The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism"

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Introduction

Although the Supreme Court has radically reduced the number of its published decisions, it continues to devote disproportionate attention to Article III standing[1]—the doctrine that determines who can sue in federal court.[2] For example, five of the Court's fifty-eight cases in its 2022–23 Term involved standing.[3] Such detailed consideration, however, has not improved this doctrine's coherence.

To be sure, all of the Justices agree that Article III, by extending federal judicial power to "Cases" and "Controversies," restricts standing to plaintiffs who have a "'personal stake'" in a genuine dispute with an adverse defendant:[4]

> Our jurisprudence has "established that the irreducible constitutional minimum of standing contains three elements" that a plaintiff must plead and—ultimately—prove. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact'" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Ibid.* Second, the plaintiff's injury must be "fairly traceable to the challenged action of the defendant," meaning that "there must be a causal connection between the injury and the conduct complained of." *Ibid.* "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Id.* at 561.[5]

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1 *See infra* Part II.

2 *See, e.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1638–41 (2023).

3 *See infra* Part II.

4 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023) (citing TransUnion, LLC v. Ramirez, 594 U.S. 413, 422 (2021)). Even the Warren Court, which greatly expanded standing, used such rhetoric. Most notably, it declared in *Baker v. Carr*, 369 U.S. 186 (1962), that the Constitution required an "actual controvers[y]" in which a plaintiff "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues" for judicial decision. *Id.* at 204–08 (internal quotations and citations omitted). Yet the Court applied this standard to allow standing by Tennessee urban voters whose alleged injury was not individualized: The claim that the state's legislature, which had apportioned electoral districts to greatly over-represent rural areas, violated the Equal Protection Clause by discriminating against all voters in cities. *See id.* at 187–88, 204–08; *see also* Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1171–77 (2002) (discussing *Baker*).

5 Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023) (internal parentheticals omitted).

According to the Court, standing promotes separation of powers by confining the federal judiciary to its properly limited role of remedying actual injuries inflicted by an adverse defendant, thereby leaving policy decisions to the elected branches.[6]

Unfortunately, the injury, traceability (i.e., causation), and redressability standards are so malleable that they can be easily manipulated depending upon whether a judge wishes to reach the merits[7]—as even some Justices have candidly recognized.[8] Relatedly, although the Justices portray standing as a threshold issue of jurisdiction, they often distort the doctrine in light of their substantive legal views.[9] In general, liberal Justices apply standing principles loosely to allow plaintiffs to vindicate progressive federal laws but strictly to foreclose challenges to such laws, whereas conservatives relax standing to help their preferred plaintiffs (such as private corporations) but rigorously enforce the doctrine to shut out leftist plaintiffs (e.g., those who seek to enforce civil rights and environmental laws).[10] The result is that the Court's standing cases are inscrutable,[11] as the Justices have at times admitted.[12]

The fundamental problem is that, contrary to the Court's assertions, its standing rules have no discernible basis in Article III's language or

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[6] *See, e.g.*, United States v. Texas, 143 S. Ct. 1964, 1969, 1973, 1975 (2023) (first citing Allen v. Wright, 468 U.S. 737, 752 (1984), and then citing Clapper v. Amnesty Int'l, 568 U.S. 398, 408 (2013)).

[7] Law professors have been making this argument for decades. *See, e.g.*, Gene R. Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68, 72–73 (1984).

[8] *See, e.g.*, *Biden*, 143 S. Ct. at 2391 (Kagan, J., dissenting) (accusing the majority of "manipulating standing doctrine" to allow a state to challenge the Biden Administration's student loan forgiveness plan so that they could invalidate it as exceeding Article II executive power); United States v. Texas, 143 S. Ct. at 1989 (Alito, J., dissenting) (assailing the Court for "refus[ing] to apply our established test for standing" to avoid reaching the merits of the Biden Administration's clear violation of federal immigration statutes).

[9] For example, in *Warth v. Seldin*, 422 U.S. 490 (1975), Justices Douglas and Brennan, joined by two colleagues, plausibly charged the majority with contorting standing doctrine to disguise their hostility to plaintiffs' civil rights claims. *See id.* at 518–19 (Douglas, J., dissenting); *id.* at 519–20 (Brennan, J., dissenting); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 490-513 (1982) (Brennan, J., dissenting) (slamming five Justices for using standing rhetoric to shut out plaintiffs to prevent them from vindicating important Establishment Clause rights that those Justices disfavored); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–44, 1754–63 (1999) (providing empirical evidence that federal courts have reached opposite results in standing cases that presented the same facts).

[10] *See* Tracey E. George & Robert J. Pushaw, Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1274–79 (2002) (setting forth numerous examples).

[11] *See infra* Part I.

[12] Justice Douglas declared that "[g]eneralizations about standing to sue are largely worthless as such." Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970). More tactfully, Justice Rehnquist acknowledged that the Court's standing opinions "ha[ve] not always been clear" and that "the concept of 'Art. III standing' has not been defined with complete consistency." *Valley Forge*, 454 U.S. at 471, 475.

history or in the Constitution's structure.[13] As originally understood, Article III authorized parties to litigate a federal law "Case" if they met three conditions. First, a plaintiff had to assert a legal right in a form prescribed by law, which since 1789 has included a variety of ex parte proceedings with no adversarial defendant. Second, a plaintiff's claim had to arise fortuitously—that is, he or she had no control over the liability-triggering act or event and no intent to deliberately manufacture a lawsuit. Third, a "Case" had to present a legal question that called for interpretation by an independent federal judge who was an expert in federal law. Article III thereby furthered separation of powers because federal courts would accept jurisdiction over all "Cases" that Congress had validly conferred on them.

The Court faithfully implemented this conception of Article III for more than a century and a half, which produced clear and consistent results.[14] By contrast, the modern switch to the injury-causation-redressability triad has created analytical confusion and has allowed federal courts to abdicate their duty to exercise their jurisdiction, granted by Congress pursuant to Article III, over "all Cases" involving federal statutory and constitutional rights.[15]

The foregoing points will be detailed in a three-part analysis. Part I describes the post-New Deal evolution of standing. Part II examines the most recent standing cases. Part III argues that if the Court wishes to clarify standing—a big if, as the doctrine gives federal judges extraordinary discretion—it would revive Article III's original meaning.

I. Modern Standing Doctrine

In the 1920s, the Court created standing as a prudential doctrine of self-governance that allowed federal judges to exercise equitable discretion to manage their caseloads.[16] Of surpassing importance were the consolidated cases of *Massachusetts v. Mellon* and *Frothingham v. Mellon*,[17] which involved requests to enjoin enforcement of a federal statute that

[13] A detailed analysis of the ideas in the following paragraph will be set forth in Part III.

[14] *See infra* Sections III.A & III.B.

[15] *See infra* Part II.

[16] *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1376–78, 1422–24, 1443–48, 1454–57 (1988); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine?: An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 596, 605, 634–38 (2010).

[17] 262 U.S. 447 (1923).

appropriated funds to states to promote maternal and child health.[18] Plaintiffs argued that this legislation violated the Tenth Amendment and federalism principles by usurping the states' reserved power over local public health.[19] Initially, the Court held that, although it had original jurisdiction over cases involving a state party, Massachusetts's claim was not "justiciable" because it had presented "abstract questions of political power," not legal issues appropriate for judicial resolution.[20]

The Court distinguished precedent allowing states to sue when their proprietary rights, physical boundaries, or "quasi-sovereign rights" had been actually invaded.[21] The Court further concluded that Massachusetts could not sue as *parens patriae* on behalf of its citizens because they were also United States citizens and thus should have directed their complaints to Congress and the Executive Branch.[22] Finally, the Court ruled that the individual taxpayer had no right to file a Tenth Amendment or Due Process complaint because his financial interest in this statute was "minute and indeterminable" and "shared with millions," so that he was really bringing a generalized political grievance.[23] The Court based its holdings on its equitable discretion in injunction proceedings.[24]

The practical need for docket control became acute during the New Deal (1933–37), as federal legislation exploded.[25] Justice Felix Frankfurter, who joined the Court in 1939, wrote several separate opinions over the next decade maintaining that standing was not merely a matter of equitable judicial discretion, but rather a constitutional command.[26] He baldly asserted that Article III's drafters used the words "Cases" and "Controversies" interchangeably to restrict standing to plaintiffs who could show a personal "legal injury" to an interest recognized at common law, in a federal statute, or by the Constitution.[27] Finally, Frankfurter declared that his vision of standing implemented the Constitution's historical separation-of-powers framework, which sharply restrained the

18 *Id.* at 475.

19 *Id.* at 479–80, 482–83.

20 *Id.* at 485.

21 *Id.* at 481–85. The Court reasoned that these interests were not infringed because the state had the option of declining to participate in the spending program. *Id.* at 485.

22 *Id.* at 481–86.

23 *Mellon*, 262 U.S. at 486–89.

24 *Id.* at 483, 487–88.

25 *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224–28 (1988). Standing doctrine also served other purposes, most notably shielding liberal federal and state regulatory legislation, which was being administered by new administrative agencies, from attacks in federal court. *See* Winter, *supra* note 16, at 1374–76, 1452–55.

26 The seminal opinion is *Coleman v. Miller*, 307 U.S. 433, 460–70 (1939) (Frankfurter, J., concurring).

27 *See id.* at 460; Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149–60 (1951) (Frankfurter, J., concurring) (internal quotation marks omitted).

federal judiciary as compared to the legislative and executive departments.[28] By 1952, he had persuaded his colleagues to accept his idea of Article III standing.[29]

This approach remained relatively stable until the early years of the Burger Court (1969–86).[30] In 1970, Justice William Douglas in a majority opinion announced that Article III required a plaintiff to demonstrate an individualized "injury in fact," replacing the former focus on an injury at law.[31] Over the next few years, the Court added the "fairly traceable" and "redressability" requirements.[32] The Burger, Rehnquist, and Roberts Courts have continually tweaked these standards in ways that have generated unpredictability.[33] This confusion cuts across all subjects, but is most evident in cases involving Acts of Congress that addressed critical emerging issues like civil rights, the environment, and the transparency of political organizations.[34] The major decisions on injury, causation, and redressability reveal these intractable analytical problems.

A. *Injury in Fact*

Violations of many federal laws often affect millions of people and do not result in personal injury, property damage, or monetary loss—the traditional, cognizable common law interests. Therefore, to allow some

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[28] *See Coleman*, 307 U.S. at 460 (Frankfurter, J., concurring); *McGrath*, 341 U.S. at 149–52 (Frankfurter, J., concurring).

[29] *See* Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952).

[30] The Warren Court formally retained the "legal injury" test for standing. However, it applied this concept loosely and allowed standing for plaintiffs whose alleged injuries were widely shared. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204–10 (1962) (granting standing to urban Tennessee voters who made the novel claim that the state's legislators, who apportioned electoral districts to wildly over-represent rural districts, had violated the Equal Protection Clause). *But see id.* at 298–300 (Frankfurter, J., dissenting) (arguing forcefully that, because this malapportionment affected all such voters in the same way, the plaintiffs did not meet the Article III requirement of individualized legal injury but rather were bringing a generalized political grievance).

[31] *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152–54 (1970). The "injury in fact" could be "economic or otherwise," such as "aesthetic, conservational, and recreational." *Id.* at 152 (internal quotations and citations omitted). The Court added another new test: that plaintiffs must claim a legal right that is "arguably within the zone of interests to be protected" by the federal statute in question. *See id.* at 153. In the companion case of *Barlow v. Collins*, 397 U.S. 159 (1970), Justices Brennan and White objected to this addition. *Id.* at 167–75 (Brennan, J., concurring in the result and dissenting).

[32] *See* Linda R.S. v. Richard D., 410 U.S. 614, 617–19 (1973), discussed *infra* notes 93–98 and accompanying text.

[33] *See infra* notes 35–122 and accompanying text.

[34] *See infra* notes 35–62, 99–105, 109–122 and accompanying text.

plaintiffs standing (especially under the statutes identified above), the Court has had to stretch the particularized "injury in fact" requirement. For example, Congress prohibited racial discrimination in housing to protect people of color, but the Court granted standing to sue over violations of this law to white apartment dwellers by recognizing a novel injury to their right to live in a multi-racial community.[35] Similar creativity is especially pronounced in opinions dealing with environmental legislation.

1. Environmental Standing

Congress typically seeks to ensure maximum compliance by supplementing Environmental Protection Agency ("EPA") enforcement with a provision granting any interested persons the right to sue over alleged violations.[36] The Justices have always insisted that Article III confines standing to those who can show an "injury in fact." However, in *Sierra Club v. Morton*,[37] the Court found that this standard could be satisfied by alleging that the violation of an environmental statute offends a particular plaintiff's "aesthetic," "recreational," or emotional sensibilities.[38] Alas, such purported injuries are not matters of fact that can be ascertained objectively (unlike physical harm or financial loss), but rather depend on one's feelings[39]—contrary to the Court's oft-repeated rhetoric that an injury must be "actual or imminent, not conjectural or hypothetical."[40]

[35] *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208–12 (1972).

[36] *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1540(g); Clean Air Act of 1970, 42 U.S.C. § 7604.

[37] 405 U.S. 727 (1972).

[38] *Id.* at 734–35. The Court rejected the Club's Article III standing to seek to enjoin construction of a ski resort that allegedly would run afoul of federal environmental laws, but indicated that individual Club members would be permitted to sue if they claimed that they personally used this area and would experience an injury to their "recreational," "aesthetic," or emotional interests. *See id.* at 731–41. Justices Brennan and Blackmun would have relaxed standing in the environmental context by allowing responsible organizations like the Sierra Club to sue on behalf of the public. *See id.* at 755 (Brennan, J., dissenting); *id.* at 755–60 (Blackmun, J., dissenting); *see also id.* at 741–52 (Douglas, J., dissenting) (proposing that environmental issues be litigated in the name of natural objects such as trees and rivers).

[39] Consequently, rejection of a plaintiff's sincere claim of aesthetic or emotional injury necessarily reflects a judge's subjective normative judgment. *See* Fletcher, *supra* note 25, at 231; *see also* Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's* The Structure of Standing, 65 ALA. L. REV. 289, 293–94, 298–99 (2013) (agreeing with Professor Fletcher on this point, but recommending that the standing inquiry focus on whether the claimant's legal rights have been invaded fortuitously).

[40] *See, e.g.*, Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

Sierra Club thereby turned the supposedly bedrock constitutional requirement of particularized, concrete injury into a pleading game. Perhaps the most egregious illustration is *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*),[41] in which the Court granted standing to Washington, D.C., law students who challenged a federal agency's decision to increase railroad freight rates.[42] The majority concluded that this order would reduce the use of recycled material (owing to higher shipping expenses), which would necessitate further exploitation of natural resources to make replacement items and thereby damage the environment—degradation that might occur in Washington and might interfere with the students' enjoyment of nature.[43]

Sierra Club and *SCRAP* rewarded clever drafting of complaints. An environmental group merely had to ask a member who lived in a location that might experience negative environmental impacts to serve as a named plaintiff, then join the complaint after that plaintiff's standing had been recognized and take over the litigation.[44]

In such cases, even imaginary "injuries" have sometimes sufficed. For instance, in *Friends of the Earth v. Laidlaw Environmental Services*,[45] the Court allowed standing to plaintiffs who claimed aesthetic and recreational injuries based on their pretrial affidavits expressing "concerns" about perceived health and safety risks stemming from a corporation's emission of a tiny amount of a pollutant into a nearby river, despite the district court's factual finding that this discharge had not caused any such harms.[46] In dissent, Justice Antonin Scalia and other conservatives made the common-sense observation that false perceptions about harm do not demonstrate a concrete injury.[47] A few years after *Laidlaw*, however, in *Summers v. Earth Island Institute*,[48] Justice Scalia wrote

41 412 U.S. 669 (1973).

42 *See id.* at 674–90.

43 *See id.* at 684–85, 688–90; *see also id.* at 699 (Blackmun, J., concurring) (contending that environmental groups should be given standing if they can prove that they would be responsible representatives of environmental interests, without the need to show that an individual plaintiff suffered an injury); *id.* at 699–714 (Douglas, J., dissenting) (agreeing that standing rules should be loosened and concluding that, on the merits, the agency's increase in freight rates should have been invalidated).

44 *See* Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 4-15, 30, 32–33, 52–53, 82–104 (2010) [hereinafter Pushaw, *Limiting*] (explaining and criticizing this phenomenon).

45 528 U.S. 167 (2000).

46 *Id.* at 173, 180–88.

47 *Id.* at 198–215 (Scalia, J., dissenting).

48 555 U.S. 488 (2009).

for a fractured Court to reject as inadequate the injuries proffered by an environmental group seeking to enjoin the U.S. Forest Service from exempting the sale of fire-damaged timber on certain federal lands from ordinary statutory review procedures.[49]

The Court has often applied the injury standard in ways that frustrate Congress's express purposes, thereby undermining standing's separation-of-powers rationale.[50] For example, the Endangered Species Act ("ESA") seeks to protect such species in many ways, such as by ensuring that federal construction projects do not threaten them.[51] Nonetheless, in *Lujan v. Defenders of Wildlife*,[52] a divided Court denied standing to plaintiffs—including scientists who had professional interests at stake because they had studied certain endangered animals in Egypt and Sri Lanka at a planned federal construction site and intended to return there—on the ground that their complaint did not state that they had bought an airline ticket for the purpose of viewing such species.[53] But in *Bennett v. Spear*,[54] the Court granted standing to ranchers and irrigation districts that had challenged the federal government's attempt to protect certain endangered fish.[55]

[49] *See id.* at 490, 493–97. The Court held that no injury was suffered by (1) the organization, which could not show an interest in a specific upcoming exempt timber sale, even though its lawsuit had begun with a valid challenge to such as sale; (2) a member of the organization, who alleged that he planned to visit a national forest that might be subject to the unlawful timber sales; or (3) any plaintiffs who objected to the Forest Service's failure to comply with ordinary procedures, because they could not prove that this violation adversely affected their individual interests. *See id.* at 494–96; *see also id.* at 501 (Kennedy, J., concurring) (suggesting that the outcome may have been different if Congress had expressly provided a broad remedy for violation of the statute at issue). *But see id.* at 501, 506–10 (Breyer, J., dissenting, joined by the three other liberal Justices) (arguing that plaintiffs had set forth an "injury in fact" by showing that three of them often used national forests and that their aesthetic and recreational interests in doing so would be compromised by the Service's sale of timber on thousands of acres without first following legally mandated procedures).

[50] *See supra* note 6 and accompanying text.

[51] 16 U.S.C. § 1536 *et seq*.

[52] 504 U.S. 555 (1992).

[53] *See id.* at 562–65, 571–78. *But see id.* at 579–81 (Kennedy, J., concurring) (cautioning that Congress, in the ESA and elsewhere, could create new legal rights that would be judicially enforceable, but agreeing with the majority that these plaintiffs lacked standing); *id.* at 589–90, 592, 595 (Blackmun, J., dissenting) (contending that the Court's antipathy toward environmental law had led it to invent new limits on Congress's Article I power to authorize citizens who had experienced true injuries to sue in federal court).

[54] 520 U.S. 154 (1997).

[55] *Id.* at 157–79. These plaintiffs claimed that the government had exceeded its authority under the ESA by halting their activities and thereby caused them to incur monetary losses. *Id.* at 159–60, 167–71.

Lujan and *Bennett* reflect the Court's elevation of its byzantine standing framework over Congress's clear intent.[56] Moreover, *Lujan* cannot be reconciled with many other cases in which the Court generously licensed Article III standing, either at Congress's behest or on its own initiative.

2. Standing to Enforce Widely Shared Rights

Lujan is an outlier, as the Court usually strains to honor Congress's efforts to bestow broad standing to enforce its laws. Consider *Federal Election Commission v. Akins*,[57] in which plaintiffs invoked a federal statutory provision that authorized "any party aggrieved" to sue the Federal Election Commission ("FEC") for allegedly violating the requirement of public access to certain information from political organizations.[58] The Court ruled that plaintiffs had shown an injury to their right to obtain such information, even though all voters had experienced the same harm.[59] Justice Scalia, along with two colleagues, dissented because this holding conflicted with longstanding precedent prohibiting standing to bring such generalized grievances, which should be made to the political branches.[60]

The decisions he cited, however, did not involve an individual's attempts to enforce a *statute*. Rather, they concerned plaintiffs who claimed, in their capacity as citizens or taxpayers, that the federal government had acted *unconstitutionally*—and whose alleged "injuries" the Court deemed insufficiently particularized because they were shared by the populace at large.[61] Moreover, those cases did not uniformly ban

[56] Of course, even if Congress intends to confer or deny standing, it cannot do so in a way that violates the Constitution. Under my Article III approach, the plaintiffs in both *Lujan* and *Bennett* should have been granted standing. *See infra* notes 232–234 and accompanying text.

[57] 524 U.S. 11 (1998).

[58] *See id.* at 17–19 (citing the Federal Election Campaign Act of 1971).

[59] *Id.* at 19–26.

[60] *See id.* at 29–38 (Scalia, J., dissenting).

[61] The seminal cases predated the post New-Deal transformation of standing doctrine. *See* Frothingham v. Mellon, 262 U.S. 447, 487–89 (1923) (rejecting a taxpayer's standing to allege that a federal statute that helped fund state programs to promote mothers' health violated the Tenth Amendment, as his financial interest was too attenuated to suffice as an injury); *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (concluding that a citizen lacked standing to complain that Hugo Black could not become a Justice because he had served in a Congress that passed a law increasing the compensation of federal judges, even though the Constitution clearly provided that such financial conflicts prohibited Black's appointment). The more recent decisions on citizen and taxpayer standing will be described *infra* notes 63–73 and accompanying text.

such standing, and they all featured numerous concurring and dissenting opinions.[62]

For example, in *Flast v. Cohen*,[63] a fragmented Warren Court allowed taxpayers to sue over the government's allocation of tax revenue to religious organizations, which violated the Establishment Clause prohibition on such expenditures.[64] In 1974, however, a divided Court refused to extend *Flast* to two other constitutional challenges. First, in *United States v. Richardson*,[65] it denied taxpayers standing to complain that a federal law authorizing secret CIA expenditures ran afoul of the constitutional mandate that Congress provide a "Statement and Account" of all public expenses.[66] Second, in *Schlesinger v. Reservists Committee to Stop the War*,[67] the Court rejected the standing of citizens who complained that a congressman's service in the military reserves—part of the executive branch—transgressed a constitutional clause forbidding such dual office-holding.[68]

In *Valley Forge Christian College v. Americans United for Separation of Church and State*,[69] a bare majority of Justices then limited *Flast* itself to challenges under the Establishment Clause only when Congress had acted under the Article I Spending Clause, not its Article IV power to dispose of federal property.[70] As the dissenters emphasized, however, this distinction

62 *See infra* notes 64, 66, 68, 71–72 and accompanying text.

63 392 U.S. 83 (1968).

64 *Id.* at 91, 102–06. Two Justices argued that *Frothingham*'s general prohibition on taxpayer standing remained intact, but that the Court had properly made a narrow exception because taxpayers had a specific Establishment Clause right to ensure that Congress did not use any revenue to support religion. *See id.* at 114 (Stewart, J., concurring); *id*. at 115–16 (Fortas, J., concurring). By contrast, Justice Douglas would have overruled *Frothingham* and generously allowed taxpayers to sue the federal government for constitutional violations. *See id.* at 107–14 (Douglas, J., concurring). Finally, Justice Harlan dissented on the ground that the Court should not grant standing in such cases unless Congress had expressly so authorized. *See id.* at 117–33.

65 418 U.S. 166 (1974).

66 *See id.* at 168, 175–79 (quoting U.S. CONST. art. I, § 9, cl. 7); *see also id.* at 180–97 (Powell, J., concurring) (agreeing with this result and arguing that the *Flast* approach should be abandoned); *id.* at 197–202 (Douglas, J., dissenting) (declaring that all citizens should have standing to bring constitutional challenges against the government); *id.* at 202–07 (Stewart, J., dissenting) (maintaining that the Constitution specifically obliges the federal government to account publicly for all expenditures—a requirement that gives taxpayers a judicially enforceable right to ensure compliance).

67 418 U.S. 208 (1974).

68 *See id.* at 209, 220–22; *see also id.* at 228–29 (Stewart, J., concurring) (agreeing that these plaintiffs failed to plead that they had suffered an individualized injury, but not foreclosing possible standing for others). Justices Brennan and Marshall argued that the plaintiffs had alleged the invasion of a particular constitutional right that could be remedied only if citizens were granted standing. *See id.* at 235–38 (Brennan, J., dissenting); *id.* at 238–40 (Marshall, J., dissenting); *see also id.* at 229–35 (Douglas, J., dissenting) (reiterating his plea for broad citizen standing).

69 454 U.S. 464 (1982).

70 *See id.* at 478–80.

was legally irrelevant because the Establishment Clause violation—federal financial support of religion—was the same regardless of the source of Congress's power.[71] Thus, they assailed the Court for spouting standing rhetoric, rather than applying the law of *Flast*, to obscure its hostility to the substantive constitutional rights at issue.[72] Finally, the Roberts Court confined *Flast* to its facts without technically overruling it.[73]

Overall, in taxpayer and citizen standing cases, the Court has split badly. The Justices' opinions appear to be driven more by their political and ideological leanings than by anything in Article III's text or history. Recently, however, Justice Clarence Thomas has broken with his conservative brethren by questioning whether Article III always requires a showing of "injury in fact."

3. Justice Thomas's Originalist Version of Standing

In *Spokeo v. Robins*,[74] the Court concluded that Article III obliged plaintiffs to demonstrate not only that a company had violated a federal consumer-protection statute that gave private parties a right to sue over such breaches, but also that this violation had caused them to suffer a concrete and individualized "injury in fact."[75] In a concurrence, Justice Thomas argued that English and American courts at the time of the Framing recognized standing for those who simply claimed that their own *private* rights had been infringed, but that a plaintiff who relied upon *public* rights (i.e., those held by all citizens)—such as Robins—also had to demonstrate that the legal violation had resulted in a concrete, personal injury.[76]

Justice Thomas recently elaborated upon this opinion in *Transunion LLC v. Ramirez*.[77] There, Justice Brett Kavanaugh and four other conservatives reiterated the shibboleth that Article III "Cases" and "Controversies," in eighteenth-century Anglo-American legal parlance, limited federal courts to resolving disputes in which a plaintiff incurred a

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71 *See id.* at 491, 505–13 (Brennan, J., dissenting); *id.* at 513–15 (Stevens, J., dissenting).

72 *See id.* at 490–91, 510–13 (Brennan, J., dissenting).

73 *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 592–93, 604–05 (2007) (denying taxpayers' standing to contest an executive branch decision that had been funded indirectly through a general appropriation measure, rather than through a specific federal statute).

74 578 U.S. 330 (2016).

75 *Id.* at 337–43.

76 *Id.* at 343–48 (Thomas, J., concurring).

77 594 U.S. 413 (2021).

particularized "injury in fact" inflicted by an adverse defendant.[78] The majority acknowledged that Congress had provided for a private cause of action against credit-reporting agencies that disobeyed the statute by failing to ensure the accuracy of the information of consumers (they had erroneously been deemed poor, terrorists, or drug traffickers).[79] The Court held, however, that most of the thousands of plaintiffs could not prove that this conceded statutory violation also resulted in a true, personalized "injury in fact" (i.e., a harm akin to a traditional common law injury such as physical, monetary, or reputational damage).[80]

Justice Thomas (joined by the three liberal Justices) dissented on the ground that Article III, as originally understood, authorized federal jurisdiction over any "Case" in which a plaintiff claimed that his own private rights, whether founded in common law or statute, had been infringed.[81] But a party who merely alleged violation of a legal duty owed to the public had to demonstrate both such an injury at law (*injuria*) and actual damages[82]—although Justice Thomas admitted that there were some historical exceptions.[83] He criticized the majority for ignoring this history in favor of the "'injury in fact' (as opposed to injury at law) concept of standing" that the Court had created in 1970—in a case that did not even involve standing under Article III, but rather a federal statute.[84] Justice Thomas conceded that after 1970, the Court had repeatedly denied standing where a federal statute established a *public* right and authorized citizens to sue over its violation, unless they also proved that the breach had personally and concretely injured them.[85] However, the Court had never insisted on such a showing of "injury in fact" when a statute created *private* rights because that would invade Congress's Article I legislative

78 *Id.* at 423–24.

79 *Id.* at 418–22.

80 The Court allowed standing only for the plaintiffs who had been concretely injured because their mistaken credit reports had been sent to third parties, typically lenders. *Id.* at 419, 430–32. However, those plaintiffs whose reports had not been disclosed had not suffered any actual injury, but rather had merely speculated that they might be harmed in the future. *See id.* at 433–39.

81 *Id.* at 446–48 (Thomas, J., dissenting) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405 (1821)). For instance, in 1790 Congress passed copyright and patent laws and authorized intellectual property holders to sue anyone who violated those laws, regardless of actual injury or damages—and the Court upheld such statutes. *Id.*

82 *Id.* at 447.

83 *Ramirez*, 594 U.S. at 453 n.4 (Thomas, J., dissenting) (citing many laws enacted by the First Congress that empowered private informers to sue to collect damages for certain behavior that injured the public at large, as well as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317, 321–22 (1819), which was initially filed by a plaintiff who sought to recover penalties for both himself and Maryland).

84 *Id.* at 450; *see also id*. at 450–51 (noting that the Court added "injury in fact" to its Article III analysis to help plaintiffs obtain standing who could not get it under the traditional "injury at law" standard for statutes).

85 *Id*. at 451–52.

power.[86] Consequently, Justice Thomas maintained that all the plaintiffs had properly alleged a violation of their private statutory rights, which sufficed to confer Article III standing.[87]

Unlike the Court's other professed originalists, Justice Thomas has studied history to challenge the notion that Article III standing has always required a concrete, particularized "injury in fact." As I will show, he is half right.[88] As Justice Thomas said, eighteenth-century plaintiffs never had to demonstrate such an injury when they credibly alleged infringement of their own private rights, whether derived from a statute, the common law, or the Constitution. However, his other conclusion—that private parties who claim a violation of their public rights must prove an individualized "injury in fact"—does not fit with the historical evidence.[89]

4. Summary: The Capricious Application of "Injury in Fact"

As the foregoing cases illustrate, "injury in fact" is a conceptual quagmire. Accordingly, whether a party has experienced a sufficiently concrete and particularized injury often depends on a judge's whims. Sometimes the Court recognizes injuries that seem abstract (as in *SCRAP* and *Laidlaw*) or generalized (as in *Akins* and *Flast*), but at other times the Court rejects injuries that seem quite real and individualized (as in *Lujan* and *Summers*).[90] Many cases are contradictory, such as *Flast* and *Valley Forge*.[91] Similarly impossible to reconcile are the Court's holdings that the federal government's refusal to provide information as required by federal law is an "injury in fact" in some cases (like *Akins*) but not others (like *Richardson*).[92]

Finally, even if such an injury is found, it must be "fairly traceable" to (i.e., caused by) the defendant and "likely to be redressed" judicially. Those determinations are also arbitrary.

86 *See id*. at 452–54.

87 *Id.* at 446–47, 458–60.

88 *See infra* notes 213–219 and accompanying text.

89 *See infra* notes 172–173, 176–180, 185–195, 202–207, 215–219 and accompanying text.

90 *See supra* notes 41–49, 52–53 and accompanying text.

91 *See supra* notes 57–60, 63–66, 69–71 and accompanying text.

92 This right to information was provided by a federal statute (in *Akins*) and by the Constitution (in *Richardson*). *See supra* notes 57–62, 65–66 and accompanying text. This difference in the legal source of the right should not have affected standing analysis, as the injury (denial of the right to information) was identical.

B. *Causation*

The Burger Court introduced these new standing elements in *Linda R. S. v. Richard D.*,[93] which treated causation and redressability as a single inquiry about whether a plaintiff sought a judgment that would actually affect the parties' rights and responsibilities.[94] Linda, the mother of an out-of-wedlock child, requested (1) a declaratory judgment that Texas's practice of pursuing child support obligations only from fathers of "legitimate" children violated the Equal Protection Clause, and (2) prosecution of the father for failure to pay such support.[95] Characterizing Linda's injury as monetary, the Court denied her standing because the remedy she sought would cause the father to be imprisoned, not to pay child support.[96] The dissenters argued that Linda had standing because she had suffered a personal "injury in fact" (as opposed to suing solely as a representative of the public) and had set forth a serious constitutional claim, whereas the probability that she would ultimately obtain relief was a separate matter.[97] Moreover, if the Court had defined the injury as discrimination against unwed mothers, then prosecution would have redressed that harm. Indeed, in later cases the Court employed exactly that logic, yet without reversing *Linda R. S.*[98]

In *Allen v. Wright*,[99] the Court clarified that traceability was distinct from redressability,[100] yet that segmentation did little to improve analysis. In *Allen*, the majority held that the IRS's failure to fulfill its statutory obligation to deny tax-exempt status to private schools that racially discriminated had inflicted an "injury in fact" on black families that could be remedied if the IRS changed its approach, but that this injury was not "fairly traceable" to the IRS's illegal act.[101] As the dissent stressed, however, these tax exemptions provided financial support that helped to cause continuing discrimination.[102]

93 410 U.S. 614 (1973).

94 *Id.* at 617–19.

95 *Id.* at 614–16.

96 *Id.* at 618.

97 *Id.* at 620–21 (White, J., dissenting, joined by Douglas, J.).

98 *See, e.g.*, Orr v. Orr, 440 U.S. 268, 282–83 (1979) (granting a divorcing husband standing to bring an Equal Protection challenge to a state law that gave alimony only to wives, regardless of whether he ever received any alimony award); Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 658, 666 (1993) (permitting white contractors to claim that a city ordinance granting minority-owned companies preferences in contracts violated the Equal Protection Clause, even if those contractors' bids were unsuccessful for other reasons and they therefore suffered no economic loss).

99 468 U.S. 737 (1984).

100 *See id.* at 751–53.

101 *Id.* at 739–40, 756–59.

102 *Id.* at 768–69 (Brennan, J., dissenting); *id.* at 785 (Stevens, J., dissenting).

The Burger Court never explained why it incorporated "traceability" into the standing framework. Adding this element beclouded analysis, as causation is a notoriously protean construct developed in torts and other legal areas.[103] Determining whether an action "caused" a result is a discretionary, policy-laden judgment about how far back in a chain of events one is willing to go.[104] Thus, "traceability" can easily be deployed to achieve preferred political and ideological results, as when conservative Justices in *Allen* invoked causation to thwart civil rights plaintiffs.[105] Sometimes the Burger Court applied causation loosely to reach the merits and sustain laws it favored, such as a federal statute that limited private companies' liability for nuclear power plant accidents that had been challenged by environmental activists.[106]

The Rehnquist and Roberts Courts have continued to issue confusing and conflicting opinions about "traceability."[107] No amount of case-by-case tinkering with causation can clarify this idea, which is inherently malleable.

C. *Redressability*

Ascertaining whether a judicial decision is "likely" to redress an injury presents two difficulties. First, courts consider an appropriate remedy at the end of a trial if liability has been found, so such relief should not be a threshold issue of jurisdiction.[108] Second, the "likelihood" standard depends upon a subjective calculation of probabilities. Judges enjoy broad

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103 The Justices surely know this, because all first-year law students learn about the vagaries of causation in cases like *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928).

104 *See* JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW (1978) (detailing this theme generally and in the context of standing law).

105 *See supra* note 102 and accompanying text.

106 *See* Duke Power Co. v. Carolina Env't Study Grp., 438 U.S. 59, 64–94 (1978) (conferring standing on parties who unsuccessfully claimed that the Price-Anderson Act ("PAA"), which limited liability for nuclear accidents, had induced Duke Power to construct a nuclear reactor, which assertedly caused plaintiffs certain injuries (such as possible exposure to radiation) in violation of the Fifth Amendment). Several Justices argued that the majority's desire to uphold this law had prompted it to disregard the traceability requirement, which should have led to the conclusion that the PAA—as contrasted with Duke Power's independent business decisions—had not caused the plaintiffs' alleged, and speculative, injuries. *See id.* at 94–95 (Stewart, J., concurring in the result); *id.* at 95–102 (Rehnquist, J., concurring in the judgment); *id.* at 102–03 (Stevens, J., concurring in the judgment).

107 Most dubiously, the Court held that the EPA's decision not to regulate new motor vehicles would marginally increase global warming, which would slightly raise sea levels, which a century later might cause Massachusetts the injury of losing a few feet of coastal land. *See* Massachusetts v. EPA, 549 U.S. 497, 504–26 (2007), discussed *infra* Section I.D.

108 *See* Linda R.S. v. Richard. D., 410 U.S. 614, 619–22 (1973) (White, J., dissenting).

remedial discretion, so their initial judgment about possible redressability typically reflects their degree of sympathy towards a plaintiff's substantive legal claim. Not surprisingly, conservative Justices tend to find that an injury is likely to be redressed when alleged by a preferred party like a private corporation, but unlikely to be remedied when proffered by disfavored plaintiffs (e.g., those bringing civil rights[109] or environmental claims[110]), whereas liberal Justices usually do the opposite.[111]

D. *The Arbitrariness of All Three Standing Elements:* Massachusetts v. EPA

The foregoing analysis reveals that most standing cases feature disagreements about one of the three factors—injury, traceability, or redressability. But some decisions implicate all of these elements, with the Justices reaching radically different conclusions. The most striking illustration is *Massachusetts v. EPA.*[112]

This case added a chapter to the Court's long struggle to adapt standing doctrine—developed in the context of human beings who had claimed personal injuries resulting from an infringement of their rights—to states.[113] Recall that in *Massachusetts v. Mellon*, the Court held that states, on behalf of their citizens, could not sue the federal government for allegedly exceeding its constitutional powers (there, under the Spending Clause) and violating the Tenth Amendment because such issues should be resolved through the political process.[114] However,

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[109] The landmark case is *Warth v. Seldin*, 422 U.S. 490 (1975), in which poor Rochester residents complained that a wealthy suburb had violated federal civil rights laws by enforcing rigorous zoning ordinances (e.g., allowing only single-family homes on large acreages) that prevented the building of affordable residences. *Id.* at 493–96. The Court concluded that the plaintiffs had not shown that the redress sought (striking down the zoning laws) would be likely to remedy their alleged injury because (1) the builders had not submitted to the city any plans for low-cost housing and might never do so; and (2) even if they constructed such residences, the plaintiffs still might have lacked the money to buy them. *Id.* at 502–18. For other examples, see *supra* notes 34, 99–102, 105 and accompanying text.

[110] *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 86–88, 102–09 (1998) (denying standing to plaintiffs to claim that a manufacturer had violated a federal statute by failing to submit a timely report about its discharge of toxic chemicals on the ground that the relief sought—an injunction to compel filing—would not remedy their alleged injuries because, by the time their complaint was filed, the company had submitted the report). Other decisions against environmental plaintiffs are discussed *supra* notes 37–40, 48–49, 52–53, 90 and accompanying text.

[111] For instance, in *Warth*, four liberal Justices charged the majority with butchering standing doctrine because of their hostility to plaintiffs' substantive civil rights claims. *See Warth*, 422 U.S. at 518–19 (Douglas, J., dissenting); *id*. at 520–21 (Brennan, J., dissenting); *see also Steel Co.*, 523 U.S. at 112 (Stevens, J., concurring in the judgment, joined by Souter & Ginsburg, JJ.) (arguing that the Court should have avoided letting environmental violators off the hook through Article III standing analysis and instead decided the case through statutory interpretation).

[112] 549 U.S. 497 (2007).

[113] *Id.* at 518–20.

[114] Massachusetts v. Mellon, 262 U.S. 447, 480–85 (1923).

the Court recognized that states themselves could invoke federal court jurisdiction if they credibly alleged infringement of their proprietary rights, boundaries, or "quasi-sovereign" interests.[115] The Court was trying to establish a strong presumption against states suing the United States. However, *Mellon*, combined with the modern "injury in fact" requirement, have encouraged pleading creativity in which states disguise their political beefs with federal programs as individualized common law injuries.

In *Massachusetts v. EPA*, five liberal Justices initially declared that states deserved "special solicitude" in standing determinations,[116] despite the contrary *Mellon* presumption. This bare majority then ruled that Massachusetts had standing under the Clean Air Act ("CAA") to contest the EPA's denial of a petition for a rulemaking to regulate greenhouse gas emissions from new motor vehicles.[117] Critically, the Court concluded that Massachusetts had demonstrated its own "injury in fact" (as contrasted with harms that may have befallen its citizens) by asserting that the EPA's inaction would contribute to global warming, which would increase sea levels, which by the end of the century might erode some of the state's coastal land.[118] The Court then found that this injury was "fairly traceable" to the EPA's inaction and likely to be redressed by ordering it to promulgate the requested regulation.[119]

Chief Justice John Roberts, writing on behalf of his three conservative colleagues, dissented.[120] At the outset, he contended that Massachusetts's alleged injury (land loss) had not actually occurred and was hardly "imminent" (as it might not happen at all, and if so not for a century).[121] He then argued that (1) causation was absent because emissions from new American motor vehicles would have only a minute impact on global warming, and many other factors might cause future erosion on the Massachusetts coast, and (2) the proposed regulation would not be likely to remedy the state's purported injury.[122]

Massachusetts v. EPA illustrates that standing opinions depend heavily on the Justices' politics and ideology, which in turn leads them to characterize the facts to fit those views. The liberal Justices, who favor strict environmental laws, (1) stretched the concept of "actual or

115 *Id.* at 481–85.

116 Massachusetts v. EPA, 549 U.S. at 520–21.

117 *Id.* at 504–26.

118 *Id.* at 521–22.

119 *Id.* at 523–25.

120 *Id.* at 541–48 (Roberts, C.J., dissenting).

121 *Id.* at 541–44.

122 Massachusetts v. EPA, 549 U.S. at 543–48.

imminent" factual injury to include the exceedingly distant possibility of property loss (property rights being a bulwark of traditional common law); (2) strung together a very long chain of causal connections; and (3) accepted plaintiffs' speculative assertion that issuing the requested regulation would redress their alleged injury. The conservative Justices, who tend to be environmental skeptics, disagreed as to all three elements of standing.

The conceptual and practical problems with standing have persisted. The Court's recent Term provides many illustrations.

II. Standing Cases in 2023

The Court's latest standing decisions have further muddled analysis. Most notably, in *Biden v. Nebraska*,[123] Missouri and several other states challenged the Department of Education's plan to forgive $430 billion in student-loan debt at the end of the COVID-19 pandemic.[124] The Department relied upon a 2003 federal statute designed to help such debtors in a "national emergency" like the 9/11 terrorist attacks.[125] In his majority opinion, Chief Justice Roberts began by noting that the State of Missouri had created, supervised, and controlled MOHELA, a nonprofit corporation, to serve the public function of assisting its citizens with student loans.[126] The Court concluded that Missouri had standing because the Department's debt-forgiveness program would cause the state to suffer a concrete "injury in fact"—MOHELA's loss of $44 million in fees—that could be judicially remedied.[127] On the merits, the Court held that the 2003 statute did not authorize the Department to take such a drastic and costly action.[128]

Justice Elena Kagan, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson, dissented on the ground that Missouri had no "personal stake" in the Department's loan forgiveness plan because it had incurred no particularized injury, but rather had simply brought a generalized grievance based on its disagreement with the federal loan forgiveness policy.[129] Justice Kagan argued that MOHELA, which was legally and financially independent of Missouri and thus would absorb all monetary losses, might have been a proper plaintiff but had deliberately chosen not to sue.[130] The dissenters accused the majority of disregarding established

123 143 S. Ct. 2355 (2023).

124 *Id.* at 2362–65.

125 *Id.* at 2363–64.

126 *Id.* at 2365–66.

127 *Id.* at 2365–68.

128 *See id.* at 2368–76.

129 Biden v. Nebraska, 143 S. Ct. at 2385–91 (Kagan, J., dissenting).

130 *See id.* at 2386–87, 2391.

standing principles in their unseemly eagerness to invalidate the loan forgiveness program.[131]

Biden v. Nebraska rendered ineffective, from a real-world and political standpoint, a related case in which the Court had denied certain borrowers standing to challenge the loan forgiveness program.[132] One need not be a Legal Realist to surmise that politics and ideology influenced the Justices' approach to standing in *Biden v. Nebraska*. On the one hand, all six conservative Justices have embraced the theory that federal statutes should not be interpreted as delegating "major questions" to executive agency discretion, especially massive financial outlays not specifically authorized by Congress.[133] The conservatives could apply this theory in *Biden v. Nebraska* only if they first determined that some plaintiff had standing to raise it. Therefore, they unsurprisingly accepted Missouri's claim that it had been "injured in fact" because MOHELA would lose money (a classic common law injury) as a result of the Department's loan forgiveness plan. On the other hand, the liberals presumably supported this Biden Administration initiative. Hence, they characterized Missouri as a third party that had suffered no injury to its own interests, as contrasted with the financial harm incurred by MOHELA. Standing standards are flexible enough to justify either the majority or dissenting opinions, which boiled down to the technical legal relationship between a state and one of its agencies.

Another fragmented standing decision, *United States v. Texas*,[134] arose out of the Biden Department of Homeland Security's announcement that it would not comply with federal immigration statutes requiring the arrest and removal of certain noncitizens (e.g., those who have been convicted

131 *See id.* at 2384–86, 2388–91.

132 In *Department of Education v. Brown*, 143 S. Ct. 2343 (2023), two student-loan debtors who did not qualify for loan forgiveness claimed that if the Department had followed proper procedures in promulgating its regulations, they would have been able to comment and urge adoption of a plan that would have been more generous to them. *See id.* at 2348–50. Justice Alito, writing for a unanimous Court, denied Article III standing on the ground that plaintiffs had failed to show a concrete injury "fairly traceable" to the Department's action, as governments routinely create programs that benefit some groups and not others, and those excluded have no legal right to such benefits. *Id.* at 2351–55. The conservative Justices (Roberts, Alito, Thomas, Gorsuch, Kavanaugh, and Barrett) could claim that they impartially applied standing law because they found standing in *Biden v. Nebraska* but denied it in *Brown*. Of course, *Brown* had little practical effect because the Court ultimately invalidated the loan forgiveness program.

133 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

134 143 S. Ct. 1964 (2023).

of crimes).[135] All of the Justices agreed with the district court's finding that this new policy would cause border states like Texas to incur significant costs (in law enforcement, incarceration, and social services), which qualified as an "injury in fact" for standing purposes.[136]

Nonetheless, Justice Kavanaugh, joined by Chief Justice Roberts and the three liberals, ruled that this injury was not "legally and judicially cognizable," for two reasons.[137] First, federal courts traditionally had not entertained such suits, and indeed had denied standing where (as here) the plaintiff was not subject to an actual or threatened arrest or prosecution.[138] Second, Article II gave the Executive Branch broad discretion over criminal law enforcement, and a decision to refrain from arresting or prosecuting did not infringe upon the individual liberty and property interests that courts must protect.[139] Such discretion extended to the immigration context, where enforcement choices reflected policy judgments such as resource constraints, changing opinions about public welfare and safety needs, and foreign-affairs considerations.[140]

Justice Neil Gorsuch, joined by Justices Thomas and Amy Coney Barrett, concurred in the judgment.[141] Initially, he rejected the majority's conclusion that Texas's injury was not legally cognizable because it involved a discretionary decision not to prosecute, especially since the Court in *Massachusetts v. EPA* had granted standing to challenge the EPA's similar choice not to regulate.[142] Instead, Justice Gorsuch argued that this injury was not redressable because Congress had specifically prohibited lower federal courts (albeit not the Supreme Court) from enjoining the operation of the immigration statutes at issue.[143] Justice Barrett separately concurred, agreeing with Justice Gorsuch about redressability, but adding that the majority had erroneously held that Texas lacked a judicially cognizable injury by superimposing onto the Article III standing analysis a separate substantive opinion about Article II executive authority.[144]

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135 *See id.* at 1968–69. The Department of Homeland Security issued new enforcement guidelines that "prioritize[d] the arrest and removal of noncitizens who are suspected terrorists, or dangerous criminals, or who have unlawfully entered the country only recently." *Id.* at 1968.

136 *Id.* at 1970; *id.* at 1976–78 (Gorsuch, J., concurring in the judgment); *id.* at 1787–89 (Barrett, J., concurring in the judgment); *id.* at 1994 (Alito, J., dissenting).

137 *See id.* at 1970–76 (majority opinion).

138 *See id.* at 1968, 1970–73, 1976 (citing Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)).

139 *See id.* at 1971–74. The Court acknowledged that the standing result might have been different if Congress had required the Executive Branch to make arrests or prosecutions, but noted that such statutes were exceedingly rare. *See id.* at 1973–74, 1976.

140 *See* United States v. Texas, 143 S. Ct. at 1971–72.

141 *Id.* at 1976–86 (Gorsuch, J., concurring in the judgment).

142 *See id.* at 1976–77 (citing Massachusetts v. EPA, 549 U.S. 497, 516–26 (2007)); *see also id.* at 1996–97 (Alito, J., dissenting) (agreeing with Justice Gorsuch on this point).

143 *See id.* at 1978–86 (Gorsuch, J., concurring in the judgment).

144 *See id.* at 1986–89 (Barrett, J., concurring in the judgment).

In dissent, Justice Samuel Alito maintained that Texas plainly had standing because it (1) had suffered an "injury in fact" (monetary losses) (2) directly caused by the Executive Branch's violation of federal law (3) that could be remedied under either the applicable immigration statute (which expressly empowered the Supreme Court to enjoin violations) or the Administrative Procedure Act, which authorizes federal courts to set aside agency actions contrary to law.[145] In his view, the majority had ignored settled standing law to embrace an extreme view of plenary Article II "executive [p]ower" as including the authority to willfully flout a statute that explicitly limited the Executive Branch's discretion, which in turn invaded Congress's plenary power over immigration law.[146]

United States v. Texas cannot be explained in purely partisan terms, as only Justices Sotomayor, Kagan, and Jackson would have been politically inclined to support the Biden Administration.[147] Nonetheless, these liberals found ideological common ground with five of the conservatives, who subscribe to the idea—originated in the Reagan era—that Article II creates a "unitary executive" with extraordinary discretion, particularly in criminal law and foreign affairs (including immigration).[148] This substantive legal theory best explains the majority and concurring

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145 *See id.* at 1989–2004 (Alito, J., dissenting).

146 United States v. Texas, 143 S. Ct. at 1989–90, 2001–04.

147 I should add that Chief Justice Roberts has often joined the liberals in high-profile cases through solo opinions that are so legally unprincipled, in my view, that they can rationally be explained only as part of his self-defeating attempt to persuade Americans that political considerations do not influence him or his colleagues. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2310–17 (2022) (Roberts, C.J., concurring in the judgment) (asserting that the constitutional right to abortion created in *Roe v. Wade*, 410 U.S. 113 (1973), and later cases could be preserved as long as a state gave women a "reasonable opportunity" to exercise this right (as Mississippi's fifteen-week window allowed), even though this precedent plainly recognized a right to abortion until the fetus became viable (at about twenty-three weeks)); Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 543–74 (2010) (Roberts, C.J., concurring in the judgment) (concluding that the Affordable Care Act's regulatory "penalty" imposed on those who did not buy health care insurance exceeded Congress's power under the Commerce Clause—which Congress had explicitly identified as the exclusive Article I basis for this statute—but rewriting this provision as a "tax" that could be upheld under Congress's Taxing Clause power, which is plenary). *See* Robert J. Pushaw, Jr., *Defending* Dobbs*: Ending the Futile Search for a Constitutional Right to Abortion*, 59 SAN DIEGO L. REV. 265, 309, 314 (2023) (criticizing the Chief Justice's opinions in *Dobbs* and *National Federation* as politically driven). Justice Kavanaugh has also written separate opinions to try to assure liberals that he is acting in a politically impartial manner. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2304–10 (Kavanaugh, J., concurring) (arguing that the Constitution is "neutral" on abortion and thus commits this issue to the political process, but adding dicta that a state could not constitutionally prohibit its citizens from traveling to another state to obtain an abortion).

148 *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2021 SUP. CT. REV. 83, 83–85 (2020) (describing and critiquing this theory).

opinions,[149] because they make little sense under the Court's established Article III standing principles. Especially mystifying is Justice Kavanaugh's treatment of the injury requirement, since Texas proved it had incurred the paradigmatic injury in Anglo-American law (money damages), and the Court had often held that such financial harm to a state was legally cognizable—as the concurring and dissenting Justices showed.[150] Likewise, the Court could have redressed this injury, for reasons Justice Alito set forth.[151] Because all of the Justices except Alito did not apply the injury, causation, and redressability requirements in a straightforward manner, they must have been using standing verbiage to mask some other purpose—either to reinforce the "unitary executive" theory or to avoid reaching a controversial political issue.

Even where the Justices agree as to standing, their conclusions are often curious, as two cases illustrate. First, in *303 Creative v. Elenis*,[152] Lorie Smith wished to expand her business to include website designs exclusively for heterosexual couples, based on her religious belief that marriage is the union of a man and a woman.[153] The Court briefly affirmed the Court of Appeals for the Tenth Circuit's grant of standing because Smith had alleged a "credible threat" that, if she moved forward, the state would enforce its law that prohibited public accommodations from discriminating based on sexual orientation.[154] The Court then enjoined Colorado from enforcing this law because it would violate Smith's First Amendment rights by compelling her to create expressive designs celebrating same-sex marriage, which she did not endorse.[155] The three liberal Justices dissented from this substantive holding, but did not mention standing.[156]

149 Justice Kavanaugh, joined by Chief Justice Roberts, repeatedly stressed this idea. United States v. Texas, 143 S. Ct. at 1971–74. Justices Gorsuch, Barrett, and Thomas did not question this Article II theory, but rather objected to its migration into the distinct jurisdictional analysis of Article III standing. *See supra* notes 141–146 and accompanying text. This conclusion was reinforced in a case decided at about the same time as *United States v. Texas*, in which three conservative Justices emphasized that the Article II "unitary executive" idea, which they endorsed, cast doubt upon the standing of relators to bring *qui tam* suits on behalf of the federal government (e.g., where someone has submitted false claims for payment to the government). *See* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1737 (2023) (Kavanaugh, J., concurring, joined by Barrett, J.); *id.* at 1741 (Thomas, J., dissenting).

150 *See supra* note 136 and accompanying text.

151 *See supra* notes 145–146 and accompanying text.

152 143 S. Ct. 2298 (2023).

153 *See id.* at 2308–10.

154 *Id.* at 2310.

155 *See id*. at 2310–22.

156 Rather, they argued that, although Smith had a First Amendment right to express her views about same-sex marriage as a private citizen, she could not discriminate against gays and lesbians by denying them services in a business open to the public. *See id.* at 2322–43 (Sotomayor, J., dissenting, joined by Kagan & Jackson, JJ.).

This cursory treatment of standing is odd. Smith certainly had not suffered any actual injury, so the dispositive issue was whether she had proved that such harm was "imminent." It is debatable whether Smith met this requirement with bare allegations that she "planned" to design wedding websites at some future time and that, if she did so, she would not serve same-sex couples.[157] Accordingly, the Court easily could have denied standing, as it had done in cases like *Lujan*, on the ground that Smith's asserted injury was not "concrete," but rather "conjectural or hypothetical."[158] However, doing so would have prevented the Justices from reaching the merits of an important constitutional issue, which they were apparently keen to adjudicate.

Second, *Haaland v. Brackeen*[159] involved the federal Indian Child Welfare Act ("ICWA"), which directs states, in custody proceedings concerning a Native American child, to give preference to (1) members of the child's extended family, (2) other members of the child's Tribe, or (3) other Indian families, with the child's Tribe free to pass a resolution altering this preference order—even if the state determined that a non-Native American placement would be in the child's best interest.[160] The Court denied standing to various parties who claimed that the ICWA violated the Equal Protection Clause.[161]

One group of plaintiffs consisted of three non-Indian couples who could not adopt Native American children. The Court held that they had suffered an "injury in fact," but could not show that their requested injunction and declaratory judgment against the named *federal* parties would remedy this injury because the ICWA was administered by *state* officials, who were not defendants.[162] This distinction, however, rests on the dubious assumptions that state executive officers and judges will likely defy a Supreme Court holding that the ICWA is unconstitutional and that the federal government will fail in its duty to supervise states to ensure they are complying with that law.

The Court then rejected Texas's standing to claim that the ICWA forced it to break its promise to its citizens that its child placement decisions would not racially discriminate as not amounting to a concrete

157 *Id.* at 2308–10 (majority opinion).

158 *See supra* notes 20, 38–40, 48–49, 52–53, 75, 78–80, 90 and accompanying text (examining cases in which the Court rejected standing on these grounds).

159 143 S. Ct. 1609 (2023).

160 *Id.* at 1622–25 (summarizing the relevant statutory provisions).

161 *Id.* at 1638–41.

162 *Id.* at 1638–40.

and particularized injury.[163] Furthermore, Texas's allegation that implementing the ICWA's placement provisions increased its costs was not "fairly traceable" to those provisions because the state would incur the same expenses in all custody proceedings.[164]

If the Court had wanted to reach the Equal Protection issue, however, it could have granted Texas standing. Indeed, its conclusion that the federal government's compelling a state to racially discriminate is not an "injury in fact" is surprising, given the Court's consistent recognition that such discrimination inflicts serious harm on victims.[165] Similarly, forcing a state in custody proceedings to add consideration of federal legal standards to their ordinary laws will logically cause it to incur greater expenditures (and even a marginal loss of money counts for standing purposes).

Finally, the Court did confer standing on the non-Indian couples and Texas to challenge the ICWA as (1) exceeding Congress's powers under Article I's Indian Commerce Clause, and (2) unconstitutionally "commandeering" states to administer federal laws in an area of traditional state concern, but upheld the statute's validity as an exercise of Congress's plenary authority.[166] Thus, the Court cleverly deployed standing so that it could uphold Congress's power to enact the ICWA, yet avoid deciding whether that statute violated the Equal Protection Clause.

In sum, the Court's most recent standing cases continue its pattern of applying the injury, causation, and redressability standards in cryptic ways. More generally, the Court's constant tinkering with the doctrine over the past half century has done little to improve analytical precision or predictability. Nor can it, as the problem is foundational: Standing law is built on the sand of judicial fiat, not the rock of Article III's text and history and the Constitution's structure. Resurrecting the original and long understood meaning of Article III would greatly clarify standing.

163 *Id.* at 1640.

164 *Id.* at 1640–41.

165 Justice Kavanaugh correctly noted that the ICWA requirement that states discriminate based on race "raise[s] significant questions under bedrock equal protection principles and the Court's precedents," but deferred to the majority's ruling that these plaintiffs lacked standing to make this claim. *Haaland*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring).

166 *See id.* at 1627–38; *see also id.* at 1641–61 (Gorsuch, J., concurring) (agreeing with this conclusion based on a lengthy historical analysis); *id.* at 1662–83 (Thomas, J., dissenting) (contending that the Constitution, as originally understood, does not empower Congress to regulate child welfare proceedings, but leaves this subject entirely to states); *id.* at 1683–89 (Alito, J., dissenting) (reiterating Justice Thomas's point and adding that the ICWA has the practical consequence of depriving states of their critical interest in placing vulnerable children with the best possible adoptive parents).

III. The Original Understanding of Article III and "Standing"

I have challenged the conventional wisdom about standing in a series of articles beginning thirty years ago[167] based on exhaustive research into Article III's original linguistic meaning, the intent of its drafters, and the understanding of its ratifiers and early implementers. My main insights have been independently confirmed and refined by James Pfander in a thorough historical analysis.[168] I will summarize our main conclusions, without reproducing our hundreds of supporting primary sources.

A. *My Critical Distinction Between "Cases" and "Controversies"*

Article III begins by conferring "the judicial power," which since 1787 has been defined as rendering a judgment after "expounding" the law—interpreting it and applying it to the facts.[169] This grant of "judicial power" presupposes that federal judges will have sufficient time to find the operative facts, ascertain the governing legal principles, and issue a sound judgment, typically accompanied by a reasoned opinion.[170] Such "judicial power" is then extended to various "Cases" and "Controversies."[171]

Article III does not mention standing—much less "injury in fact," traceability, or redressability—or provide that the "judicial power" can be exercised only in the context of an adversarial dispute. Such concepts also escaped the attention of everyone during the Convention and Ratification debates and the Court for the next century and a half.[172] The modern Court's basic mistake has been to assert that Article III, as historically understood, used the words "Cases" and "Controversies" synonymously to

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167 *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) [hereinafter Pushaw, *Case/Controversy*]; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) [hereinafter Pushaw, *Justiciability*]; Pushaw, *Limiting*, *supra* note 44 (published in 2010).

168 *See generally* JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021).

169 *See* Pushaw, *Case/Controversy*, *supra* note 167, at 471, 474–79, 489–92; Pushaw, *Justiciability*, *supra* note 167, at 398, 402, 406, 417–18, 421–27, 431–32, 436–41; *see also* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741–42, 808–09, 825–28, 843–46 (2001).

170 *See* Pushaw, *Justiciability*, *supra* note 167, at 398, 402, 417–18; Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1289, 1328–29 (2005) [hereinafter Pushaw, *Bridging*].

171 U.S. CONST. art. III, § 2, cl. 1.

172 *See* Pushaw, *Case/Controversy*, *supra* note 167, at 448–50, 470–517; Pushaw, *Limiting*, *supra* note 44, at 66.

establish a requirement of standing (and other justiciability doctrines like ripeness and mootness) that restrict federal courts to adjudicating only concrete disputes between opposed parties.[173]

In fact, however, the Framers consciously shifted from "Cases" to "Controversies" because those two words had different meanings, as becomes evident upon reading seventeenth and eighteenth century English legal dictionaries, abridgements, treatises, and judicial opinions.[174] On the one hand, a "controversy" was a dispute—a definition that has lasted to this day.[175] On the other hand, in the eighteenth century, a "Case" referred to a recognized judicial form of action in which a party requested the vindication of a legal right, regardless of whether there was an adversarial dispute.[176] "Case" derives from the Latin "*casus*," meaning "chance."[177] Hence, a "Case" requires that the legal claim arose fortuitously—meaning that plaintiffs (1) had no control over the action or event that generated the claim, and (2) did not manufacture a lawsuit.[178] For example, if a legislature creates a new form of action authorizing suits by persons who are adversely affected by violation of a law, plaintiffs must establish that their rights under that law have been abridged involuntarily as a result of some occurrence beyond their control, not by exposing themselves to an arguable legal violation simply to contrive litigation.[179]

Article III's structure reinforces this linguistic distinction between "Cases" and "Controversies." That Article enumerates three kinds of "Cases" defined by subject matter: (1) the federal Constitution, statutes, and treaties; (2) admiralty and maritime; and (3) the law of nations applicable whenever foreign ministers are affected.[180] Article III then uses a different word, "Controversies," to denominate six disputes concerning certain parties (e.g., the United States, states or their citizens, and foreign nations or their subjects), regardless of the substantive law at issue.[181]

The Constitution's drafters, ratifiers, and early implementers interpreted this distinction primarily as signifying the federal courts' main function in each jurisdictional category.[182] As for "Controversies," federal courts' principal role would be to resolve the parties' dispute, and the judges' tenure and salary protections would guarantee the independence

173 *See* Pushaw, *Case/Controversy*, *supra* note 167, at 447–57, 472.

174 *Id.* at 466–67, 470–84.

175 *Id.* at 449–50, 482–84.

176 *Id.* at 449, 472–73.

177 *See* Pushaw, *Limiting*, *supra* note 44, at 67–68.

178 *See id.* at 11–17, 66–105.

179 *See id.* at 12–16, 82–104.

180 *See* Pushaw, *Case/Controversy*, *supra* note 167, at 447, 449, 471–72, 494–95.

181 *Id.* at 447, 449–50, 472.

182 *Id.* at 449–50, 467–70, 472–517.

that their state counterparts typically lacked.[183] Any interpretation of legal questions would be of secondary importance, as evidenced by the fact that state law (as definitively determined by state courts) would usually supply the rule of decision.[184]

In "Cases," however, a dispute did not have to exist (although one may have been present).[185] Instead, a "Case" arose if "a party assert[ed] his rights in the form prescribed by law," in the words of Chief Justice John Marshall[186] (borrowing from Blackstone).[187] One such form of action was private: a plaintiff's claim that a common law or statutory right had been violated by a defendant.[188] Other causes of action were "public."[189] For example, "relator" suits enabled citizens to act as private attorneys general to vindicate certain laws that safeguarded the public interest, while "informers" could sue on behalf of the government to help enforce criminal and regulatory laws (e.g., suspected evasion of customs duties) and obtain a share of any money damages recovered, even if the violation had not caused the plaintiff any personal injury.[190] Similarly, prerogative writs (mandamus, prohibition, quo warranto, and certiorari) permitted English courts to investigate government actions alleged to exceed its legitimate power, regardless of an adversarial dispute.[191] Likewise, many other "Cases" featured uncontested claims—for instance, bankruptcy, naturalization, consent decrees, and default judgments.[192]

The takeaway is that many "Cases" did not involve a dispute between adversaries, but rather focused on legal exposition. The natural inference is that Article III's Framers anticipated that the federal courts' main role in federal question, admiralty, and foreign minister "Cases" (which were obviously of crucial national importance) would be to interpret and apply the law.[193]

Like Sherlock Holmes's dog that didn't bark, the Constitutional Convention, the Ratification debates, and federal government (including

183 *Id.* at 450, 483–84, 504–11.

184 *Id.* at 450, 504–11.

185 *Id.* at 448–50, 495–504.

186 Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819 (1824); *see* Pushaw, *Case/Controversy*, *supra* note 167, at 473–75 (citing landmark Marshall Court cases, Blackstone, Mansfield, James Wilson, and other English and American legal giants).

187 *See id.* at 473 n.134.

188 *See id.* at 476–79; *see also* Pushaw, *Limiting*, *supra* note 44, at 68–69.

189 *See* Pushaw, *Limiting*, *supra* note 44, at 69–73.

190 *See* Pushaw, *Case/Controversy*, *supra* note 167, at 480–82, 498, 526.

191 *See id.* at 480–81, 498.

192 *See id.* at 526.

193 *Id.* at 447, 474–79, 495–504.

court) proceedings for well over a century contain no hint that Article III "Cases" required a dispute in which a defendant had caused a plaintiff-adversary to incur an "injury in fact." On the contrary, since 1789, Congress, with the approval of the President and the Court, has continuously conferred federal jurisdiction over non-adversarial actions in areas like relator and informer actions, bankruptcy, naturalization, consent decrees, default petitions, and criminal pleas.[194] No one has ever suggested that plaintiffs in such "Cases" lacked standing.

Moreover, *every* major standing decision has involved only Article III "Cases" arising under federal law, not any "Controversies."[195] Recognizing this fact further belies the notion that these two words are synonyms and that the party-dispute approach to "Controversies" should be mindlessly transferred to the distinct category of "Cases."

Similarly, the Court has asserted, with no historical support, that standing furthers separation of powers by appropriately limiting the federal judiciary to preserve the democratic power of the two elected branches.[196] Yet Article III does not merely restrict federal courts, but affirmatively grants them "judicial power" to decide "all Cases" arising under federal law.[197] Therefore, it violates separation of powers when federal judges decline to exercise jurisdiction that Congress has constitutionally given them—a principle that the Marshall Court recognized and that its successors have repeated,[198] but not in standing cases.[199]

B. *Pfander's "Litigable Interest" Thesis*

Recently, Professor James Pfander's independent historical research has confirmed three of my major points. First, Article III's language shifted from "Cases" to "Controversies" to convey important differences in meaning that were well understood in England and America.[200] Second, "Controversies" were adversarial disputes.[201] Third, "Cases" involved a plaintiff's claim of a legal right in a form prescribed by law—a "litigable interest" that need not be contested by an opposing defendant.[202] In his

194 *Id.* at 526.

195 *Id.* at 447–48.

196 *See supra* notes 6 and 28 and accompanying text.

197 *See* U.S. CONST. art. III, § 2, cl. 1.

198 *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

199 The modern Court's justiciability doctrines invert the Founders' conception of constitutional separation of powers. *See* Pushaw, *Justiciability*, *supra* note 167, at 395–454.

200 *See* PFANDER, *supra* note 168, at 5–12, 18–19, 23–25, 61–83, 143, 148–49.

201 *Id.* at 5, 9–10, 12, 73–79, 148–49, 165, 168, 193, 238.

202 *Id.* at 1–11, 19, 175, 181–85, 192, 229, 232–33, 237–38. In one type of "case," arising under English and American common law, a plaintiff sought a judicial remedy for violation of a contract,

most original contribution, Professor Pfander showed that such "noncontentious jurisdiction" originated with Roman law, continued in the civil law codes of Continental Europe, and was incorporated in England alongside its common law system.[203]

Professor Pfander concluded that Article III, by extending "judicial power" to "Cases," continued the tradition of authorizing plaintiffs with a "litigable interest" to sue, even if they had not experienced an individualized "injury in fact" caused by a defendant.[204] He also reaffirmed, with voluminous supporting documentation, my insight that early federal practice and precedent reinforced that Article III "Cases" included such "noncontentious jurisdiction."[205] The First Congress routinely empowered federal courts to consider petitioners' federal law rights ex parte, and the Court never so much as hinted that such proceedings presented a constitutional problem.[206]

Overall, the original meaning, intent, and understanding of Article III was that parties could pursue a federal court "Case" if they satisfied three factors. First, plaintiffs had to assert a claim of right in a form prescribed by law, which could—but need not—involve a dispute with an adverse defendant.[207] Second, plaintiffs had to aver that their claim arose

tort, or property right by a defendant who contested the claim. *Id.* at 4–5, 19–23. Another kind of Anglo-American "case" involved "noncontentious jurisdiction," in which a court adjudicated a petitioner's request (usually ex parte) for a "constitutive" order, which recognized either a legal right or a new legal status in subjects such as family law, probate, bankruptcy, naturalization, admiralty, several equity matters, and requests for prerogative writs. *Id.* at 4–12, 17–24, 42, 61–64, 110–13, 166. English courts entertained two types of public-law actions that did not require plaintiffs to demonstrate that a defendant's violation of the law had inflicted an individual physical or financial injury. The first were relator and informer suits. *Id.* at 224–25. The second concerned private parties who filed public actions to enforce rights shared by the whole community, if a violation might otherwise not be satisfactorily remedied. *Id.* at 176–81. American colonial and state courts adopted all of these forms of action. *Id.* at 5, 18–19, 23–25.

203 *Id.* at 1–11, 17–24, 42, 61–64, 110–13, 166, 176–82, 224–25.

204 *Id.* at 5–6, 18, 25, 73, 166–68.

205 *Id.* at 5–6, 8–9, 25, 33–59, 148–49, 164–65, 175, 178–85, 192–94, 200–02, 223–32. Federal courts, however, asserted noncontentious jurisdiction exclusively in Article III federal question and admiralty "Cases"—not in "Controversies" arising under state law. *Id.* at 61–83, 148, 165. Thus, Article III's distinction between "Cases" and "Controversies," which the Marshall Court frequently emphasized, applied with unique force in the field of uncontested adjudication. *See id.* at 5–7, 9–12, 73–83, 143, 148–49, 165, 168–69, 181, 193, 225–33, 238.

206 *See* PFANDER, *supra* note 168, at 42.

207 *See id.* at 2, 6–7, 73–77, 81, 182, 193–94, 215; Pushaw, *Case/Controversy*, *supra* note 167, at 449, 472–82, 495–96.

fortuitously.[208] Third, a federal question "Case" had to raise a legal issue that needed exposition by an independent Article III court with expertise in federal law.[209]

IV. A Truly Originalist Approach to Article III Standing

Of course, the Court will be loath to abandon the standing doctrine it has developed over the past seventy years. The foregoing analysis does not necessarily require a wholesale repudiation, however. Most pertinently, the modern law of standing, which confines federal courts to resolving actual clashes between adversaries, can be easily applied to all six categories of Article III "Controversies" (e.g., diversity jurisdiction), which are party-defined disputes.[210] Moreover, current standing doctrine might even be sensibly applied to those "Cases" in which plaintiffs either (1) assert their personal common law rights, which usually involve a defendant who caused an accident, breached a contract, or invaded property rights,[211] or (2) seek to vindicate their own constitutional rights (as contrasted with a busybody attempting to litigate someone else's rights).[212] Finally, stripping the injury, causation, and redressability factors of their technical jargon, their real purpose is to screen out plaintiffs who make claims that strike judges as not worthy of their time. But those standards do a poor job of achieving that goal, whereas the fortuity element of "Cases" would do so directly and effectively.

The Justices who are either self-styled "originalists" (Thomas, Gorsuch, Kavanaugh, and Barrett) or at least weigh history heavily (like Roberts and Alito) should be most open to modifying Article III doctrine in light of the historical evidence. In *Spokeo* and *Transunion*, Justice Thomas got this ball rolling by demonstrating that Article III, as originally understood, did not always require an "injury in fact"—a phrase the Court had minted in 1970 to replace its previous focus on injury at law.[213] He correctly pointed out that such legally cognizable injuries have always included those in which a plaintiff simply claimed that his own private

208 *See* Pushaw, *Limiting*, *supra* note 44, at 11–17, 66–105; Pushaw, *Case/Controversy*, *supra* note 167, at 472 (cited approvingly in MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 165 (2000)).

209 *See* Pushaw, *Case/Controversy*, *supra* note 167, at 447, 474–79, 495–96.

210 *Id.* at 450, 459, 519–23.

211 *See supra* notes 27, 35, 80, 89, 118, 127, 136, 145, 150, 188, 202; *infra* note 224226 and accompanying text.

212 *See supra* notes 28, 61–62 and accompanying text; *infra* Section IV.B.1.

213 *See* Spokeo v. Robins, 578 U.S. 330, 343–48 (2016) (Thomas, J., concurring); TransUnion LLC v. Ramirez, 594 U.S. 413, 445–60 (2021) (Thomas, J., dissenting), discussed *supra* notes 74–89 and accompanying text.

rights, whether based on common law or a statute, had been violated.[214] However, Justice Thomas went awry in asserting that private petitioners who relied upon public law rights also had to prove that the violation of such rights had caused them to incur a concrete personal injury (typically monetary damages).[215] He did, however, honestly acknowledge historical exceptions to such an additional showing of factual injury, such as laws enacted by the First Congress and the Court's opinion in *McCulloch v. Maryland*.[216]

But those "exceptions" are actually the rule. Indeed, it seems implausible that the Framers and ratifiers who dominated the First Congress (including Madison), with approval from President Washington (who also presided over the Constitutional Convention) and Chief Justice Marshall (who had participated in the Virginia ratifying convention) either broke their oaths to uphold the Constitution or did not grasp that it prohibited public actions by private parties.

Perhaps most notably, consistent with established Anglo-American practice, Congress from its inception has authorized informer and relator suits, in which petitioners have never had to allege a personal "injury in fact" caused by an adverse defendant.[217] Justice Scalia and his conservative successors Kavanaugh and Gorsuch have suggested that the Court should invalidate such statutes because they conflict with Article III standing requirements.[218] But those standards reflect a "living Constitution" reinterpretation of Article III, whereas a faithful originalist would recognize that such "Cases" surely include informer and relator actions—as well as bankruptcy, naturalization, default judgments, consent decrees, criminal pleas, prerogative writs, and various equity actions.[219]

Beyond those ancient subjects of noncontentious jurisdiction, however, there may be some constitutional constraints on Congress. Special difficulties arise where Congress determines that its novel statutes

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214 *See Spokeo*, 578 U.S. at 343–48 (Thomas, J., concurring); *TransUnion LLC*, 594 U.S. at 446–60 (Thomas, J., dissenting).

215 *See Spokeo*, 578 U.S. at 345–47 (Thomas, J., concurring); *TransUnion LLC*, 594 U.S. at 446–60 (Thomas, J., dissenting); *see also* Robert J. Pushaw, Jr., "*Originalist" Justices and the Myth that Article III "Cases" Always Require Adversarial Disputes*, 37 CONST. COMM. 259, 268, 272–74 (2022) [hereinafter Pushaw, *"Originalist"*] (demonstrating Justice Thomas's error).

216 *See TransUnion LLC*, 594 U.S. at 453 n.4 (Thomas, J., dissenting).

217 *See supra* notes 190, 194, 202 and accompanying text; *see also* Pushaw, *"Originalist," supra* note 215, at 264–65, 272.

218 *See* PFANDER, *supra* note 168, at 223–26, 229–32 (citing their opinions).

219 *See supra* notes 190–192, 194, 202, 205–206, 217 and accompanying text; *see also* Pushaw, *"Originalist," supra* note 215, at 261–62.

(and the public interest they protect) can best be vindicated by supplementing executive branch enforcement with suits by private parties.[220] Such "citizen suit" provisions are especially common in environmental legislation.[221] Article III, however, does not compel federal courts to entertain all such complaints filed by any person, for two reasons.

First, a "Case" arises only when the violation of such a statute has infringed the plaintiff's legal rights by chance through an act or event beyond his or her control—not when people, acting individually or at the behest of an organization, voluntarily expose themselves to an alleged statutory violation in order to manufacture a lawsuit.[222] Article III's fortuity requirement thereby provides a clear mechanism for weeding out a large percentage of potential lawsuits brought under such regulatory statutes. By contrast, the Court's doctrine does not filter out contrived litigation because it treats self-inflicted harms as "injuries in fact."[223] Such manufactured complaints are really a type of feigned claim, which the Court has long (and correctly) prohibited.[224]

Second, the proper exercise of Article III "judicial power" requires adequate time to ascertain the relevant facts and law, and then determine how that law (which is often expressed in flexible standards rather than black-letter rules) should be applied to reach a sound final judgment.[225]

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220 *See supra* notes 35–36, 51, 58, 79 and accompanying text; *see also* Pushaw, *Limiting*, *supra* note 44, at 97.

221 *See* Pushaw, *Limiting, supra* note 44, at 95–97.

222 *See id.* at 11–17, 66–82. Instead of applying this straightforward definition of a "case," the Court has tried to figure out whether plaintiffs alleging interference with their aesthetic sensibilities have been concretely injured in fact. This hopelessly subjective inquiry has led to inconsistent results, and sometimes has allowed the manufactured litigation that Article III prohibits.

223 *See id.* at 82, 87. This illogical treatment traces back to the early days of the "injury in fact" standard. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Court denied the organization's Article III standing to claim that construction of a resort near a national forest would violate federal environmental statutes, but suggested that individual club members could sue if they alleged that they used this area and that the construction would cause an injury to their recreational, aesthetic, or emotional interests. *See id.* at 731–41. The Court thereby encouraged plaintiffs to do so to contrive a lawsuit, and it often upheld their standing. *See* Pushaw, *Limiting*, *supra* note 44, at 82.

224 The seminal case is *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850). Realistically, however, the Court will be unlikely to discard its "injury in fact" standard. Nonetheless, it might imperfectly incorporate the idea of a "case" as a chance occurrence by establishing a presumption that only a plaintiff who experiences a tort, breach of contract, or property damage as a result of a statutory violation has incurred an "injury in fact" (as such common law harms almost always befall plaintiffs by happenstance), rebuttable only by evidence that the plaintiff had been an accidental victim of an illegal act. *See* Pushaw, *Limiting*, *supra* note 44, at 12, 67–68, 83, 86–91. Even then, however, the Court should require plaintiffs to allege something more substantial and objective than their personal feelings (such as offending their aesthetic sensibilities). *See id.* at 12–13, 82–105 (detailing this proposal and responding to possible objections).

225 *See* Pushaw, *Bridging*, *supra* note 170, at 1328–29.

Consequently, Congress cannot expand federal dockets to such an extent that they would overwhelm judges' ability to make deliberative decisions, as would occur if thousands or millions of Americans invoked "citizen suit" provisions[226] (although class actions and multidistrict litigation could ameliorate this problem).[227] The Court has not candidly acknowledged that it created and developed modern standing doctrine mainly as a docket-control device,[228] probably because doing so would fly in the face of its longstanding precedent that the Constitution authorizes Congress alone to determine the federal courts' jurisdiction—and that they cannot decline to exercise the jurisdiction conferred.[229] Although Congress admittedly has broad discretion, it is subject to countervailing constitutional limits—most pertinently here, the need to exercise "judicial power" deliberatively.

Application of my proposed framework would change either the results or reasoning (or both) in many standing cases.[230] I will separately consider standing to bring complaints under statutes and the Constitution, because the latter raise certain unique issues.

A. *Standing to Sue Over Statutory Violations*

As explained above, the Court should have granted standing in *Spokeo v. Robins* and *Transunion LLC v. Ramirez* because plaintiffs' legal claims (1) were in a form prescribed by Congress, which had given victims of breaches of its consumer-protection and credit-reporting laws a right to sue; (2) arose fortuitously (plaintiffs had nothing to do with the companies' statutory violations and were not faking claims); and (3) presented questions of federal statutory interpretation that were suitable for resolution by federal courts.[231]

Environmental cases are a mixed bag. Sometimes the Court has denied standing when it should have been granted—most notably, in *Lujan v. Defenders of Wildlife*, where plaintiffs made their claim in a form

226 *See id.* at 1289, 1328–41.

227 *See* Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 BYU L. REV. 1869, 1871–77, 1926–59 (2023) (discussing such large-scale lawsuits).

228 A rare acknowledgment can be found in *United States v. Richardson*, 418 U.S. 166, 182–83 (1974) (Powell, J., concurring).

229 For a description and critique of this principle of absolute legislative control, see Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847.

230 *See* Pushaw, *Limiting*, *supra* note 44, at 66–105.

231 *See id.* at 82, 91, 100–01.

prescribed by law, as the Endangered Species Act authorized suits by anyone affected by a federal agency's failure to follow procedures for construction projects to ensure that they did not imperil such species.[232] That legal claim arose by chance, at least as to the two scientists who studied endangered animals in Egypt and Sri Lanka that were threatened by a proposed federal government building project.[233] Finally, this case presented novel legal issues that called for federal judicial interpretation, such as whether the ESA applied to the United States' projects outside of its borders.[234]

While sometimes rejecting standing when it should have been conferred, the Court has often mistakenly permitted standing. That is especially true in environmental law decisions where my critical second factor—"Case" as a chance occurrence—was absent. The clearest example is *SCRAP*, which involved a claim fabricated by law students who simply disagreed with an agency's increase in railroad freight rates.[235] *Laidlaw* is a closer case, because the company did technically violate federal water pollution laws by emitting a chemical in a river (albeit a harmless amount), which accidentally affected people who happened to live next to or used the river.[236] Turning to my first factor, however, it is unclear whether Congress authorized private plaintiffs (as opposed to the EPA) to sue over de minimis statutory breaches that posed no real-world dangers.[237] Expansively interpreting the statute would potentially explode federal courts' dockets, and would thereby compromise the deliberative exercise of "judicial power," by granting standing to anyone who wrongly perceived that small amounts of air or water pollution (which occurs frequently) posed a danger to them.[238]

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232 Lujan v. Defenders of Wildlife, 504 U.S. 555, 589–90, 594, 596 (1992) (Blackmun, J., dissenting).

233 *See* Pushaw, *Limiting*, *supra* note 44, at 37.

234 *See Lujan*, 504 U.S. at 557–58. In the other major ESA case, the Court appropriately gave standing to ranchers and irrigation district officials who complained that a federal agency had exceeded its statutory authority in overprotecting certain fish, which violated those plaintiffs' legal right to use that water. *See* Bennett v. Spear, 520 U.S. 154, 157, 161, 166 (1997), discussed *supra* notes 54–56 and accompanying text. Under my suggested framework, this claim (1) was advanced in a proper form of action; (2) came about by happenstance, as the plaintiffs had no control over the government's alleged violations of the statute, were not manufacturing a lawsuit, and presented a common law complaint (financial losses) that is presumptively fortuitous; and (3) raised questions of federal statutory interpretation and administrative law that federal courts were well-qualified to decide. Under my approach, then, the grants of standing would ensure that the ESA was neither underenforced (as in *Lujan*) nor overenforced (as in *Bennett*).

235 *See* United States v. SCRAP, 412 U.S. 669 (1973), examined *supra* notes 41–44 and accompanying text.

236 *See* Friends of the Earth v. Laidlaw Env't Servs., 528 U.S. 167, 175–176 (2000), described *supra* notes 45–47 and accompanying text.

237 *See* Pushaw, *Limiting*, *supra* note 44, at 14.

238 *See id.* at 14–15.

In an especially dubious decision, the Court in *Massachusetts v. EPA* granted the state standing to sue over the EPA's denial of a request for a rulemaking to regulate greenhouse gas emissions from new motor vehicles.[239] For openers, a basic administrative law principle is that, although judicial review is available to anyone adversely affected by an agency's action, it is presumptively barred when an agency exercises discretion not to do something.[240] Therefore, Congress likely did not want anyone to be able to sue to force the EPA to regulate, especially given that Congress itself can oversee executive branch agencies, direct them to engage in rulemaking, or simply enact legislation. Moreover, even if that were not true, states would be last on the list of preferred plaintiffs, as the Court has long disfavored state suits against the United States on the ground that they are usually better handled through the political rather than judicial process.[241] Thus, it is not clear whether Massachusetts was a proper plaintiff to file this cause of action.

Turning to my second factor, Massachusetts and other blue states might assert that they incurred a happenstance deprivation of their rights under the Clean Air Act in the sense that they had no control over the EPA's regulatory rulemaking process. Nonetheless, these states were enlisted by environmental organizations to contrive this litigation to protest the Bush II Administration's perceived lack of urgency in addressing global warming.[242] The "injury in fact" rubric did not prevent this manufactured litigation because Massachusetts concocted a common law harm (property damage) based on its speculative allegation that it might lose a few feet of coastline a century hence.[243] Finally, federal courts should not have interfered because the suit involved an issue of policy to be worked out through the democratic process, not a question of the legal meaning of the federal statute.

The foregoing analysis would also have changed the outcome in *Biden v. Nebraska*.[244] The Court granted Missouri standing to contest the

239 Massachusetts v. EPA, 549 U.S. 497, 505–06, 511 (2007).

240 *See* Heckler v. Chaney, 470 U.S. 821, 826, 831–32 (1985) (establishing a strong presumption against judicial review of an agency's decision declining to initiate enforcement proceedings). That same presumption should apply to the complex and politically laden process of determining whether or not to engage in rulemaking.

241 *See* Frothingham v. Mellon, 262 U.S. 447, 481–86 (1923), discussed *supra* notes 17–24 and accompanying text. That case involved a state's claim that the federal government had exceeded its powers under the Constitution, but the same rationale applies with at least as much force to a state's complaint that the federal executive branch had failed to comply with an Act of Congress.

242 *See* Pushaw, *Limiting*, *supra* note 44, at 14–15, 45–47.

243 *See* Massachusetts v. EPA, 549 U.S. 497, 505, 522–23 (2007).

244 143 S. Ct. 2355 (2023), discussed *supra* notes 123–133 and accompanying text.

Department of Education's $430 million student loan forgiveness plan because this program resulted in a remediable "injury in fact"—the state's loss of $44 million in fees.[245] Under my suggested approach, Missouri submitted a claim in a standard legal form (an injunction) and presented a vital question of federal law—whether Congress had authorized the agency to make such a huge monetary decision. As for my second factor, Missouri might maintain that the Department's alleged legal violation infringed its rights involuntarily, as the state played no part in this decision. Nonetheless, as Justice Kagan argued, Missouri and the other five states contrived this litigation for political purposes:[246]

> Is there a person in America who thinks Missouri is here because it is worried about MOHELA's loss of loan-servicing fees? I would like to meet him. Missouri is here because it thinks the Secretary's loan-cancellation plan makes for terrible, inequitable, wasteful policy. And so too for [the other five state plaintiffs].[247]

Sadly for Justice Kagan, current standing doctrine is not based on reality but rather on pleading technicalities, and Missouri's claim of monetary damages (even a very small amount of its overall budget) is a classic common law "injury in fact." Again, a "fortuity" inquiry does the work that the Court's injury analysis cannot.

My proposed framework would also have altered the result in the other recent state standing decision, *United States v. Texas*.[248] This case is unique because the Biden Administration announced that it would refuse to enforce Acts of Congress requiring the arrest and removal of specified noncitizens (e.g., convicted criminals)—not merely exercise executive discretion to decline to make such arrests or removals in individual situations based on extenuating circumstances (e.g., if the noncitizen had terminal cancer).[249] That fact also distinguishes *United States v. Texas* from *Massachusetts v. EPA*,[250] in which an executive agency used its discretion to refrain from making a specific rule, not to disregard its governing statutes.[251]

The majority rejected Texas's standing only because of the elasticity of the injury, causation, and redressability requirements (indeed, the Justices could not agree on which element had not been met).[252] The result is difficult to fathom, as Texas's plight—being forced to deal with many noncitizens who legally should not have been roaming free, with attendant increased costs in law enforcement, prisons, and social

245 *Id.* at 2365–68.

246 *Id.* at 2385–91 (Kagan, J., dissenting).

247 *Id.* at 2388.

248 143 S. Ct. 1964 (2023), discussed *supra* notes 134–151 and accompanying text.

249 *See id.* at 1989–2004 (Alito, J., dissenting).

250 549 U.S. 497 (2007).

251 *See supra* notes 112–122 and accompanying text.

252 *See supra* notes 134–151 and accompanying text.

services[253]—was far more serious than the relatively piddling asserted state "injuries" alleged in *Biden v. Nebraska* or *Massachusetts v. EPA*.

My Article III analysis would be far more straightforward. First, as to the form of action, the federal immigration statutes at issue expressly authorized the Court to enjoin violations of its provisions at the behest of victims of such lawlessness, like Texas.[254] Second, Texas's legally protected interests had been invaded fortuitously, as the state did not deliberately expose itself to the federal government's unlawful conduct to manufacture a lawsuit. Third, only the Court had the independence necessary to vindicate this important federal legislation.

In sum, the Court's cases on standing to sue to enforce statutes are hard to justify, from either a legal or practical standpoint. My proposed three-pronged approach, which is actually rooted in Article III, would provide long-overdue clarity.

B. *Standing to Sue Over Constitutional Violations*

Although my analysis can be applied to both statutory and constitutional claims, the latter implicate unique concerns. "We the People" established the Constitution as our supreme and fundamental law, which both empowers and restrains all governments—with elected officials especially prone to disregard those limits for immediate political gain.[255] The only exceptions would be the constitutional clauses that grant Congress and the President virtually unlimited discretion, such as those addressing war- and treaty-making, presidential vetoes, impeachment, and appointment of executive and judicial officers.[256] All other constitutional provisions must be amenable to a judicial challenge by at least one person, or else they become suggestions rather than law.[257] In light of this principle, my third factor assumes special significance: Federal courts alone have the independence necessary to impartially and faithfully expound the Constitution. I will separately consider two types

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253 United States v. Texas, 143 S. Ct. at 1969–70. The Court has long adhered to a sound presumption that a state should generally be denied standing to sue the United States, except where it demonstrates that a federal government policy is causing unique harm to the state itself. *See supra* notes 20–24, 113–122 and accompanying text. Texas made the undisputed showing that (1) the Executive Branch violated federal statutes; (2) the consequences of this lawlessness fell heavily upon Texas and a few other border states; and (3) the political process could not resolve the problem.

254 *See* United States v. Texas, 143 S. Ct. at 1989–2004 (Alito, J., dissenting).

255 *See* Pushaw, *Justiciability*, *supra* note 167, at 397–454.

256 *Id.* at 428–35, 449–53, 503–11.

257 *Id.* at 397–98, 467–80, 485–90.

of judicially enforceable constitutional provisions: individual and collective.

1. Standing to Sue Over Individual Constitutional Rights

Plaintiffs who credibly allege a fortuitous violation of their individual constitutional rights, typically found in the Bill of Rights or the Fourteenth Amendment, should have standing. For example, in both *Linda R. S. v. Richard D.* and *Allen v. Wright*, the Court erred by denying standing to plaintiffs who made serious claims, in a recognized form of action, that their Equal Protection rights had been violated through government actions which the plaintiffs could not control and did not seek out.[258]

Similarly, in the recent case of *Haaland v. Brackeen*, the Court should have granted standing to the white couples who complained that the Indian Child Welfare Act violated the Equal Protection Clause.[259] First, they sought to vindicate their constitutional rights in a form prescribed by law, as they appropriately invoked federal question jurisdiction. Second, their claim was not contrived but rather came about by happenstance, as the federal government's enforcement of the ICWA thwarted their effort to adopt the Indian children they had been fostering, which would have been successful under state law. Third, although Justice Kavanaugh concurred in the denial of standing, he correctly noted that the ICWA requirement that states discriminate based on race "raises significant questions under bedrock equal protection principles and the Court's precedents,"[260] and those thorny issues should have been resolved. However, the Court did properly deny standing to Texas, as a state has no Equal Protection rights—and hence cannot make a litigable claim that they were violated.[261]

The Court's other recent case involving standing to secure individual constitutional rights, *303 Creative v. Elenis*, correctly allowed plaintiff Smith to proceed, but with very little explanation. Applying my suggested framework, Smith submitted her claim in a familiar legal form—a request for an injunction to prevent a violation of her constitutional rights. That claim arose fortuitously, as Colorado sought to force her to express endorsement for same-sex marriage in her wedding website design business, contrary to her sincere religious beliefs. Third, an important

258 *See supra* notes 93–105 and accompanying text. Interestingly, the Court would have reached the same result if it had relied solely upon its "particularized injury in fact" standard, which can logically be applied to individual rights claims, instead of adding its opaque "traceability" analysis. *See supra* notes 97–98, 101–105 and accompanying text.

259 *Haaland*, 143 S. Ct. at 1638–40.

260 *Id.* at 1661 (Kavanaugh, J., concurring).

261 *See id.* at 1640–41 (majority opinion).

legal question required exposition by the Court—whether First Amendment freedom of expression allowed businesses serving the public an exemption from anti-discrimination laws.

In sum, the Court's analysis of standing to vindicate individual constitutional rights might have been defensible if it had focused exclusively on ascertaining, through the "particularized injury in fact" inquiry, whether a plaintiff has personally experienced a violation of such rights. The plaintiffs in *Linda R. S.*, *Allen*, and *Haaland* all satisfied that test. However, they could not litigate their serious Equal Protection claims because the Court needlessly added consideration of the traceability and redressability factors. By contrast, my proposed approach would have granted these plaintiffs standing.

2. Standing to Sue Over Collective Constitutional Rights

The Court's requirement of an *individualized* injury makes little sense in the context of constitutional clauses that guarantee rights held by the People *collectively*.[262] Such provisions retain legal viability only if any citizen, on behalf of the People, has standing to enforce them. Thus, in two cases, the Court incorrectly denied citizens standing to litigate clear violations of constitutional clauses that protect the public from conflicts of interest by forbidding (1) dual office-holding in the legislative and executive branches,[263] and (2) appointment to the Court of Congressmen who had voted to raise the pay of Justices.[264] Similarly, a taxpayer should have had standing to challenge Congress's violation of the Article I clause obliging Congress to provide a "Statement and Account" of all public expenses, which reflects the democratic principle that all Americans have a right to know where their tax contributions are going.[265]

To hold that the aforementioned provisions cannot be enforced unless their violation inflicts a unique factual injury on some individual is to require the impossible and thereby effectively delete those provisions from the Constitution.[266] The Court's legitimate fear that allowing such broad citizen standing would overwhelm federal dockets could be allayed

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262 *See* Pushaw, *Justiciability*, *supra* note 167, at 485–90.

263 *See* Schlesinger v. Reservists Comm., 418 U.S., 208 (1974), analyzed *supra* notes 67–68 and accompanying text.

264 *See Ex parte* Lévitt, 302 U.S. 633, 634 (1937), discussed *supra* note 61.

265 *See* United States v. Richardson, 418 U.S. 166, 197 (1974), examined *supra* notes 65–66 and accompanying text.

266 *See* Pushaw, *Justiciability*, *supra* note 167, at 487–88.

if it adopted a rule that, in cases involving collective constitutional rights, only one well-qualified plaintiff will be permitted to represent the public.

The Establishment Clause is trickier. Historically, this Clause served as a structural safeguard of federalism: Congress could not establish religion, but states could.[267] A devout originalist, then, would apply the same approach above and grant standing to any citizen who brought a credible claim that the federal government was violating the Establishment Clause. The modern Court, however, has reinterpreted the Clause as conferring an individual right to be free of religious establishments.[268] Accordingly, the Court has limited standing to those whose rights have personally been abridged—for example, only a non-Christian would be injured by New Testament readings and related prayers in a public school that he or she attended.[269]

But the core Establishment Clause no-no—financial support of religion—adversely affects all Americans equally, because even its immediate beneficiaries might find that government funding comes with strings attached that can compromise a church's beliefs and teachings. This collective constitutional right should be enforceable by any taxpayer who is competent to represent the public interest. Therefore, the Court was correct in *Flast*[270] to permit taxpayers to sue over the federal government's financial support of religion, and wrong to eviscerate *Flast*.[271]

My analysis of standing to enforce collective constitutional provisions reflects the fundamental postulate that the Constitution—unlike legislation—is our fundamental law, not mere exhortations. My proposed handling of this set of cases is consistent with my overall approach to Article III. First, the plaintiff is asserting rights in a form prescribed by law: Both Article III and federal statutes confer jurisdiction over "all Cases arising under the Constitution,"[272] with no exception for its provisions that secure collective rights. Second, such claims arise fortuitously insofar as the plaintiffs had no control over the government's actions alleged to violate the Constitution.[273] Third, such "Cases" invariably feature novel

267 *See generally* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776–1833 (Carl H. Esbeck & Jonathan Den Hartog eds., 2019).

268 The landmark case is *Everson v. Board of Education*, 330 U.S. 1, 8–18 (1947).

269 *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 224, 266–67 (1963).

270 *Flast v. Cohen*, 392 U.S. 83 (1968).

271 *See supra* notes 63–64, 69–73 and accompanying text.

272 *See* U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331.

273 An objection would be that such litigation is manufactured. However, when the federal government flouts a provision such as the prohibition on simultaneous legislative/executive office-holding or the Statement and Account Clause, no plaintiffs deliberately exposed themselves to such legal violations to gin up a legal claim. Rather, the unconstitutional conduct befell them fortuitously and involuntarily.

and important legal issues that require interpretation and application by independent Article III courts that are well-versed in constitutional law.

Conclusion

The Court's most recent standing decisions continue its pattern of applying the vague injury, traceability, and redressability standards in arbitrary ways. Genuinely originalist Justices would abandon this common law of standing and instead incorporate the original meaning of an Article III "Case": a legal claim that arose fortuitously, was submitted in a recognized form of action, and would benefit from legal exposition by an independent federal court. Moreover, the liberal, non-originalist Justices would achieve more favorable results through application of this legally principled approach to Article III instead of the current impressionistic standing doctrine.