laid out in *Akins* when it decided *Friends of the Earth Inc.*, though without much discussion of the generalized grievance question. The Court broadened standing, Stephen Lanza, *The Liberalization of Article III Standing: The Supreme Court's Ill-Considered Endorsement of Citizen Suits in Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 52 ADMIN. L. REV. 1447, 1462 (2000), loosening the test for individualized interest by easing the causation inquiry, Johnson, *supra* note 119, at 414–17, and deferring to Congress more than in *Lujan*, Nichol, *supra* note 102, at 197–98. But see Craig, *supra* note 3, at 169–70 (arguing that *Friends of the Earth Inc.*, contrary to Justice Scalia's dissent, did not depart from *Lujan*).

The Supreme Court case that decided, through Justice Scalia, that *qui tam* actions present no violation of Article III standing doctrine, *Vermont Agency v. United States*,²⁸⁴ may pose a question for the jurisprudence of the generalized grievance. The Court found *qui tam* actions passed muster under Article III because it construed the action as based upon an injury assigned to the relator from the government.²⁸⁵ Such representational standing seems to some too facile a means to bypass *Lujan* and authorize actions for what are really generalized grievances in citizen's suits.²⁸⁶ Still, taking the Supreme Court at its word would seem to find in *qui tam* actions concrete and individuated injury once assigned. Then again, Article II and separation of powers may yet put *qui tam* actions off limits, and possibly under an analysis that draws upon generalized grievance doctrine.

Four Supreme Court cases decided between *Vermont Agency* and *Hein* divide on whether the generalized grievance violates a constitutional or a prudential doctrine. The two older that treat the doctrine perfunctorily classify it as prudential,²⁸⁷ while the two more recent give the doctrine more attention and appear to consider the doctrine constitutional.²⁸⁸

The last pertinent word of the Supreme Court as of this writing is *Hein v. Freedom From Religion Foundation, Inc.*²⁸⁹ *Hein* rejects the standing of taxpayers to bring suits to challenge executive branch expenditures of general appropriations for violating the Establishment Clause. *Flast* and its application occupy much of the opinions. Three Justices constituting the Court adhered to *Flast* and decided it did not authorize the suit. Four Justices in dissent adhered to *Flast* and decided it did authorize the suit. The remaining two Justices, concurring in the judgment, departed from *Flast* and decided that the suit breached the Article III standard for

²⁸⁴ 529 U.S. 765 (2000). See *supra* notes 119–21 and accompanying text.

²⁸⁵ *Vermont Agency*, 529 U.S. at 773–74. The Court reserved the question whether *qui tam* actions violate Article II. See *supra* note 119.

²⁸⁶ See Gilles, *supra* note 109, at 337–40; Leonard & Brant, *supra* note 45, at 117–19; Winter, *supra* note 117, at 164–65.

²⁸⁷ *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004); *Devlin v. Scardelletti*, 536 U.S. 1, 6–7 (2002) (citing *Allen*, 468 U.S. 737, and citing *Lujan*, 504 U.S. 555, for the Article III requirement of injury, causation, and redressability).

²⁸⁸ See *Lance v. Coffman*, 127 S. Ct. 1194 (2007) (per curiam) (deciding that an action upon the Elections Clause states a generalized grievance and therefore cannot proceed without violating the Article III case or controversy requirement); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345–46 (2006) (deciding the injury there as too speculative to support standing, classifying the generalized grievance as an Article III doctrine, and observing that state taxpayer standing would make federal courts supervisors of the fisc).

²⁸⁹ 127 S. Ct. 2553 (2007).

standing—a standard they found breached by *Flast* itself as well.²⁹⁰ The justices therefore had occasion to discuss generalized grievances, the context of the *Flast* “exception to the general constitutional prohibition against taxpayer standing.”²⁹¹ This discussion places the rule against generalized grievances within the doctrine of Article III and separation of powers.²⁹² Justice Scalia does note, “It is true that this Court has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar.”²⁹³ But he attributes this practice to *Warth v. Seldin*²⁹⁴ and finds the *Warth* Court supporting its position “only by naked citation” of “cases squarely rested on Article III considerations.”²⁹⁵ *Hein*, then, lends its support to a constitutional bar against suits on generalized grievances.

This cursory historical review of Supreme Court cases on the generalized grievance doctrine demonstrates that the doctrine has variously been categorized as constitutional, prudential, or perhaps both, for nearly its entire history, including up to the present.²⁹⁶ What accounts for this instability? More importantly, what significance does it hold for the constitutional doctrine of standing? Specifically, does the nature of the injury required by the constitutional test of standing change as the generalized grievance doctrine moves in and out of the constitutional standing category?

²⁹⁰ *Id.* at 2573–74 (Scalia, J., concurring in judgment). The plurality itself noted that *Flast*, by “mistake,” short-changed separation of powers concerns. *Id.* at 2569 (Alito, J., for plurality).

²⁹¹ *Id.* at 2564 (Alito, J., for plurality).

²⁹² See *id.* at 2563–64, 2570 (Alito, J., for plurality); *id.* at 2573–74, 2582–84 (Scalia, J., concurring in judgment); cf. *id.* at 2588 n.5 (Souter, J., dissenting) (mentioning prudential standing not in the context of the rule against generalized grievances but rather in the context of deference to cases brought by “better plaintiffs”).

²⁹³ *Id.* at 2582 n.5 (Scalia, J., concurring in judgment).

²⁹⁴ 422 U.S. 490 (1975).

²⁹⁵ *Hein*, 127 S. Ct. at 2582 n.5 (Scalia, J., concurring in judgment). Whether the careful Justice Scalia meant by “rest[ing] on Article III considerations” that the cited precedents relied straightforwardly on a rule of the Constitution or instead on principles at some remove from the text is a nice question. Prudential standing doctrines are not wholly distinct from Article III considerations. In perhaps another nod to an earlier prudential aspect of the generalized grievance rule, the plurality notes that “specific statutory authorization” may expand “federal taxpayer and citizen standing.” *Id.* at 2569 (Alito, J., for plurality).

²⁹⁶ Cf. Varat, *supra* note 82, at 320–22 (noting that the Court has had difficulty classifying standing doctrine as constitutional or prudential, and pondering in 1980 whether there might not have been a trend towards classifying the generalized grievance doctrine as prudential); Guilds, *supra* note 177, at 1903–04 (noting in 1996 that the generalized grievance doctrine was cited by the Supreme Court as an Article III doctrine regarding particularized injury and not prudential whenever relied upon to bar an action).

A mark of prudential standing doctrines is their concern with the legal theory propounded by the claimant rather than with injury-in-fact.²⁹⁷ Even in a case like *Valley Forge* that treated the generalized grievance doctrine as based both upon prudence and upon the Constitution, when the Court applied the doctrine as prudential, it examined legal theory and the abstractness of the questions presented.²⁹⁸ Generalized grievance as prudential deals with the legal quality of an action, as if to test whether the plaintiff holds a cause of action upon which to bring suit, a claim supported by a theory supplied by law.

When the generalized grievance doctrine is taken as a creature of the Constitution it is folded into the analysis of injury, causation, and redressability.²⁹⁹ The Court does this chiefly through qualifying the test of injury, specifying what injury meets the constitutional requirement. And so the Court has rejected, as generalized grievances beyond the constitutional power of federal courts to decide, an “abstract injury” to an interest in constitutional governance,³⁰⁰ or an injury in seeing the Constitution violated,³⁰¹ or an injury to an interest in the law’s being kept.³⁰² If injury-in-fact is being tested here for constitutional standing, it is an injury-in-fact very different from harm only, and with no regard to its legal quality.

Actually, taking the generalized grievance inquiry into the constitutional injury inquiry may be an admission that a purely factual assessment of injury is impossible³⁰³ and that instead, if not a full blown recovery of the test of legal injury when standing looked to cause of action, then at least something like it in a test of legally cognizable injury is in play. The tie between a constitutional generalized grievance test and an injury for standing other than the supposedly simple harm of injury in fact is longstanding. Justice Frankfurter’s opinions treating the generalized grievance doctrine as constitutional examined standing by

²⁹⁷ See *supra* notes 189–97 and accompanying text. See also Guilds, *supra* note 177, at 1904–09.

²⁹⁸ *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982).

²⁹⁹ See Sunstein, *supra* note 96, at 633 (describing *Lujan*); cf. Kelso & Kelso, *supra* note 35, at 123 n.197 (remarking that the independent generalized grievance test does less work when supplemented by the Article III test of injury); Guilds, *supra* note 177, at 1865–66 (advocating a generalized grievance test based solely upon Article III and therefore occupied solely with the test of injury).

³⁰⁰ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

³⁰¹ *Valley Forge*, 454 U.S. at 485–86.

³⁰² *Whitmore v. Arkansas*, 495 U.S. 149, 160–61 (1990); see also Hartnett, *supra* note 3, at 2240 (so describing the Article III treatment of generalized grievance in *Akins*).

³⁰³ See *supra* notes 96–98 and accompanying text.

assessing the legal theory supporting the plaintiffs' case,³⁰⁴ the legal interests, and legal injury presented.³⁰⁵ The *Reservists* Court likewise evaluated the plaintiff's standing under a constitutional generalized grievance test by seeking a "judicially cognizable" interest and found no violation of right.³⁰⁶ The Court has done the same in other cases as well.³⁰⁷

Taking the generalized grievance as an aspect of the constitutional test of standing, and thereby qualifying the injury required to meet it, helps explain criticisms that in such cases standing really becomes consideration on the merits.³⁰⁸ Again, this move suggests some sort of recovery of an older understanding of standing as having to do with the plaintiff's holding a cause of action.

It also helps explain the Court's recent turn, as prompted by Justice Scalia, to look to the particularization and individuation of injury when testing for constitutional standing. In this view, injury-in-fact is not met just because the plaintiff is aggrieved.³⁰⁹ The injury must be personal and individual, setting the plaintiff apart from the citizenry at large by its particularity.³¹⁰ This test might be viewed as satisfied by the plaintiff's holding an individual legal right violated by the defendant.³¹¹ With individuated injury, a plaintiff is calling upon the federal courts not to supervise the executive, but to remedy his own injury as an act of judicial power.³¹² This separation of powers aspect of a constitutional generalized

³⁰⁴ See *Coleman v. Miller*, 307 U.S. 433, 460–65 (1939) (Frankfurter, J., dissenting).

³⁰⁵ See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151–53 (1951).

³⁰⁶ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224–27 (1974).

³⁰⁷ See, e.g., *United States v. Hays*, 515 U.S. 737, 742–43 (1995); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125–30 (1940); see also *Nichol*, *supra* note 33, at 1936–37, 1943–44; *Sunstein*, *supra* note 96, at 642–43; *Guilds*, *supra* note 177, at 1886–92; *cf. Blanch*, *supra* note 118, at 711 (supporting an Article III test of generalized grievance that Congress can affect by waiver, but best understood as recognizing that Congress might supply legal rights giving rise to legally cognizable injury).

³⁰⁸ See *Fletcher*, *supra* note 33, at 267–72; *cf. Albert*, *supra* note 41, at 425–26 (arguing that standing is best seen as holding a cause of action); *Sunstein*, *supra* note 35, at 209 (musing whether the generalized grievance inquiry is tied somehow to redressability).

³⁰⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 204 (2000) (Scalia, J. dissenting).

³¹⁰ *Scalia*, *supra* note 72, at 881–82.

³¹¹ See *Guilds*, *supra* note 177, at 1886–92, 1898–1901; *cf. Krent & Skenkman*, *supra* note 107, at 1806–08 (observing that Congress can by law create individuated interests to support standing); *Sunstein*, *supra* note 137, at 134 (same).

³¹² *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 36–37 (1998) (Scalia, J., dissenting); *CHEMERINSKY*, *supra* note 28, at 98; *Krent & Shenkman*, *supra* note 107, at 1794 n.9, 1795 n.10, 1796; see also *Leonard & Brant*, *supra* note 45, at 33, 91–92

grievance test may have something to do with the numbers of people sharing the grievance, as if to allow politics to resolve grievances shared by many and the courts to resolve grievances shared by few.³¹³ But fundamentally, the question is one of individuation rather than raw numbers.³¹⁴ If individuation resembles a consequence of holding a cause of action, a constitutional test of injury that includes a consideration of generalized grievance resembles a recovery of a legal-interest test of standing.

Justice Scalia's opinion concurring in the judgment in *Hein* points in the same direction. Because this opinion advances the overthrow of *Flast*, it vigorously rehearses the contrary rule against standing for generalized grievances, a rule it locates in the Constitution.³¹⁵ For the federal courts to entertain a generalized grievance—a grievance regarding “Psychic Injury,” “the taxpayer’s *mental displeasure* that money extracted from him is being spent in an unlawful manner”³¹⁶—is “a contradiction of the basic propositions that the function of the judicial power ‘is, solely, to decide on the rights of individuals’ and that generalized grievances affecting the public at large have their remedy in the political process.”³¹⁷ But nowhere does the opinion suggest that “Psychic Injury” is not some sort of injury, or that suffering “*mental displeasure*” is not some sort of harm. For the Constitution to bar suit upon generalized grievances it must be distinguishing among types of injury and harm. And it is distinguishing based upon the nature of the injury, upon the legal theory tracing the harm. Again, the constitutional bar against the generalized grievance takes into the Constitution the legal theory focus of the prudential bar.

The placement of the generalized grievance standing doctrine in either the prudential or constitutional column speaks to more than generalized grievance. If the constitutional test of standing includes a generalized grievance inquiry, the constitutional test of standing is not a

(arguing that individuated injury was for the Framers a touchstone of the separation of powers between judiciary and executive).

³¹³ See Scalia, *supra* note 72, at 894–95; see also Leonard & Brant, *supra* note 45, at 27–29; McCormack, *supra* note 101, at 601–02 (acknowledging but criticizing this view).

³¹⁴ Public Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 449–50 (1989); Albert, *supra* note 41, at 487–89; Leonard & Brant, *supra* note 45, at 125–28; Sunstein, *supra* note 36, at 1469–71; Guilds, *supra* note 177, at 1886. But see Gottlieb, *supra* note 176, at 1082 n.114, 1106 (suggesting the generalized grievance rule as a prudential bar prevents suits if many are injured and as a constitutional bar if all citizens are injured).

³¹⁵ See *supra* notes 290, 293–95 and accompanying text.

³¹⁶ *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2574 (2007) (Scalia, J., concurring in judgment).

³¹⁷ *Id.* at 2584 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)) (citation omitted).

test of injury-in-fact. The legal theory focus of prudential tests of standing has found its way into the constitutional test.

V. CONCLUSION

The malleability and flexibility of the standing doctrines are legend. They enable the federal courts to assume or to decline jurisdiction of cases without having to confront merits, except perhaps *sub rosa*. As the courts became more and more generous with rights, they found the justiciability doctrines of standing convenient in avoiding cases that threatened to require the courts to follow where precedents led, however inconvenient. *Frothingham* meant the courts need not become comptrollers; *Flast* meant the courts could police some violations of the Establishment Clause; *Hein* means courts need not police those violations if executive and not congressional. Likewise, the stricter the standing doctrines become, the more they tend to approximate the classical role of standing in assuring that the party bringing an action indeed holds a cause of action, or that a party raising a defense indeed holds a right to interpose.

The contemporary notion of standing as a justiciability doctrine therefore presents some irony. The more standing limits jurisdiction, the more it approximates in result the old regime of standing as a doctrine on the merits. Without standing, the party loses. But at the same time, the greater the role of standing as justiciability, the more likely that the merits, the law granting rights, has departed from the classical jurisprudence of rights. The more expansive and creative the range of rights, the more need for the practical limiting apparatus of standing as a justiciability doctrine. This may be especially true of prudential standing, a matter wholly within the control of the Supreme Court even in principle. The need to limit parties on the grounds of justiciability to assert legal theories—rights, ultimately—indicates a liberality on the merits. If federal courts permitted parties to raise only rights they really held—causes of action they really held, for example—what room could be left for prudential standing or any standing as an independent doctrine of justiciability? And so standing may be a dual barometer. It measures how reluctant federal courts are to follow and extend precedents generous with rights. But it also measures how generous those precedents themselves are.

Taking the generalized grievance inquiry explicitly into the constitutional test of standing is a move not only toward reducing prudential tests of standing, but also toward reducing the distinction between standing and the merits. If this move is a prelude to having the constitutional test of standing take *jus tertii* and zone of interest into account as well, the injury for that test will become all the more like the legal injury that gives rise to a cause of action. While augmenting the

constitutional test of standing, such a development would diminish the role of standing as a question other than that of old: Does the plaintiff assert a cause of action?