

ARTICLES

EX NIHILO—THE SUPREME COURT’S INVENTION OF CONSTITUTIONAL STANDING

BY
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There are few requirements of constitutional law more firmly established than the requirement that the federal courts do not have jurisdiction unless the plaintiffs show injury-in-fact. Dozens of Supreme Court decisions since the 1920s have so held. However, in none of these cases has the Court made a serious effort to set forth the basis for this doctrine. Repetition should not be able to establish a constitutional doctrine that has no other support.

The simple explanation for the lack of justification is that no such justification could be made. The language of Article III, which gives federal courts jurisdiction over “cases” or “controversies,” obviously begs the question unless there is evidence that the Framers meant these words to require a showing of injury. However, the annals of the Constitutional Convention provide no support for such an interpretation and several law journal articles by distinguished legal scholars provide considerable evidence that British and American courts before and after the adoption of the Constitution entertained litigation where the plaintiffs asserted rights of the public at large. While the Supreme Court has invoked the separation of powers to support the injury requirement, standing, unlike the political question doctrine or the ripeness requirement, does not distinguish between litigation infringing on the powers of the President and Congress and litigation that does not. Indeed, the establishment of standing as a constitutional requirement denies Congress the power to decide federal

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court jurisdiction. Even if practical considerations would justify the establishment of a constitutional doctrine, they do not weigh in favor of the injury requirement. The Court should therefore end the standing doctrine and allow Congress to exercise its constitutional power to define federal court jurisdiction.

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I. INTRODUCTION

Few principles of constitutional law seem as solidly established as standing. Dozens of decisions on standing have been issued by the Supreme Court in the last ninety years.¹ While it is not difficult to demonstrate substantial inconsistencies in the Court's decisions, the basic doctrine of constitutional standing is unchallenged, even by dissenting opinions.² According to the Supreme Court, the doctrine is firmly grounded in the language of the Constitution, the history of Anglo-American law, and sound public policy.³ As a result, the Court has emphatically held that “[n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.”⁴

A good summary of the current law of standing was set forth by the Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental*

¹ See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *City of L.A. v. Lyons*, 461 U.S. 95 (1983).

² See, e.g., *Laidlaw*, 528 U.S. at 198 (Scalia, J., dissenting) (arguing that the majority's reasoning violated “traditional principles of federal standing,” thereby assuming the validity of the standing doctrine).

³ See, e.g., *Lujan*, 504 U.S. at 559 (describing standing as a constitutional requirement); see also Mary A. Myers, *Standing on the Edge: Standing Doctrine and the Injury Requirement at the Borders of Establishment Clause Jurisprudence*, 65 VAND. L. REV. 979, 988–89 (2012); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395–96 (1988) (explaining the Anglo-American roots of standing, as applied by the Supreme Court through the middle of the twentieth century).

⁴ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) (citing *Gladstone, Realtors v. Vill. of Bellwood*, 422 U.S. 91, 100 (1979)).

Services (TOC), Inc. (Laidlaw), a citizen enforcement action brought under the Clean Water Act.⁵ There, in finding that the citizen plaintiffs had standing, the Court stated:

[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.⁶

The Court has severely restricted the kind of interest that will be recognized by requiring that it be "distinct and palpable,"⁷ "actual or imminent,"⁸ "personal and individual,"⁹ and not "abstract,"¹⁰ "conjectural or hypothetical,"¹¹ "speculative,"¹² or "generalized."¹³ This Article will focus on the first requirement set forth in *Laidlaw*—whether plaintiffs must have suffered injury-in-fact.¹⁴

⁵ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

⁶ *Laidlaw*, 528 U.S. at 180–81 (citing *Lujan*, 504 U.S. at 560–61); see also *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (stating the requirements for standing); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011) (stating the requirements for standing); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.4 (1973) ("One of the leading commentators on standing has written, 'Even, though the past law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition without exception: One who has no interest of his own at stake always lacks standing.'" (quoting K. Davis, *ADMINISTRATIVE LAW TEXT* 428–29 (3d ed. 1972))).

⁷ *E.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

⁸ *Whitmore*, 495 U.S. at 155.

⁹ *Lujan*, 504 U.S. at 560 n.1.

¹⁰ *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

¹¹ *Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

¹² *Diamond v. Charles*, 476 U.S. 54, 66 (1986).

¹³ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

¹⁴ Since the second prong, causation, is based on injury-in-fact, its constitutional viability depends on injury-in-fact being constitutionally required. The third prong, redressability, addresses a different type of issue, whether the litigation can have an effective result. If it cannot, it resembles an advisory opinion. See, e.g., *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 241–42 (1937) (stating that "[i]t must be a real and substantial controversy admitting of specific relief. . . . Where there is such a concrete case . . . the judicial function may be appropriately exercised"). A case that can only result in an advisory opinion may reasonably be deemed not to be a case or controversy. See *Flast v. Cohen*, 392 U.S. 83, 94–96 (1968); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). Thus, the thesis of this Article—that there is no basis for the constitutional standing requirement that the plaintiffs be injured—does not apply to the redressability requirement.

II. THE LANGUAGE OF THE CONSTITUTION

The “[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.”¹⁵ Citing Article III, Section 2, the Supreme Court has repeatedly stated that “Article III of the Constitution limits the ‘judicial power’ of the United States to the resolution of ‘cases’ and ‘controversies.’”¹⁶ As the Court said in *Whitmore v. Arkansas*,¹⁷ “the requirement of an Art. III ‘case or controversy’ . . . is imposed directly by the Constitution.”¹⁸

The portion of Section 2 relating to standing provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof;—and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.¹⁹

Thus, the Constitution provides that the judicial power is divided into several categories, such as “all cases affecting Ambassadors, other public Ministers and Consuls” and “admiralty and maritime Jurisdiction.” The Constitution never provides jurisdiction to the federal courts for “cases or controversies” as to any one of these categories of cases. It provides for jurisdiction based on either “cases” or “controversies.”

¹⁵ *Bender v. Willamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Congress has the power to determine the jurisdiction of the federal courts as long as such jurisdiction is consistent with Article III. *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 599–600 (1949).

¹⁶ *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *see also* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 597–98 (2007) (describing standing as “[o]ne of the controlling elements in the definition of a case or controversy under Article III”); *Clinton v. City of New York*, 524 U.S. 417, 429, 436 (1998) (applying the standing doctrine to determine whether the dispute was an Article III case); *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (asserting that standing must be established to satisfy the case-or-controversy requirement); *Eisenstadt v. Baird*, 405 U.S. 438, 443–44 (1972); *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922).

¹⁷ 495 U.S. 149 (1990).

¹⁸ *Id.* at 161.

¹⁹ U.S. CONST. art. III, § 2.

By far the broadest category of federal court jurisdiction and the one as to which most of the standing cases relate is the following: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .”²⁰ These words are the sole basis for the standing doctrine in the language of the Constitution. Thus, to the extent that standing depends on the language of the Constitution, the issue is whether the litigation is a “case.”²¹

The word “case” provides little, if any, assistance in determining whether the courts have jurisdiction over particular litigation. Today, the word “case” is defined as “a suit or action in law or equity.”²² This definition

²⁰ *Id.*; U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY TABLE C-2 (2014), available at <http://www.uscourts.gov/file/18266/download>.

²¹ Other categories of matters over which the Constitution gives the federal courts jurisdiction, such as matters in which the “United States shall be a Party,” are termed “Controversies.” It is unclear why the Framers gave jurisdiction to some matters as “Cases” and other matters as “Controversies.” Since the two words appear in the same paragraph, it is logical to assume that the framers meant them to have different meanings; otherwise one of the words would be rendered superfluous. *See* *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”). If “Cases” and “Controversies” were deemed to have the same meaning, as the Supreme Court’s use of the phrase “cases and controversies” seems to imply, the word “controversy” would not narrow the meaning of “case.” This is consistent with the dictionary definition of “Controversy.” “Controversy” is defined today as a discussion marked especially by the expression of opposing views. *Controversy*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/controversy> (last visited Nov. 21, 2015). “Controversy” in 1789 meant a dispute or a debate. NATHAN BAILEY, *COMPLEAT ENGLISH DICTIONARY* (7th ed. 1788). Thus, consideration of the word “Controversies” would only confirm that the word “Cases” includes any litigation.

A law review article has discussed the difference between “Cases” and “Controversies” based on the usage of these words before and around the adoption of this Constitution in England and the United States. Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 457 (1994). The article contends that the function of federal courts in “Cases” “would be to declare the law in matters of national and international importance.” *Id.* at 449, 472–82, 489–504, 523–30. On the other hand, “Controversies” involved “bilateral dispute[s] wherein a judge served principally as a neutral umpire whose decision bound only the immediate parties.” *Id.* at 450, 472, 482–86, 493–96, 504–11, 519–23. For “Cases,” the author concluded that the plaintiff did not need to show any individualized injury. *Id.* at 480–81, 512–19. *See infra* Part V for further discussion of English and American legal history.

²² *Case*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/case> (last visited Nov. 21, 2015). The Supreme Court has increasingly relied on dictionary definitions to construe statutes. *See* Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 84 (2010). However, Judge Learned Hand wrote that “it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” *Cabell v. Markham*, 148 F.2d 737, 739 (1945), *aff’d*, 326 U.S. 404 (1945). An article in the *New York Times* noted that dictionary definitions are not intended to give the exact definitions of words; indeed, the definitions are largely based on newspaper usage, with the *New York Times* being the pinnacle.

covers all litigation, whether or not the plaintiffs have standing under Supreme Court case law. Thus, the opinion in *Lujan v. Defenders of Wildlife* (*Lujan*),²³ in which the Supreme Court held that the plaintiffs had no standing to bring the case in federal courts because of their total lack of injury-in-fact, begins with “This case.”²⁴

The definition of “cases” in 1789 is of course of more importance in establishing what the word means as embodied in the Constitution. Dictionaries published around 1789 often defined “case” by defining its synonym, “action,” as “a legal demand of one’s rights” that “implies a recovery of, or restitution to something;”²⁵ “[t]he form of a suit given by law for recovery of that which is one’s due; a legal demand of a man’s right. . . . Actions are either *criminal* or *civil*”;²⁶ and as a

universal remedy given for all personal wrongs and injuries with force

. . . .

. . . [W]here there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally . . . an action on the special case [lies], for damages consequent on such omission or act.²⁷

In 1829, in an opinion by Chief Justice Marshall, the Supreme Court expansively interpreted the word “case” in the Judiciary Act of 1789:²⁸

The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit.²⁹

Thus, Chief Justice Marshall defined “case” much as it would be defined today, as any matter in a court.³⁰

Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES, June 14, 2011, at A11.

²³ 504 U.S. 555 (1992).

²⁴ *Id.* at 557.

²⁵ 4 WILLIAM MARRIOT, A NEW LAW DICTIONARY 3 (1797).

²⁶ 1 JACOB GILES & T.E. TOMLINS, THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW, IN THEORY AND PRACTICE; DEFINING AND INTERPRETING TERMS OF WORDS OF ART; AND COMPRISING COPIOUS INFORMATION HISTORICAL, POLITICAL, AND COMERCIAL, ON THE SUBJECTS OF OUR LAW, TRADE, AND GOVERNMENT 30, 403 (1811) (referring reader to “action”).

²⁷ 1 RICHARD BURN, A NEW LAW DICTIONARY 143 (1792).

²⁸ Ch. 20, 1 Stat. 73 (1789).

²⁹ *Weston v. City Council of Charleston*, 27 U.S. 449, 464 (1829).

³⁰ *Id.* The Court then described the case as: “The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his suggestion, a writ of prohibition, the appropriate remedy, is issued.” *Id.* The word “aggrieved” would seem to mean

These definitions roughly contemporaneous with the adoption of the Constitution are sufficiently ambiguous that they might have supported an argument that federal courts have no jurisdiction unless the plaintiff was personally aggrieved. However, while in formulating its standing doctrine, the Supreme Court has often cited Article III, Section 2 and stated that the case before it was or was not a “case or controversy,” it has never discussed these definitions.³¹ Indeed, it has never explained how this phrase supports the standing doctrine it was applying to the facts before it.

For example, in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. (Valley Forge)*,³² the Court stated that “the ‘cases and controversies’ language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums,” but gave no explanation as to how the language had this meaning.³³ In *Allen v. Wright*,³⁴ after citing the “case or controversy” requirement of Article III, the Court stated that “[t]he requirement of standing . . . has a core component derived directly from the Constitution,” namely injury.³⁵ The Court then referred to separation of powers, not the wording of Article III, as supporting this conclusion.³⁶ The Court’s failure to explain the connection of standing doctrine to the words of the Constitution strongly suggests that the Court does not believe that these words provide significant support.

Indeed, the Court itself has implied that the words “case” or “controversy” do not mark the dividing line between cases within the jurisdiction of the federal courts and those without. In *Steel Co. v. Citizens for a Better Environment*,³⁷ the Court stated: “Every criminal investigation conducted by the Executive is a ‘case,’ and every policy issue resolved by congressional legislation involves a ‘controversy.’ These are not, however, the sort of cases and controversies that Article III, § 2, refers to.”³⁸

Justice Scalia, the foremost proponent of standing restrictions on the present Court, has essentially admitted that standing cannot be based on the language of Article III. Dissenting in *Honig v. Doe*,³⁹ he stated that the lack of

merely that the party disagrees with the ordinance, rather than the kind of injury-in-fact now required by the Supreme Court.

³¹ *E.g.*, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101–10 (1998) (finding that because “none of the relief sought by respondent would likely remedy its alleged injury in fact . . . respondent lacks standing to maintain this suit,” without discussing relevant definitions of the word “case”); *Lujan*, 504 U.S. 555, 559–62 (1992) (finding that respondents lacked standing because they “had not made the requisite demonstration of (at least) injury and redressability,” without discussing relevant definitions of the word “case”); *Allen v. Wright*, 468 U.S. 737, 750–53 (1984) (finding that “neither [allegation of injury] suffices to support respondents’ standing,” without discussing relevant definitions of the word “case”).

³² 454 U.S. 464 (1982).

³³ *Id.* at 473.

³⁴ 468 U.S. 737 (1984).

³⁵ *Id.* at 751.

³⁶ *Id.* at 752.

³⁷ 523 U.S. 83 (1998).

³⁸ *Id.* at 102.

³⁹ 484 U.S. 305 (1988).

citations to Article III in the early standing cases was because “the courts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms (‘The judicial Power’; ‘Cases’; ‘Controversies’) that have virtually no meaning except by reference to that tradition.”⁴⁰ He then referred to “[t]he ultimate circularity, coming back in the end to tradition . . .”⁴¹ Later, in *Lujan*, now speaking for a majority of the Court, Justice Scalia opined that:

While the Constitution of the United States divides all power conferred upon the Federal Government into “legislative Powers,” Art. I, § 1, “[t]he executive Power,” Art. II, § 1, and “[t]he judicial Power,” Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to “Cases” and “Controversies,” but an executive inquiry can bear the name “case” (the Hoffa case) and a legislative dispute can bear the name “controversy” (the Smoot-Hawley controversy). Obviously, then, the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.⁴²

In short, “case” meant nothing more than a matter pending in a court—or, even, as Justice Scalia noted, matters in other fora. Litigation brought by plaintiffs who have not been injured, and therefore lack standing under the Supreme Court’s jurisprudence, are just as much “cases” as litigation brought by plaintiffs who have been injured and therefore have standing. Thus, the language of the Constitution itself provides little, if any, support for the doctrine of standing.

III. THE POWER OF CONGRESS TO DETERMINE FEDERAL COURT JURISDICTION.

Article I, Section 8, of the Constitution states in the “Enumerated Powers” that Congress shall have the power “[t]o constitute tribunals inferior to the supreme Court.”⁴³ This provision would seem to give Congress the power to determine the jurisdiction of federal courts in the absence of any contrary provision in the Constitution or well-supported constitutional principle like the political question doctrine. The Supreme Court, in an

⁴⁰ *Id.* at 340.

⁴¹ *Id.*

⁴² *Lujan*, 504 U.S. 555, 559–60 (1992). Justice Scalia, before being appointed to the Supreme Court, stated concerning the language of Article III that it is “[s]urely not a linguistically inevitable conclusion” that “[t]here is no case or controversy . . . when there are no adverse parties with personal interest in the matter.” Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). Judge Posner has recently similarly stated that support for the constitutional doctrine of standing in the “Cases” or “Controversies” language of Article III is “tenuous.” *American Bottom Conservancy v. U.S. Army Corps of Eng’rs*, 650 F.3d 652, 655 (7th Cir. 2011).

⁴³ U.S. CONST. art. I, § 8.

opinion by Justice Story, stated in *Martin v. Hunter's Lessee*⁴⁴ that Congress “might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure.”⁴⁵

Article III, Section 2 provides that “[i]n all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”⁴⁶ This provision would seem on its face to give Congress authority to determine the extent of Supreme Court appellate jurisdiction. In *Ex Parte Yerger*,⁴⁷ the Supreme Court stated that its “appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make.”⁴⁸ Thus, again Congress would seem to have the power to abolish standing requirements unless some other constitutional provision prohibited it.⁴⁹

IV. THE HISTORY OF THE CONSTITUTION

The debates underlying the framing of the Constitution and its ratification by the states likewise do not support the Supreme Court’s standing doctrine. There was no discussion at the Constitutional Convention as to the kinds of “cases” or “controversies” that come within Article III, Section 2.⁵⁰ The Framers variously used the words “cases,” “controversies,” “questions,” “disputes,” or “causes” in their resolutions and comments on Article III, Section 2.⁵¹ However, they never discussed the meaning of any of these words. It therefore appears that “cases” or “controversies” had no

⁴⁴ 14 U.S. (1 Wheat.) 304 (1816).

⁴⁵ *Id.* at 331.

⁴⁶ U.S. CONST. art. III, § 2.

⁴⁷ 75 U.S. (8 Wall.) 85 (1868).

⁴⁸ *Id.* at 98.

⁴⁹ William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222–23 (1988) (“Assuming that Article III has been satisfied, Congress can confer standing by statute.”). There does not seem to be any case law interpreting this provision of the Constitution. It also does not seem to have been discussed at the Constitutional Convention.

⁵⁰ U.S. CONST. art. III, § 2; Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1150 (1993) (asserting that the debates of the Constitutional Congress provided little indication as to what the phrase “case or controversy” meant).

⁵¹ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 25 (Farrand ed. 1911) (Edmund Randolph referring to disputes as conflicts between states and other countries); *id.* at 119 (John Rutledge arguing against the creation of federal courts “except a single supreme one,” so state courts can decide “all cases” in the first instance); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 136 (Farrand ed. 1911) (Committee of Detail resolution granting federal courts appellate jurisdiction in all “Causes wherein Questions shall arise” regarding the construction of treaties and trade and commerce regulations, or where the United States is a party); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 626 (Farrand ed. 1911) (describing the Supreme Court’s jurisdiction over “causes,” “controversies,” and “questions”). The word “cases” was also sometimes used with regard to the power of Congress to legislate. *Id.* at 616 (describing the New Jersey Plan which proposed extending the Supreme Court’s jurisdiction to “all cases which concern the common interests of the United States”).

special meaning. Some word was required in order to identify the matters within the jurisdiction of the federal courts. Thus, the limitations intended by the Framers were not embodied in the words “cases” or “controversies,” but rather in the kinds of “cases” or “controversies” described in Section 2. The federal courts would have jurisdiction, inter alia, over cases arising under the Constitution and controversies in which the United States was a party.

The only discussion at the Constitutional Convention which bears on the issue of standing related to a resolution by William Samuel Johnson of Connecticut to add cases under the Constitution to Article III, Section 2. The records of the convention, drafted by James Madison, contain the following:

Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not be of this nature ought not to be given to that Department.

The motion of Doctr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.⁵²

As we will see below, the right of plaintiffs, who had not been injured, to use the courts to enforce the law against both the government and private citizens was well recognized at that time.⁵³ Thus, such cases were “cases of a Judiciary Nature.”

The debate during the Virginia ratification convention recognized that the Constitution gave the federal judiciary broad jurisdiction. George Mason voiced his concern over this jurisdiction:

I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts. If there be any limits, they must be contained in one of the clauses of this section; and I believe, on a dispassionate discussion, it will be found that there is none of any check.⁵⁴

The records of the Constitutional Convention and the states’ ratification conventions therefore provide no support for limiting federal court jurisdiction based on the words “cases” or “controversies.”

⁵² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 51, at 430.

⁵³ See discussion *infra* Part V.

⁵⁴ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 521 (Jonathon Elliot, 2d ed. 1891).

V. THE HISTORY OF ANGLO-AMERICAN LAW

We have seen above that nothing in the language of Article III or the records of the Constitutional Convention or state ratification conventions support the Supreme Court's requirements for standing.⁵⁵ However, if the courts in England and the United States around the time of the adoption of the Constitution adjudicated only cases in which the plaintiffs had suffered injury, it would be reasonable to say that litigation brought by a plaintiff who had not been injured by the defendant's conduct was not considered a case by judges and lawyers near the end of the eighteenth century.⁵⁶ In such circumstances, it would be reasonable to read this history into the word "case."

The Supreme Court has repeatedly indicated that its standing requirements are based on legal history. The Court stated in *Blair v. United States*⁵⁷ in 1919:

Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.⁵⁸

In *Raines v. Byrd*,⁵⁹ the Court referred to "the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement."⁶⁰ More recently, in *Summers v. Earth Island Institute*,⁶¹ the Court stated that "[i]n limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury."⁶² However, in none of these decisions or in any other has the Court set forth the tradition it asserts supports its standing doctrine.⁶³

⁵⁵ See *supra* Parts III–IV.

⁵⁶ The Supreme Court has noted that it has relied frequently on English and American history in deciding issues of justiciability other than standing. *Glidden Co. v. Zdanok*, 370 U.S. 530, 563 (1962). It has also noted that the Framers of the Constitution were deeply familiar with the common law. *Ex Parte Grossman*, 267 U.S. 87, 109 (1925).

⁵⁷ 250 U.S. 273 (1919).

⁵⁸ *Id.* at 279.

⁵⁹ 521 U.S. 811 (1997).

⁶⁰ *Id.* at 833.

⁶¹ 555 U.S. 488 (2009).

⁶² *Id.* at 492; see also *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) (explaining that an abstract harm deprives a case of the concrete specificity, which was the traditional concern of the courts at Westminster).

⁶³ On the other hand, the Court has sometimes suggested that the constitutional doctrine of standing is not based on tradition. In *Flast v. Cohen*, the Court noted the "uncertain historical antecedents of the case-and-controversy doctrine" and that, even though English courts, at the time of the Constitution, could issue advisory opinions, they are clearly not justiciable in this country. 392 U.S. 83, 95–96 (1968). The Court stated in *Valley Forge* that:

The Court's statements about tradition leave unclear whether the Court means the understanding of judicial power in 1789, some later time, or some combination over the last two centuries. However, in *Joint Anti-Fascist Refugee Committee v. McGrath*,⁶⁴ Justice Frankfurter stated in a concurring opinion that:

[A] court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.⁶⁵

The Supreme Court has analyzed legal history in its standing decisions not involving the basic constitutional requirement of injury-in-fact. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,⁶⁶ the Court analyzed the history of qui tam litigation from English practice in the thirteenth century to American practice before and after the framing of the Constitution and found that it satisfied the cases and controversies requirement of Article III.⁶⁷ Based on this history, as well as the "theoretical justification,"⁶⁸ i.e., that qui tam plaintiffs shared in the recovery, the Court upheld the standing of the plaintiff-relator.⁶⁹

Similarly, in *Sprint Communications v. APCC Services*,⁷⁰ the Court held that assignees of a claim have standing to bring suit based on a detailed analysis of English law beginning in the seventeenth century and of American law beginning in the latter half of the eighteenth century and continuing into the twentieth century, even though they were not harmed by the defendant's actions.⁷¹ The Court considered "this history and precedent 'well nigh conclusive' in respect to the issue before us: Lawsuits by assignees, including assignees for collection only, are 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"⁷²

The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.

454 U.S. 464, 471 (1982).

⁶⁴ 341 U.S. 123 (1951).

⁶⁵ *Id.* at 150 (Frankfurter, J., concurring).

⁶⁶ 529 U.S. 765 (2000).

⁶⁷ *Id.* at 774–78. The Court had previously considered the history of qui tam litigation relating to issues other than standing in *Marvin v. Trout*, 199 U.S. 212, 225–26 (1905), and *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943).

⁶⁸ *Vt. Agency of Natural Res.*, 529 U.S. at 774–78.

⁶⁹ *Id.* at 778.

⁷⁰ 554 U.S. 269 (2008).

⁷¹ *Id.* at 274–85.

⁷² *Id.* at 285 (citing *Vt. Agency of Nat. Res.*, 529 U.S. at 777–78).

The Court has also approved the bringing of litigation by a “next friend” on behalf of the person actually injured if the injured person cannot appear on his own behalf and if the plaintiff is truly dedicated to the injured person, such as having a significant relationship with him.⁷³ In doing so, the Court briefly considered seventeenth and eighteenth century English legal history and late nineteenth century and twentieth century American decisions.⁷⁴

The Supreme Court has also cited history in rejecting the standing of members of Congress to sue over the constitutionality of statutes. In *Raines v. Byrd*, the Court found that “historical practice” showed that in numerous earlier disputes between the Executive Branch and Congress, neither Congress nor the President had brought litigation.⁷⁵

While the Supreme Court has examined in detail the history of these narrow applications of standing law, it has never examined the history of its basic requirement for standing—that the plaintiffs have suffered injury. In fact, the history of Anglo-American law is to the contrary. Scholars have convincingly shown that both English and American courts have upheld their jurisdiction over suits against both the government and other private citizens by persons who had not been injured starting in the seventeenth century and lasting into the nineteenth century. For example, private criminal prosecutions extended throughout this period.⁷⁶ While these prosecutions were normally brought by victims, relatives, or friends, no monetary or other compensation went to the private prosecutor.⁷⁷ Measured by contemporary standing requirements, these prosecutions brought by relatives or friends would be dismissed for want of a showing of harm to the plaintiff, as well as want of redressability.

Several scholars have shown that, in both England and the United States, the courts recognized in the seventeenth and eighteenth centuries that any person, whether directly affected or not, could sue the sovereign to assure its compliance with the law. As long ago as 1905, a leading administrative law treatise stated with regard to English writs:

The purpose of the writs is twofold. In the first place, they are issued mainly with the intention of protecting private rights; in the second place, some of them may be made use of also for the purpose of the maintenance of the law regardless of the fact whether in the particular case a private right is attacked or not. . . . The courts, however, have held with regard to the *quo warranto* that it may be issued on the demand of any citizen of responsibility; and the better

⁷³ *Whitmore v. Arkansas*, 495 U.S. 149, 161–62 (1990).

⁷⁴ *Id.* at 162–63.

⁷⁵ *Raines v. Byrd*, 521 U.S. 811, 826–28 (1997).

⁷⁶ John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 516–18 (1994).

⁷⁷ *Id.* at 515; ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880* 5 (1989); FRANK J. GOODNOW, *PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 412 (1905); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 127–28 (1998) (Stevens, J., concurring) (discussing the history of private prosecutions in England and the early United States).

rule would seem to be that in matters of public concern any citizen or taxpayer may apply for the *mandamus*.⁷⁸

In 1961, the distinguished administrative law scholar, Professor Louis L. Jaffe of Harvard Law School, showed that various writs had been used in England to challenge government actions by plaintiffs who had not been injured by these actions for centuries before the adoption of the American Constitution and had been similarly used in state courts during the nineteenth and twentieth centuries.⁷⁹ Professor Jaffe cited the writ of mandamus, the bill of equity for an injunction, and declaratory action.⁸⁰ He said that “[t]he prerogative writs, in their origin and until the middle of the nineteenth century, were used primarily to control authorities below the level of the central government.”⁸¹ With regard to mandamus, he stated “I have encountered no [English] case before 1807 in which the standing of the plaintiff is mooted, though the list of cases in the digests strongly suggest the possibility that the plaintiff in some of them was without a personal interest.”⁸² He said that “[t]he English tradition of *locus standi* in prohibition and certiorari is that ‘a stranger’ has standing, but relief in suits by strangers is discretionary.”⁸³

In the United States, Professor Jaffe showed that public actions were principally based on mandamus and injunction.⁸⁴ He quoted from *People ex rel. Case v. Collins*,⁸⁵ an 1837 Supreme Court of New York case, that “[i]t is at least the right, if not the duty of every citizen to interfere and see that a public offence be properly pursued and punished, and that a public grievance be remedied.”⁸⁶ He found that, in most states, both taxpayer and mandamus suits challenging the legality of local and state official conduct not involving the expenditure of funds were permitted in the twentieth century.⁸⁷ He concluded that:

I have demonstrated that the public action—an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations—has long been a feature of our English and American law. If our constitutional notions of proper judicial business are grounded to a significant degree in history it is next to impossible to conclude—as was attempted in

⁷⁸ GOODNOW, *supra* note 77, at 431–32 (footnotes omitted).

⁷⁹ Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269–75 (1961).

⁸⁰ *Id.* at 1269.

⁸¹ *Id.*

⁸² *Id.* at 1270.

⁸³ *Id.* at 1274.

⁸⁴ *Id.* at 1276–77.

⁸⁵ 19 Wend. 56 (N.Y. 1837).

⁸⁶ Jaffe, *supra* note 79, at 1276 (quoting *Case*, 19 Wend. 56).

⁸⁷ *Id.* at 1278–82. The Supreme Court itself recognized in *Massachusetts v. Mellon*, that numerous cases established that local taxpayers could sue in American courts and the Supreme Court had itself accepted these holdings. 262 U.S. 447, 486 (1923).

Frothingham—that a taxpayer’s action does not fulfill the constitutional requisites of case or controversy.⁸⁸

In 1969, Professor Raoul Berger wrote a more detailed article concerning English and American legal history relating to the standing requirements imposed by the Supreme Court.⁸⁹ He found that strangers to the events of the litigation were long permitted in English courts to bring writs of prohibition, certiorari, quo warranto, mandamus, and relator actions to prevent violations of law.⁹⁰

Professor Berger quoted Lord Coke as stating that all the judges and barons of England had agreed to the following statement:

Prohibitions by law are to be granted at any time to restraine a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of, and they are much mistaken that maintaine the contrary . . . And the kings courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court temporall or ecclesiasticall doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgement and execution, as before.⁹¹

Professor Berger noted that no English court ever disagreed and that Lord Coke was cited throughout the eighteenth and nineteenth centuries and is still good law.⁹² Professor Berger concluded that while the evidence that English law permitted such “public actions” at the time the Constitution was adopted may be scanty, there is no evidence at all to the contrary.⁹³ He likewise found that two cases in American state courts in the 1790s provided relief to plaintiffs who had shown no injury against illegal government actions.⁹⁴

Similarly, Professor Steven L. Winter has shown that the prerogative writs of mandamus, prohibition, and certiorari allowed suits in English courts before the Revolution even though the plaintiffs had no injury-in-fact.⁹⁵ These cases were designed to prevent illegal action by lower courts

⁸⁸ Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961). Professor Fletcher concluded that Professor Jaffe was correct “that the federal courts were not, as a historical matter, constitutionally forbidden to entertain ‘public actions.’” Fletcher, *supra* note 49, at 231.

⁸⁹ Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

⁹⁰ *Id.* at 819–27.

⁹¹ *Id.* at 819 (quoting 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 602 (1797)).

⁹² *Id.*

⁹³ *Id.* at 827. Professor Berger stated that English law indicates that allowance of the writs of certiorari, quo warranto, and perhaps prohibition issued as a matter of discretion. *Id.* at 837–39. However, this does not affect the conclusion that English courts had jurisdiction to issue such writs to plaintiffs who had not been injured.

⁹⁴ *Id.* at 834–35 (citing *Zylstra v. Charleston*, 1 Bay 382 (S.C. 1794); *State v. Corp. of New Brunswick*, 1 N.J.L. 393 (1795)).

⁹⁵ Winter, *supra* note 3, at 1396.

and governmental bodies.⁹⁶ The courts were viewed as acting on behalf of the King. As Professor Winter stated:

This model therefore required neither injury nor “standing.” At common law, these writs were available by suit of a stranger. The citizen-plaintiff’s lack of a direct, personal interest did not require that the court ignore the plaintiff’s petition. . . .

. . . On issues of public rights or public duties, where the English attorney general could sue on behalf of the Crown, any person might seek one of the prerogative writs or bring a suit for an injunction in the name of the attorney general. The litigant, or relator, needed only to obtain the *fiat* or permission of the attorney general to use his name; such permission was granted as a matter of course. Once permission was obtained, the relator prosecuted the action at his or her own expense and without direction from the attorney general. The attorney general, however, was not a necessary party—that is, his *fiat* was not needed—“where the interference with the public right is at the same time an interference with some private right or is a breach of some statutory provision for the protection of the plaintiff.” This latter rule demonstrates that the relator practice clearly contemplated actions by those without a direct stake in the controversy.⁹⁷

American practice after the Revolution was consistent with that of England. Professor Winter cited *County Commissioners v. People ex rel. Metz (Metz)*,⁹⁸ an 1849 Illinois Supreme Court decision, involving the payment by the county for navigation improvements in a creek.⁹⁹ There, the court stated:

Where the remedy is resorted to for the purpose of enforcing a private right, the party interested in having the right enforced, must become the relator. . . . A stranger is not permitted officiously to interfere, and sue out a mandamus in a matter of private concern. But where this object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.¹⁰⁰

The Supreme Court cited *Metz* with approval in 1875 in *Union Pacific Railroad Co. v. Hall*.¹⁰¹ There, the plaintiffs “had no interest other than such as belonged to others” and sought to enforce “a duty to the public generally.”¹⁰² In allowing the plaintiffs to sue, the Court stated that there is “a

⁹⁶ *Id.* at 1397.

⁹⁷ *Id.* at 1398–99 (internal citations omitted).

⁹⁸ 11 Ill. 202 (1849).

⁹⁹ Winter, *supra* note 3, at 1402.

¹⁰⁰ *Metz*, 11 Ill. at 207–08.

¹⁰¹ 91 U.S. 343, 355 (1875).

¹⁰² *Id.* at 354.

decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty.”¹⁰³

Professor Winter also noted that informer statutes were adopted as early as 1424 in England to allow informers, with no personal interest in the subject of the litigation, to bring suit to collect penalties from custom house officials who had embezzled.¹⁰⁴ Other such statutes were enacted in England and then both by the colonies and states in the United States.¹⁰⁵ The first, second, and third Congresses, which included numerous members of the Constitutional Convention, all enacted such statutes.¹⁰⁶ As Chief Justice Marshall stated in *Adams v. Woods*,¹⁰⁷ “Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information.”¹⁰⁸ Thus, it was well recognized in 1789 that suits to enforce the law could be brought against private parties by plaintiffs with no interest in the underlying dispute.

Professor Cass R. Sunstein has likewise analyzed English and American legal history with relation to constitutional standing. He concluded:

There is no evidence of constitutional limits on the power to grant standing. In both England and America, actions by strangers, or by citizens in general, were fully permissible and indeed familiar. There is no basis for the view that the English and early American conception of adjudication forbade suits by strangers or citizens.¹⁰⁹

More specifically, Professor Sunstein found that the practice in England before the American Revolution was to allow writs of prohibition, certiorari, and mandamus by “strangers,” but relief was discretionary.¹¹⁰ He found that American state practice soon after the adoption of the Constitution was similar.¹¹¹

More recently, two law review articles have appeared which question the work of Professors Jaffe, Berger, Winters, and Sunstein.¹¹² However, these more recent articles do not claim that there was clear evidence in English or early American law that the courts did not permit suits by plaintiffs who had not shown injury. Their argument is that the earlier

¹⁰³ *Id.* at 355.

¹⁰⁴ Winter, *supra* note 3, at 1406.

¹⁰⁵ *Id.* at 1406–07.

¹⁰⁶ *Id.* at 1406–08.

¹⁰⁷ 6 U.S. (2 Cranch) 336 (1805).

¹⁰⁸ *Id.* at 341. The relationship of qui tam cases to the Supreme Court’s standing jurisprudence is discussed above. *See supra* notes 66–69 and accompanying text.

¹⁰⁹ Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 171 (1992).

¹¹⁰ *Id.* at 171–72.

¹¹¹ *Id.* at 173, 175–76.

¹¹² Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

articles overstated the clarity of the evidence that uninjured plaintiffs could sue.

In 1997, Bradley S. Clanton published a law review article contending that all the earlier studies were wrong, and that there is no evidence of English or American practice before or shortly after the adoption of the Constitution that allowed plaintiffs without any interest in litigation to bring suit.¹¹³ He argues that the reference to “strangers” with regard to the writs of prohibition and certiorari meant only persons who had not been parties to the dispute at earlier stages, rather than persons with no interest in the litigation.¹¹⁴ However, the article also states that *quo warranto* could be brought by any person in suits against corporate bodies as long as the suits were brought in the name of the king.¹¹⁵

In 2004, Professors Ann Woolhandler and Caleb Nelson published an article which concluded based largely on analysis of American, rather than English, law:

We do not claim that history *compels* acceptance of the modern Supreme Court’s vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. The subsistence of *qui tam* actions alone might be enough to refute any such suggestion. We do, however, argue that history does not *defeat* standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution’s meaning.¹¹⁶

Professors Woolhandler and Nelson go on to state rather cautiously that “civil remedies for violations of public rights were not *generally* available at the behest of private plaintiffs, at least in the absence of some connection to a private injury”¹¹⁷ and “even when the plaintiff’s allegations fit into one of the established writs and therefore enabled him to bring a case to court, separate doctrines operated at an issue-specific level to keep private parties from litigating certain matters of public right.”¹¹⁸

Professors Woolhandler and Nelson note that Chief Justice Shaw of the Supreme Judicial Court of Massachusetts stated in dictum that “the general rule” was that:

[A] private individual can apply for a writ of mandamus only in a case where he has some private or particular interest to be subserved, or some particular right

¹¹³ Clanton, *supra* note 112, at 1011–13.

¹¹⁴ *Id.* at 1009–16, 1024, 1028, 1030–32.

¹¹⁵ *Id.* at 1036–38. Mr. Clanton, having spent almost his entire article criticizing Professors Jaffe and Berger, states that “their contributions in this area have been enormous.” *Id.* at 1049 n.304.

¹¹⁶ Woolhandler & Nelson, *supra* note 112, at 691 (emphases in original).

¹¹⁷ *Id.* at 701 (emphasis added).

¹¹⁸ *Id.* at 704.

to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large . . .¹¹⁹

However, they then note that “some state courts did not follow Shaw’s dictum,”¹²⁰ including a New York case only three years later.¹²¹ By 1875, they admit, the state courts were evenly divided.¹²² The authors say that “[a]lthough the early *qui tam* statutes do not undercut our claim that the public was the only proper plaintiff to litigate diffuse harms to the public as a whole, they undoubtedly support the notion that Congress could authorize private citizens to initiate and conduct litigation on behalf of the public.”¹²³ This concession is inconsistent with the statement that, “contrary to modern critics’ claims, the nineteenth-century Supreme Court did see standing as a constitutional concern.”¹²⁴ However, they did not cite, and could not cite, any nineteenth century Supreme Court case citing Article III barring jurisdiction in a case brought by private plaintiffs based on lack of injury.¹²⁵

Regardless of how the somewhat conflicting articles are evaluated, the Supreme Court has never dealt with the evidence they set forth. While emphasizing the importance of Anglo-American legal history, the Supreme Court’s standing cases have simply ignored it.¹²⁶ They have not even mentioned the wealth of analysis of that history by leading scholars over several decades, which is only briefly discussed above.¹²⁷

VI. SEPARATION OF POWERS

In 1923, in *Massachusetts v. Mellon*,¹²⁸ the Supreme Court, without mentioning the phrase “separation of powers,” held that taxpayers had no standing to challenge a federal statute giving funds to the states for programs to reduce mortality and protect the health of mothers and

¹¹⁹ *In re Wellington*, 33 Mass. (16 Pick.) 87, 105 (1834); Woolhandler & Nelson, *supra* note 112, at 709.

¹²⁰ Woolhandler & Nelson, *supra* note 112, at 709.

¹²¹ *Id.*

¹²² *Id.* at 710.

¹²³ *Id.* at 726–27.

¹²⁴ *Id.* at 718.

¹²⁵ In contrast, the Supreme Court had denied jurisdiction under other clauses of Article III, Section 2. *See, e.g., Scott v. Sandford*, 60 U.S. (19 How.) 393, 430 (1856) (denying jurisdiction because the suit “was not a suit between citizens of different States”).

¹²⁶ Approximately 25 years ago, the author of this Article mentioned to Judge Richard Arnold, a distinguished member of the Court of Appeals for the Eighth Circuit, that several law review articles showed that English and American legal history did not support the constitutional requirement of standing as adopted by the Supreme Court. He expressed surprise that such articles existed. Judge Arnold’s lack of knowledge of this scholarship is consistent with their infrequent citation in the case law.

¹²⁷ Judge Posner has called the support for constitutional standing based on “the practice of the English royal courts, on which the federal judiciary was modeled,” as “tenuous,” just as he found it “tenuous” based on the language of Article III. *Am. Bottom Conservancy v. U.S. Army Corps of Eng’rs*, 650 F.3d 652, 655 (7th Cir. 2011).

¹²⁸ 262 U.S. 447 (1923).

children.¹²⁹ The Court stated that “[w]e have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional.”¹³⁰ The Court then stated that a “justiciable issue” was only presented if the plaintiffs could show “some direct injury suffered or threatened.”¹³¹ Otherwise, the Court said, it would be assuming “a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.”¹³²

In contrast, in 1968, in *Flast v. Cohen*,¹³³ the Supreme Court flatly stated that standing is not based on separation of powers.¹³⁴ It explained that, “in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”¹³⁵ Since *Flast*, the Supreme Court has increasingly referred to the source of the standing requirement as being based on separation of powers rather than the language of Article III. This change may be implicit recognition that the language of Article III does not provide a basis for the standing requirements that the Court has imposed.

Without specifically mentioning separation of powers, in *Schlesinger v. Reservists Committee to Stop the War*¹³⁶ in 1974, the Supreme Court nevertheless clearly invoked it: “To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, [and] distort the role of the Judiciary in its relationship to the Executive and the Legislature.”¹³⁷

Then, in 1984, the Court totally repudiated in *Allen v. Wright*¹³⁸ the statement in *Flast* that standing did not involve separation of powers: “the law of Art. III standing is built on a single basic idea—the idea of separation of powers.”¹³⁹ A few years later, the Court stated in *Lewis v. Casey*¹⁴⁰ that:

¹²⁹ *Id.* at 479–80.

¹³⁰ *Id.* at 488.

¹³¹ *Id.*

¹³² *Id.* at 489.

¹³³ 392 U.S. 83 (1968).

¹³⁴ *Id.* at 100.

¹³⁵ *Id.* at 101. In *Flast*, the Court attempted to distinguish *Mellon* on the ground that *Flast* involved the Establishment Clause of the Constitution, which imposed specific limitations on taxation, while *Mellon* involved the more general provisions of the taxing and spending clauses. *Id.* at 104–06; see also *Valley Forge*, 454 U.S. 464, 479 (1982). However, the injury to the plaintiffs, the supposed basis for standing, should not be affected by the specificity of the constitutional provisions involved. Such specificity relates to whether the plaintiffs, having established their standing, can make out a valid claim.

¹³⁶ 418 U.S. 208 (1974).

¹³⁷ *Id.* at 222.

¹³⁸ 468 U.S. 737 (1984).

¹³⁹ *Id.* at 752; see also *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

¹⁴⁰ 518 U.S. 343 (1996).

Flast erred in assuming that assurance of “serious and adversarial treatment” was the only value protected by standing. . . . *Flast* failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not.¹⁴¹

In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*¹⁴² in 1993, the Court tried to marry the “case” or “controversy” language of Article III with separation of powers by stating that “[t]he doctrine of standing is ‘an essential and unchanging part of the case-or-controversy requirement of Article III,’ . . . which itself ‘defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.’”¹⁴³ In *Spencer v. Kemna*,¹⁴⁴ the Court noted that *Flast* marked “an era in which it was thought that the only function of the constitutional requirement of standing was ‘to assure that concrete adverseness which sharpens the presentation of issues.’”¹⁴⁵ The Court went on to say, “[t]hat parsimonious view of the function of Article III standing has since yielded to the acknowledgment that the constitutional requirement is a ‘means of ‘defin[ing] the role assigned to the judiciary in a tripartite allocation of power.’”¹⁴⁶ However, shortly thereafter, in *Steel Co. v. Citizens for a Better Environment*, the Court stated that “our standing jurisprudence . . . though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.”¹⁴⁷ Thus, the Court has had a great deal of trouble ascertaining what in the Constitution supports its standing doctrine.

In *Valley Forge*, the Court explained why separation of powers supported standing requirements:

[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.¹⁴⁸

However, this statement does not indicate how standing requirements draw the appropriate line between the cases that the courts should adjudicate and those that they should not. Such a line would more

¹⁴¹ *Id.* at 353 n.3.

¹⁴² 508 U.S. 656 (1993).

¹⁴³ *Id.* at 663 (quoting *Lujan*, 504 U.S. 555, 560 (1992), and *Allen*, 468 U.S. at 750).

¹⁴⁴ 523 U.S. 1 (1998).

¹⁴⁵ *Id.* at 11 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

¹⁴⁶ *Id.* (quoting *Valley Forge*, 454 U.S. 464, 474 (1982)).

¹⁴⁷ 523 U.S. 83, 102 n.4. (1998).

¹⁴⁸ 454 U.S. at 474 (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

reasonably depend on the substantive issue involved rather than the character of the plaintiff.

The Court stated in *Allen v. Wright* that, were a plaintiff able to challenge government actions without suffering a personal injury, “[a] black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into ‘no more than a vehicle for the vindication of the value interests of concerned bystanders.’”¹⁴⁹ Similarly, in *Laird v. Tatum*,¹⁵⁰ the Court stated that:

Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the “power of the purse”; it is not the role of the judiciary¹⁵¹

These statements describe the litigation subject to standing requirements in a way that virtually foreordains the outcome. Of course, the courts have no business invalidating executive actions based on value judgments or disputes as to wisdom or soundness. However, that is not the issue. The issue is whether anything in the Constitution forbids federal courts from invalidating executive actions that violate either the Constitution or a federal statute based on the lack of concrete injury to the plaintiffs.

The incoherence of the Supreme Court’s standing decisions is forcefully demonstrated by *Valley Forge* and *Hein v. Freedom from Religion Foundation, Inc.*¹⁵² In the former case, the Court distinguished *Flast* on the ground that the Establishment Clause claim by taxpayers in *Valley Forge* was directed at the transfer of property by an executive agency to a religious group whereas in *Flast* it involved a federal statute.¹⁵³ The Court further distinguished *Flast* because that case involved the Taxing and Spending Clause of the Constitution while *Valley Forge* involved the Property Clause.¹⁵⁴ No persuasive reasons are set forth as to why either of these distinctions should make a difference. It is obvious that a new majority of the Court did not agree with *Flast*, but did not want to overrule it.

¹⁴⁹ *Allen v. Wright*, 468 U.S. 737, 756 (1984) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973)).

¹⁵⁰ 408 U.S. 1 (1972).

¹⁵¹ *Id.* at 15; *see also* *Lewis v. Casey*, 518 U.S. 343, 349–50 (1996) (describing how the requirement of actual injury to a party limits the role of the courts in undertaking tasks assigned to other political branches); *Lujan*, 504 U.S. 555, 577 (1992) (“[T]o convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts . . . would enable the courts, with the permission of Congress, ‘to assume a position of authority over the governmental acts of another and co-equal department’ . . .”).

¹⁵² 454 U.S. 464 (1982); 551 U.S. 587 (2007).

¹⁵³ 454 U.S. at 479.

¹⁵⁴ *Id.* at 480.

In *Hein*, the Court held that taxpayers could not challenge under the Establishment Clause payments to religious groups made by the executive branch under a general budgetary measure giving broad discretion, even though taxpayers can sue under *Flast* for payments made directly by legislative enactment.¹⁵⁵ The only basis suggested by the plurality opinion for giving more deference to the executive than the legislature was that otherwise the judicial power would expand at the expense of the executive. It explained that the federal courts would be enlisted “to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials.”¹⁵⁶ No consideration seems to have been given to holding, as a matter of substantive law, that such activities of the executive do not implicate the Establishment Clause, but that substantial monetary support for religious institutions, whether provided by the executive or legislative branches, raises Establishment Clause issues properly within the jurisdiction of federal courts. Alternatively, if such executive actions do implicate the Establishment Clause, the Court did not indicate why this should be allowed to occur with impunity because the federal courts refuse to decide their validity. In any event, it is hard to understand how any of these considerations affect the determination whether the taxpayer–plaintiffs have suffered injury.

The plurality opinion in *Hein* also emphasized that the Court had “declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause.”¹⁵⁷ It stated that “the *Flast* exception has largely been confined to its facts.”¹⁵⁸ The net result is that this area of standing jurisprudence, perhaps even more than other areas, has no persuasive basis.

The Supreme Court has likewise applied its separation-of-powers rationale to bar standing to plaintiffs in non-taxpayer cases where there has been broad public harm. In *Lujan*, an opinion by Justice Scalia, the Court set forth its rationale why plaintiffs cannot sue if their injury is broadly shared:

¹⁵⁵ 551 U.S. at 593. Justice Scalia, concurring in the judgment in *Hein*, stated that the plurality opinion was directly inconsistent with *Flast*. 551 U.S. at 618 (Scalia, J., concurring). He then stated that:

Today’s opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, which cannot possibly be (in any sane world) the reason it comes out differently.

Id. More recently, Justice Scalia has called *Flast* a “notorious opinion” and stated that “[w]e have been living with the chaos created by that power-grabbing decision ever since.” *United States v. Windsor*, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting).

¹⁵⁶ 551 U.S. at 611–12.

¹⁵⁷ *Id.* at 609.

¹⁵⁸ *Id.*; see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347–48 (2006) (stressing the narrow applicability of *Flast*).

“Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”¹⁵⁹ The Court went on to explain that a determination that an executive agency had violated a federal statute on behalf of citizens whose injury was widely shared would “transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3.”¹⁶⁰ There seems to be no reason why jurisdiction in the thousands of cases challenging actions of executive agencies by plaintiffs who have suffered injury not shared by most citizens avoids intruding on powers of the President, but the same kind of lawsuits involving the same kinds of issues brought by plaintiffs who have suffered widely shared injury impermissibly intrudes on those powers. The Court has never explained why this separation-of-powers consideration depends on the type of plaintiff bringing the suit rather than the type of suit being brought.¹⁶¹

Separation-of-powers law does not fit well with standing doctrine. As we have seen, plaintiffs do not have standing under the Supreme Court’s standing requirements if they have not themselves been injured or there is no connection between their injury and their cause of action.¹⁶² Thus, standing law investigates the characteristics of the plaintiffs.

In contrast, separation of powers investigates the cause of action, the claim, being advanced by the plaintiffs.¹⁶³ If it is the kind of claim that causes the judiciary to intrude on the powers of the other two branches, the case should be dismissed, regardless of the injury to the plaintiff. As the Supreme Court stated in *Flast v. Cohen*:

[T]he emphasis in the standing problem is placed on whether the person invoking a federal court’s jurisdiction is a proper party to maintain the action The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.¹⁶⁴

¹⁵⁹ 504 U.S. 555, 576 (1992) (emphasis in original).

¹⁶⁰ *Id.* at 577.

¹⁶¹ Compare *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (holding that petitioners satisfied Article III standing requirements because they were personally affected by the threat of enforcement of a statute proscribing certain political speech), with *Clapper v. Amnesty Int’l U.S.A.*, 133 S. Ct. 1138, 1146 (2013) (holding that petitioners lacked standing because they could not demonstrate that the potential monitoring of their communications constituted a “certainly impending” personal injury).

¹⁶² See *supra* note 6 and accompanying text.

¹⁶³ *Flast*, 392 U.S. 83, 99–101 (1968).

¹⁶⁴ *Id.* at 100–01.

This can be readily seen in citizen suits under the Clean Water Act.¹⁶⁵ An argument can be made that suits to enforce federal statutes under the citizen suit provision of the Act encroach on the powers of the executive branch under Article II. However, the majority in *Laidlaw*, in discussing standing, did not even mention this issue.¹⁶⁶ If the Court had rejected standing, as Justice Scalia urged in his dissent, there is no reason why other plaintiffs who could satisfy Justice Scalia's stricter injury requirements could not have brought the same case. Thus, if separation of powers is involved in citizen suits, the standing doctrine protects this interest only by coincidence when particular plaintiffs cannot show injury. There is no principled reason why some constitutional questions cannot be adjudicated by the courts—even though they are substantively similar to questions which can be adjudicated—simply because the Court has developed standing rules that exclude all possible plaintiffs from having standing to bring the former cases, but has upheld standing for some plaintiffs to bring the latter cases.

Similarly, the Supreme Court has upheld the standing of plaintiffs suing in *qui tam* actions, such as under the False Claims Act.¹⁶⁷ Plaintiffs can bring these cases with no interest in the subject matter of the litigation and no injury to the plaintiff caused by the actions of the defendant.¹⁶⁸ The cases upholding such actions base standing on the possible compensation given to the plaintiff from the funds recovered from the defendant if the plaintiff prevails.¹⁶⁹ As Justice Stevens stated, concurring in *Steel Co. v. Citizens for a Better Environment*:

[I]t is unclear why the separation-of-powers question should turn on whether the plaintiff receives monetary compensation. In either instance, a private citizen is enforcing the law. If separation of powers does not preclude standing when Congress creates a legal right that authorizes compensation to the plaintiff, it is unclear why separation of powers should dictate a contrary result

¹⁶⁵ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 129–30 (1998) (Stevens, J., concurring) (asserting that separation of powers concerns do not preclude citizen suits); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assoc., L.L.C.*, 200 F. Supp. 2d 551, 556 (E.D.N.C. 2001) (holding that private citizen enforcement mechanisms do “not offend the separation of powers doctrine”).

¹⁶⁶ Justice Scalia, after saying he would not address the compatibility of citizen suit statutes with Article II because it had not been argued, proceeded to question the validity of the statutes. *Laidlaw*, 528 U.S. 167, 208–10 (2000) (Scalia, J., dissenting). Justice Kennedy, in his concurring opinion, reserved his views on the issue. *Id.* at 197. Lower courts have rejected the argument that citizen suits are incompatible with Article II. See, e.g., *Holly Ridge*, 200 F. Supp. 2d at 556; *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 623–26 (D. Md. 1987).

¹⁶⁷ *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771–74 (2000); see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943); *Marvin v. Trout*, 199 U.S. 212, 225–26 (1905); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 339–42 (1805).

¹⁶⁸ See *Hess*, 317 U.S. at 541 n.4; *Trout*, 199 U.S. at 225–26.

¹⁶⁹ *Vt. Agency of Natural Res.*, 529 U.S. at 772–74.

when Congress has created a legal right but has directed that payment be made to the Federal Treasury.¹⁷⁰

To the extent that the cause of action in a federal court case genuinely raises separation-of-powers issues, this issue should be addressed directly. If the litigation improperly involves encroachment by the judiciary on the powers of the executive or Congress, the case should be dismissed.

This approach can be illustrated by the political question doctrine. The dominant considerations underlying the political question doctrine are that the Constitution has made the action of a political department final and there are no satisfactory criteria for a judicial determination.¹⁷¹ The Supreme Court stated in *Baker v. Carr* that the cases applying the political question doctrine “show the necessity for discriminating inquiry into the precise facts and posture of the particular case.”¹⁷² Thus, the political question doctrine properly determines whether separation of powers has been violated based on the particular issue before the court. The characteristics of the plaintiff are irrelevant.

Finally, there is a strong argument that the Supreme Court’s standing requirements themselves violate the separation-of-powers doctrine. If the provisions of Article III discussed above¹⁷³ giving authority to Congress to regulate the jurisdiction of the federal courts allow Congress to legislate standing or if Congress has such power simply because nothing in the Constitution or Anglo-American legal history forbids it, the Supreme Court’s denial of this power to Congress through its standing jurisprudence itself treads on the authority of the legislative branch.

VII. THE INVENTION OF STANDING DOCTRINE

Prior to 1922, the Supreme Court had issued decisions which, without using the label of standing, appear to have been based on similar grounds. Thus, in *Tyler v. Judges of the Court of Registration*,¹⁷⁴ the Court stated in 1900:

The prime object of all litigation is to establish a right asserted by the plaintiff. . . . Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example,

¹⁷⁰ 523 U.S. at 130.

¹⁷¹ See *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939).

¹⁷² *Baker*, 369 U.S. at 217.

¹⁷³ See *supra* note 14 and accompanying text.

¹⁷⁴ 179 U.S. 405 (1900).

in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.¹⁷⁵

However, as the reference to “statute or the settled practice” makes clear, these holdings were not based on constitutional grounds. None of them involved allegedly illegal action by a governmental agency. Moreover, while earlier Supreme Court cases were cited,¹⁷⁶ no consideration was given to English or early American history.

The law of standing, based on constitutional grounds, is generally deemed to have originated with the decision of the Supreme Court in *Fairchild v. Hughes*,¹⁷⁷ even though the word “standing” still did not appear. There, the Court, in an opinion by Justice Brandeis in 1922, held that a taxpayer could not sue to prevent ratification of the Nineteenth Amendment because it was “not a case, within the meaning of section 2 of article 3 of the Constitution.”¹⁷⁸ Because the “[p]laintiff has only the right, possessed by every citizen, to require that the government be administered according to law and the public moneys be not wasted,” the Court denied jurisdiction since “[o]bviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid.”¹⁷⁹

Shortly, thereafter, the Court decided *Massachusetts v. Mellon*.¹⁸⁰ There, the Court stated that “[i]t is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, . . . a large

¹⁷⁵ *Id.* at 406.

¹⁷⁶ *See, e.g.,* *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344, 347–48 (1809) (construing Judiciary Act); *Henderson v. Tennessee*, 51 U.S. (10 How.) 311, 323 (1850) (asserting that to give the court jurisdiction, a party must claim a right for himself, citing prior Supreme Court cases); *Hale v. Gaines*, 63 U.S. (22 How.) 144, 160 (1859) (construing the Judiciary Act); *Verden v. Coleman*, 66 U.S. (1 Black) 472, 474 (1861) (construing the Judiciary Act); *Long v. Converse*, 91 U.S. 105, 113–14 (1875) (interpreting Judiciary Act in analyzing jurisdiction); *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160–61 (1907) (asserting that a party challenging the constitutionality of a state law must belong to the class for whose sake the constitutional provision is given, citing prior Supreme Court cases); *Williams v. Walsh*, 222 U.S. 415, 423–24 (1912) (asserting that a law cannot be declared invalid by one not affected by it, without elaborating); *Hendrick v. Maryland*, 235 U.S. 610, 621 (1915) (asserting that only those whose rights are directly affected can properly question the constitutionality of a state law, citing prior Supreme Court cases).

¹⁷⁷ 258 U.S. 126 (1922); *see* Winter, *supra* note 3, at 1375–76.

¹⁷⁸ 258 U.S. at 129.

¹⁷⁹ *Id.* at 129–30. *See also, e.g., Valley Forge*, 454 U.S. 464, 482–83 (1982) (members of an organization, acting in their capacity as citizens, lacked standing to challenge the constitutionality of a conveyance of land from the Government to a private party because they failed to identify a personal injury); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (citizens challenging a state apportionment statute had standing to seek relief for impairment of a right secured by the Constitution).

¹⁸⁰ 262 U.S. 447 (1923).

number of statutes appropriating or involving the expenditure of moneys for nonfederal purposes have been enacted and carried into effect."¹⁸¹

In fact, there were numerous precedents to the contrary. Between 1899 and 1922, prior to the decision in *Fairchild*, the Supreme Court had adjudicated on the merits two federal and two state taxpayer actions seeking to enjoin the government from spending public moneys.¹⁸² Yet, these cases were ignored in both *Fairchild* and *Massachusetts v. Mellon*.

As Professor Winter has shown, standing doctrine, when it began, was not based on the Constitution but rather the requirements of equity.¹⁸³ In 1926, the Supreme Court stated that "[w]hether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction."¹⁸⁴ In 1936, Justice Brandeis, the author of *Fairchild*, stated in his famous concurring opinion in *Ashwander v. Tennessee Valley Authority (TVA)*¹⁸⁵ that the requirements that the Supreme Court later labeled as standing were "for its own governance in the cases confessedly within its jurisdiction."¹⁸⁶

The first mention in the Supreme Court of the concept of standing relating to the interest of the plaintiff based on Article III was not until 1939 in Justice Frankfurter's concurring opinion in *Coleman v. Miller*.¹⁸⁷ As Professor Sunstein has noted, the first reference to standing based on Article III in a majority opinion was a brief reference in 1944 in *Stark v. Wickard*,¹⁸⁸ and "injury-in-fact" was not mentioned until 1970 in *Barlow v. Collins*.¹⁸⁹ Thus, the constitutional doctrine of standing is a fairly recent innovation of the Supreme Court rather than being deeply embedded in American constitutional law and legal history.

VIII. PURPOSE OF STANDING

The Supreme Court stated in *Valley Forge* that the requirement that the plaintiff suffer injury:

tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to realistic appreciation of the consequences of judicial action. . . . Because it assures an actual factual setting in which the litigant

¹⁸¹ *Id.* at 487–88.

¹⁸² *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Millard v. Roberts*, 202 U.S. 429 (1906); *Wilson v. Shaw*, 204 U.S. 24 (1907); *Hawke v. Smith*, 253 U.S. 221 (1920); see *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (companion case to *Fairchild*); see also Winter, *supra* note 3, at 1376.

¹⁸³ Winter, *supra* note 3, at 1422–26.

¹⁸⁴ *Gen. Inv. Co. v. N.Y. Cent. R.R. Co.*, 271 U.S. 228, 230–31 (1926).

¹⁸⁵ 297 U.S. 288 (1936).

¹⁸⁶ *Id.* at 346.

¹⁸⁷ 307 U.S. 433, 467 (1938) (Frankfurter, J., concurring). Professor Winter noted that there were a handful of earlier cases in the lower courts beginning in 1926. Winter, *supra* note 3, at 1378, 1447.

¹⁸⁸ 321 U.S. 288, 302, 304, 306, 310 (1944).

¹⁸⁹ 397 U.S. 159, 163 (1970); Sunstein, *supra* note 109, at 169.

asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.¹⁹⁰

The Court similarly stated in *Baker v. Carr* that the purpose of the standing doctrine is “to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”¹⁹¹

In actuality, standing frequently has little or nothing to do with the merits issues. For example, in *Laidlaw* and other citizen enforcement suits under environmental statutes, the issue of standing has generally been litigated before the issues on the merits have been joined and therefore is entirely separate from the merits. The issues have revolved around the affidavits of individual plaintiffs or the members of plaintiff organizations as to their use of the land or waterway affected by the defendant’s actions and the harm they claim to have suffered from these actions.¹⁹² Before *Laidlaw*, injury-in-fact in environmental cases was often litigated on the basis of harm to the environment.¹⁹³

Similarly, in *Lujan*, which involved the issue of whether a regulation of the Department of Interior interpreting the Endangered Species Act was applicable to actions of the federal government outside the United States,¹⁹⁴ the facts relating to the issue of standing had nothing to do with the facts that would have affected the merits. The standing issues involved the injury asserted by two members of the plaintiff organization as observers of mule crocodiles, Asian elephants, and leopards if these endangered species did not have the protection of the statute to prevent the funding of projects threatening their habitat.¹⁹⁵ The Court assumed that these animals were threatened; it focused its analysis on how often the members had visited the habitats of the animals and the likelihood that they would visit them again.¹⁹⁶ These facts had nothing to do with the merits of the case.

Moreover, even when the facts involved in the injury to the plaintiff are connected with the facts relating to the merits, they do not assure that the

¹⁹⁰ *Valley Forge*, 454 U.S. 464, 472 (1982).

¹⁹¹ 369 U.S. 186, 204 (1962). For other cases applying the same logic as *Baker*, see, e.g., *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011); *Diamond v. Charles*, 476 U.S. 54, 61–62 (1986); *Larson v. Valente*, 456 U.S. 228, 238–39 (1982); *Orr v. Orr*, 440 U.S. 268, 273 (1979); *United States v. Richardson*, 418 U.S. 166, 173 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–21 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973).

¹⁹² See *Laidlaw*, 528 U.S. 167, 181–83 (2000) (determining as a preliminary matter whether plaintiffs had adequately alleged injury in fact on the basis of sworn statements).

¹⁹³ *Id.* at 199 (Scalia, J., dissenting) (asserting that previously an environmental plaintiff typically alleged harm to the environment, which in turn injured the plaintiff); see also *Pub. Interest Research Grp. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 122–23 (3d Cir. 1997) (requiring plaintiffs to show that pollution harmed the environment, and in turn threatened to cause them an imminent injury).

¹⁹⁴ 504 U.S. 555, 558–59 (1992).

¹⁹⁵ *Id.* at 563.

¹⁹⁶ *Id.* at 564.

facts as to standing will be the same as the facts upon which the merits are decided. If the case involves an attack on a governmental policy, the facts involving a single plaintiff, no matter how seriously injured, are not likely to include all the facts relating to the policy. This is an important reason why generally more than one plaintiff brings such litigation and plaintiff organizations rely on more than one member.¹⁹⁷ However, even with multiple individual plaintiffs or members, the proof on the merits at trial almost always is based, not on the testimony of these individuals or members, but on documents, factual witnesses, and expert witnesses who describe the broad ramifications of the government policy.¹⁹⁸ The facts involving a particular plaintiff constitute, at most, an illustration of the allegedly illegal activity. This is particularly true where the relief sought is an injunction against a statute or other governmental action.¹⁹⁹

In any event, there is not the slightest evidence that plaintiffs who have suffered injury of the kind recognized by the Supreme Court's standing doctrine are better able to present their case in a concrete factual context.²⁰⁰ Nor has the Supreme Court ever cited any evidence to support the proposition that they are. This is an example, all too frequent in Supreme Court opinions, where the Court has based extremely important holdings on purported statements of fact for which little or no evidence is cited.

The suggestion in *Valley Forge* that the existence of injury to the plaintiff gives the courts a better appreciation of the consequences of judicial action²⁰¹ is no more convincing. Injury to a single plaintiff may or may not be typical of injuries to other persons. If the court in a particular case is unsure of the consequences of the relief requested by the plaintiff on other persons or the public at large, the court can require such evidence.²⁰² Quite aside from standing law, plaintiffs would normally be expected to provide such evidence when requesting broad injunctive relief.²⁰³

¹⁹⁷ See *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (stating that “[e]ven in the absence of injury itself, an association may have standing solely as the representative of its members” and that “the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action”).

¹⁹⁸ See, e.g., *Int'l Union v. Brock*, 477 U.S. 274, 289 (1986) (explaining that associations suing on behalf of members “draw upon a pre-existing reservoir of expertise and capital” related to the merits of a case that the individuals do not possess themselves).

¹⁹⁹ See *Lujan*, 504 U.S. at 564.

²⁰⁰ Justice Scalia has admitted that “the doctrine [of standing] is remarkably ill designed” “to assure that concrete adverseness which sharpens the presentation of issues.” Scalia, *supra* note 42, at 891. He has noted that organizations like the NAACP or American Civil Liberties Union are “[o]ften the very best adversaries,” but they have no standing “unless they can attach themselves to some particular individual who happens to have some personal injury (however minor) at stake.” *Id.* at 891–92.

²⁰¹ *Valley Forge*, 454 U.S. 464, 472 (1982).

²⁰² See generally *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (stating that a plaintiff seeking preliminary injunctive relief must establish certain elements, including “that an injunction is in the public interest”).

²⁰³ See, e.g., *eBay v. MercExchange, LLC.*, 547 U.S. 388, 391 (2006) (explaining that plaintiffs seeking permanent injunction must demonstrate as part of a four-factor test that

The Supreme Court has also sometimes asserted that the purpose of standing is to assure “the necessary degree of contentiousness.”²⁰⁴ This presumably means that standing does not sharpen the issues on the merits, but rather ensures that the plaintiffs will effectively litigate the claims that they are asserting.

As we have seen, the Supreme Court defines “concrete adverseness” and “contentiousness” as satisfied solely by personal injury.²⁰⁵ Thus, the Court has stated, “standing is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.”²⁰⁶ Therefore, the personal injury requirement is a purely formal one. As the Supreme Court itself has noted in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,²⁰⁷ the Court has allowed suits involving as little as a fraction of a vote, a five dollar fine, or a dollar and a half poll tax, i.e., a “trifle.”²⁰⁸ Such harm hardly creates a burning interest in a case, which is certain to cost far more money to litigate than the benefit to be gained. On the other hand, “[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”²⁰⁹ Thus, the purpose of the standing doctrine, to assure “concrete adverseness which sharpens the presentation of issues,”²¹⁰ is no more than a fiction.

The fictional nature of “concrete adverseness” and “contentiousness” is further demonstrated by the Court’s holdings that once a person has shown individual injury, and therefore has standing, the plaintiff can then raise issues and arguments extending far beyond the injury the plaintiff has shown. For example, in *Sierra Club v. Morton*,²¹¹ the Court stated that “the fact of economic injury is what gives a person standing to seek judicial review . . . but once review is properly invoked, that person may argue the public interest in support of his claim.”²¹² Even more broadly, the Court said that “[t]he test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief.”²¹³ Thus, even if concrete adverseness were achieved by

equitable relief is warranted considering the hardships to plaintiff and to defendants and whether the public interest would be disserved by an injunction).

²⁰⁴ *Roe v. Wade*, 410 U.S. 113, 124 (1973). *See also* *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (explaining that what is a “controversy” under the Declaratory Judgment Act is a question of degree and declaratory judgments must therefore be warranted by “sufficient immediacy and reality”).

²⁰⁵ *See supra* notes 35, 141, 204 and accompanying text.

²⁰⁶ *Valley Forge*, 454 U.S. at 486.

²⁰⁷ 412 U.S. 669 (1973).

²⁰⁸ *Id.* at 689 n.14 (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)) (citing *Baker v. Carr*, 369 U.S. 186 (1962); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966)).

²⁰⁹ *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

²¹⁰ *Id.* at 61–62 (quoting *Baker*, 369 U.S. at 204).

²¹¹ 405 U.S. 727 (1972).

²¹² *Id.* at 737.

²¹³ *Id.* at 740 n.15.

standing requirements as to the portion of the case based on the plaintiff's injuries, the expansion of the case to the interests of the general public would, according to the Supreme Court's own reasoning, have no such concrete adverseness.

The lack of connection between injury to the plaintiff and "concrete adverseness" is also demonstrated by the Court's decisions as to the standing of plaintiffs who—while they have been injured—are raising arguments based on the legal rights of third parties. The Court has stated that taxpayers must show a nexus between their injury and the constitutional rights they claim,²¹⁴ and that "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."²¹⁵ However, in some cases, not involving taxpayers, the Court has upheld such standing. In *Eisenstadt v. Baird*,²¹⁶ the Court upheld the standing of a person convicted of distributing contraceptives to assert the constitutional rights of third persons to obtain them.²¹⁷ In doing so, the Court held that the plaintiff had a sufficient interest to attack the statute and referred to "our self-imposed rule against the assertion of third-party rights."²¹⁸

The Court has made clear that the constitutional requirements of standing do not bar injured plaintiffs from asserting the rights of persons not before the court and therefore its limitation on the right of third parties to bring suit is merely a "rule of self-restraint"²¹⁹ or a "prudential rule"²²⁰ that can be waived by the courts. In upholding the right of plaintiffs who have been injured themselves to assert the rights of third parties, the Court has relied on the consideration that "there seems little loss of effective advocacy."²²¹ Thus, the Court has decided that an injured plaintiff can assure the concrete adverseness in a case involving the rights and injuries of other people, but

²¹⁴ *Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59, 78 (1978); *United States v. Richardson*, 418 U.S. 166, 174 (1974).

²¹⁵ *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

²¹⁶ 405 U.S. 438 (1972).

²¹⁷ *Id.* at 445.

²¹⁸ *Id.* at 444. See also *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991) (detailing "limited exceptions" to the general rule that a litigant cannot assert a third party's rights); *Duke Power Co.*, 438 U.S. at 80–81 (describing the restrictions on asserting third-party rights as "prudential," not constitutional); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683–84 (1977) (holding that a vendor had standing to challenge a statute on behalf of its potential customers); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) ("[A]ppellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship.").

²¹⁹ *Craig v. Boren*, 429 U.S. 190, 193 (1976); see also *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979) (indicating that Congress may expand standing to include plaintiffs who would normally be excluded by prudential standing requirements).

²²⁰ *Bond v. United States*, 131 S. Ct. 2355, 2363 (2011).

²²¹ *Singleton v. Wulff*, 428 U.S. 106, 117–18 (1976); see also *Craig*, 429 U.S. at 194; *Powers*, 499 U.S. at 414. However, the Court cited no evidence for this assertion and it is doubtful any exists. Moreover, the Court itself has said that "third parties themselves usually will be the best proponents of their own rights" and therefore the courts "should prefer to construe legal rights only when the most effective advocates of those rights are before them." *Singleton*, 428 U.S. at 114.

an uninjured plaintiff cannot assure concrete adverseness based on the same rights, and injuries, of the same people.

The application of the standing requirement, in practice, totally fails to carry out its purported purposes of concrete adverseness and contentiousness. The first major environmental standing case, *Sierra Club v. Morton*, which involved the construction of a Walt Disney ski resort in a national forest in the Sierra Nevada Mountains, illustrates this failure vividly. There, the Supreme Court recognized that the Sierra Club had been formed in 1892 with a “principal purpose” of protecting the Sierra Nevada Mountains in California.²²² Nonetheless, the Court found that the Sierra Club did not have “a direct stake in the outcome.”²²³ The Court held that the Club did not have standing because it had not alleged in its complaint that one or more of its members used the area of the proposed ski resort and therefore would be injured by its construction.²²⁴ The Court explicitly rejected the argument that “the Club’s longstanding concern with and expertise in [the subject of the litigation] were sufficient to give it standing as a ‘representative of the public.’”²²⁵ It emphasized that “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved.’”²²⁶

On remand, the Sierra Club alleged that it had injured members and the district court upheld its standing.²²⁷ The existence of an injured member and the inclusion of this fact in the complaint surely would not have given the Sierra Club any more of a direct stake or made it any more committed to the litigation.²²⁸ As Justices Douglas, Reed, and Burton said in dissenting in *Doremus v. Board of Education of Borough of Hawthorne*, “where the clash of interests is as real and as strong as it is here, it is odd indeed to hold there is no case or controversy.”²²⁹

The Supreme Court reiterated in *Schlesinger v. Reservists Committee to Stop the War*²³⁰ that standing is not based on the depth of the plaintiffs’ interest and commitment to the issues they seek to litigate. There, the Court stated that “motivation is not a substitute for the actual injury needed by the

²²² *Sierra Club v. Morton*, 405 U.S. 727, 735 n.8 (1972).

²²³ *Id.* at 740.

²²⁴ *Id.* at 734–35.

²²⁵ *Id.* at 736.

²²⁶ *Id.* at 739; *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434–35 (1952).

²²⁷ *Sierra Club v. Morton*, 348 F. Supp. 219, 219–20 (N.D. Cal. 1972).

²²⁸ In *Asarco Inc. v. Kadish*, the Supreme Court rejected the standing of a teachers’ association in a case involving the financing of public education on the ground that “a special interest does not alone confer federal standing” and teachers have no more a “special interest in the quality of education” than “students, their parents, or various other citizens.” 490 U.S. 605, 616 (1989). On the other hand, the Court has recognized the interest and expertise of organizations in conducting litigation if they have members with standing. *Int’l Union v. Brock*, 477 U.S. 274, 289 (1986).

²²⁹ *Doremus*, 342 U.S. at 436 (Douglas, J., dissenting).

²³⁰ 418 U.S. 208 (1974).

courts and adversaries to focus litigation efforts and judicial decision making.²³¹ The Court then said that “[a] logical corollary to this approach would be the manifestly untenable view that the inadequacy of the presentation on the merits would be an appropriate basis for denying standing.”²³²

Moreover, the law of standing allows a single individual with standing to bring litigation.²³³ Thus, a single individual who had used the area to be converted into the ski resort in *Sierra Club v. Morton* one or two times and expressed the intention to use it again would have had standing. It is no more than happenstance whether a person who can assert injury actually will have a strong interest in challenging the source of the injury. The Sierra Club, whether or not it happened to have a member who had used the exact area of the proposed ski resort, was a far better plaintiff to provide the “concrete adverseness” that the Supreme Court purports to require.

The Supreme Court has never cited any study indicating that any problem exists in the dedication of plaintiffs to the litigation they have been bringing in federal courts. However, if such a problem does exist, the courts should dismiss public policy litigation when the plaintiff does not appear to have enough of a commitment to the subject matter of the case or the resources to litigate it effectively. Rule 23(a)(4) of the Federal Rules of Civil Procedure requires class action representatives to demonstrate that they “will fairly and adequately protect the interests of the class”²³⁴ and Rule 23(g)(1)(A)–(B) requires that their counsel have the experience, knowledge, and resources “to fairly, and adequately represent the interests of the class.”²³⁵ Similar requirements could be adopted to ensure that litigants against the government or representing the government in suits against private parties could adequately represent the public interest. Such requirements would at least relate to the alleged problem. In comparison, the law of standing has little, if anything, to do with it.

IX. PUBLIC POLICY

It is extremely doubtful that public policy considerations should be deemed even relevant, let alone persuasive, in the absence of any language in the Constitution, constitutional history, or legal history to support the doctrine of standing as a constitutional requirement.²³⁶ Such public policy

²³¹ *Id.* at 226.

²³² *Id.*

²³³ See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) (“Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.”).

²³⁴ FED. R. CIV. P. 23(a)(4).

²³⁵ FED. R. CIV. P. 23(g)(1)(A)–(B).

²³⁶ In *Flast*, the Court noted that *Mellon* seemed to rest “on something less than a constitutional foundation,” namely, the small amount of money paid by federal taxpayers as compared to total federal tax revenues and the likelihood that taxpayers would bring numerous

considerations would strip Congress of its usual authority to establish the jurisdiction of the federal courts. As early as 1819, Justice Story discussed Congress's power under Article III, Section 2, to dictate federal appellate jurisdiction. Speaking for the majority in *Martin v. Hunter's Lessee*, Justice Story stated:

The clause proceeds—"in all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." . . . Without such exception, congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words "may have" appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.²³⁷

Since *Hunter's Lessee*, it has become well established that Congress has the power to determine judicial jurisdiction.²³⁸ As Chief Justice Marshall forcefully stated long ago in *Cohens v. Virginia*,²³⁹ the courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."²⁴⁰ Thus, there is no basis for denying Congress its usual powers based on Supreme Court notions of public policy. In any event, the public policies cited as supporting standing are extremely weak.

First, Justice Brandeis, in his concurring opinion in *TVA*, listed the injury requirement of standing as one of the doctrines adopted by the Supreme Court to avoid the need to decide constitutional issues.²⁴¹ However, the courts have no authority to avoid constitutional questions that are properly placed before them.²⁴² They have the duty to exercise the jurisdiction given them by the Constitution and Congress.²⁴³

cases. *Flast v. Cohen*, 392 U.S. 83, 93 (1968). If standing does rest on nonconstitutional grounds, Congress would presumably have the power to enact different rules.

²³⁷ 14 U.S. (1 Wheat.) 304, 332–33 (1816).

²³⁸ See *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); *Dalton v. Specter*, 511 U.S. 462, 477 (1994) ("Judicial power . . . is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute."); *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) ("Throughout this period and beyond it up to today, [inferior federal courts] remained constantly subject to jurisdictional curtailment.").

²³⁹ 19 U.S. (6 Wheat.) 264 (1821).

²⁴⁰ *Id.* at 404. More recently, the Court has said that "federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

²⁴¹ 297 U.S. at 347–48 (Brandeis, J., concurring).

²⁴² *Ankenbrandt*, 504 U.S. at 705 (asserting that abstention from jurisdiction should rarely be invoked, because the courts are "obligated to exercise the jurisdiction given to them").

²⁴³ *Id.*

Second, standing requirements result in the dismissal of some cases and in other cases not even being brought so as to reduce the caseload of an already overburdened judiciary. However, the additional burdens imposed on the judiciary from having to entertain litigation of standing in numerous cases may well result in a greater burden on the courts, particularly since many cases dismissed on standing grounds can be relitigated by new plaintiffs.²⁴⁴ In any event, the proper branch of the federal government to deal with this issue is Congress, not the courts. Congress is best able to decide whether more resources should be appropriated to allow the courts to handle more cases or to decide whether the resources presently being appropriated should be spent in handling certain kinds of cases rather than others. The way to decide which cases should be within the jurisdiction of the federal courts is not to pretend that the framers made this decision over 200 years ago in a manner that cannot be changed short of a constitutional amendment.

Third, it is said that the standing requirement assures adequate representation of the interested parties.²⁴⁵ However, the Supreme Court has never cited any empirical studies to support such a claim. Moreover, if this were the Court's real purpose, it would examine the characteristics of the plaintiff—its financial resources, the experience of its attorney, and its history in protecting the interests at stake—rather than simply determine whether injury has occurred, particularly when even the slightest injury is deemed sufficient. As we have seen above,²⁴⁶ if the adequacy of representation is critical, surely the Sierra Club's dedication to protection of the Sierra Nevada Mountains should have satisfied this requirement in *Sierra Club v. Morton* regardless of whether it had a member who recreated in the area of the proposed ski resort.

Fourth, Justice Scalia wrote a law review article when he was a member of the Court of Appeals for the District of Columbia Circuit, which claimed that standing was intended to assure that federal court jurisdiction in cases against the government be limited to suits by individuals who are directly regulated and by minorities.²⁴⁷ He claimed that majorities, such as plaintiffs seeking to enforce clean air laws, do not need to be able to sue since they can always turn to the political process to get their rights vindicated.²⁴⁸ Justice Scalia, in his concurrence in *Hein v. Freedom from Religion Foundation, Inc.*, similarly stated that “generalized grievances affecting the public at large have their remedy in the political process.”²⁴⁹ However, taxpayers, or consumers, or environmentalists, of course do not

²⁴⁴ See, e.g., *In re Zappos.com, Inc.*, No. 12-cv-00325, 2015 WL 3466943, at *11 (D. Nev. June 2, 2015) (dismissing case for lack of standing, but granting plaintiff's leave to amend their complaints to “allege instances of actual identity theft or fraud”).

²⁴⁵ *Int'l Union v. Brock*, 477 U.S. 274, 287 (1986); *Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir. 1996).

²⁴⁶ See discussion *supra* notes 43–46 and accompanying text.

²⁴⁷ Scalia, *supra* note 42, at 894.

²⁴⁸ *Id.* at 896.

²⁴⁹ 551 U.S. 587, 636 (2007) (Scalia, J., concurring).

all share the same interests. For example, some taxpayers strongly support public tax support of religious activities; some strongly oppose it.²⁵⁰ If this issue is left to the political process, the limitations of the Establishment Clause of the Constitution, whatever they may properly be, become largely irrelevant because they are judicially unenforceable.

Regardless of Justice Scalia's ideas as to which interests need protection, the Supreme Court has never explicitly granted broader standing rights to minorities. However, the Court has adopted an analogous principle. The Court has often held that, if a plaintiff has been injured in the same manner that the general public has been injured, the plaintiff does not have standing. For example, the first standing case, *Fairchild v. Hughes*, held that a citizen with only the same rights as every citizen could not bring suit to challenge the ratification of the Nineteenth Amendment.²⁵¹ Since the plaintiff had not claimed any monetary or other injury unique to himself, the Court in effect concluded that he did not have standing because he had not suffered any injury at all.²⁵²

Massachusetts v. Mellon involved a case brought by a federal taxpayer claiming the unconstitutionality of a statute providing for federal expenditures.²⁵³ Such a taxpayer would seem to have been financially injured, even if only as to a small amount of money, if some of his tax payments had been spent illegally. However, the Court held that the federal courts have no jurisdiction over such a case:

The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.²⁵⁴

It is by no means clear, even if plaintiffs in federal courts must show injury, why such injury cannot be broadly shared. The Court has not explained why an injured person is deemed any less injured merely because many other persons have suffered similar injury. If the purpose of standing is to ensure that cases are "in a concrete factual context,"²⁵⁵ it should not matter whether there is one injured person or millions of them. Indeed, the alleged harm

²⁵⁰ See *id.* at 587–90 (considering a taxpayer challenge to executive orders allowing faith-based communities to compete for federal financial support).

²⁵¹ 258 U.S. 126, 129–30 (1922).

²⁵² *Id.* See also, e.g., *Lance v. Coffman*, 549 U.S. 437, 441–42 (2007) (denying Colorado voters standing because they asserted only a "generalized grievance"); *Valley Forge*, 454 U.S. 464, 477–79 (1982) (holding that taxpayers are unable to challenge public expenditures as unconstitutional merely because they contribute "to the public coffers"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217, 219–20 (1974) (finding that a citizen does not have standing to sue under a "generalized complaint" regarding the actions of the Executive Branch).

²⁵³ 262 U.S. 447, 479 (1923).

²⁵⁴ *Id.* at 488.

²⁵⁵ *Valley Forge*, 454 U.S. at 472.

caused by government action may be better illuminated in cases alleging injury to many persons than in cases alleging injury to a single person.

In *Massachusetts v. Mellon*, the Supreme Court also stated:

If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.²⁵⁶

The Court did not explain why it is constitutionally significant that many such suits might be brought (if the claim is invalid, the suits will be unsuccessful; if it is valid, Congress should not be allowed to take such action) or that inconveniences result from the courts considering such litigation, any more than litigation brought by individuals who have been individually injured.

In *Arizona Christian School Tuition Organization v. Winn*,²⁵⁷ the Supreme Court labeled this jurisprudence “as the rule against taxpayer standing.”²⁵⁸ It then went on to state that the tax credits in that case for students attending religious schools would not necessarily result in higher taxes.²⁵⁹ It rejected the possibility that evidence could establish whether higher taxes would result by calling the issue “conjectural” and stating that the taxpayer rule was intended to “avoid speculation.”²⁶⁰ Thus, the Court, in effect, held that taxpayers cannot bring suit regardless of evidence showing injury to themselves.

The Court has adopted this principle in taxpayer cases because all or at least most citizens pay taxes.²⁶¹ However, the conclusion that all taxpayers were injured by use of tax money to pay for mothers and children’s health programs in *Massachusetts v. Mellon* and to pay for teachers to read from the Bible in *Doremus v. Board of Education of Borough of Hawthorne* is only true in the most formal sense. Many taxpayers presumably supported the use of their tax money, which were appropriated by the state legislature and many of them benefitted directly from the expenditures.²⁶² In other words, many taxpayers were not injured by the taxes. Therefore, the cases holding that plaintiffs lack standing, although they have been injured, because of the injury to other taxpayers, have little to support them, even under the standing principles laid down by the Supreme Court.

²⁵⁶ *Mellon*, 262 U.S. at 487.

²⁵⁷ 131 S. Ct. 1436 (2011).

²⁵⁸ *Id.* at 1443.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1444–45.

²⁶¹ *Mellon*, 262 U.S. at 487.

²⁶² *Id.*

The Supreme Court itself has found standing in a number of cases where the injury to the plaintiff was similar to the public generally. In *Federal Election Commission v. Akins*,²⁶³ which involved a suit seeking to compel the Federal Election Commission to determine that an organization had violated the Federal Election Campaign Act, the Court stated: “Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’”²⁶⁴ The Court then said that “the fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes.”²⁶⁵

In *SCRAP*, the Court bluntly stated that “standing is not to be denied simply because many people suffer the same injury.”²⁶⁶ In *Warth v. Seldin*,²⁶⁷ the Court recognized that a plaintiff who had been injured would have standing, “even if it is an injury shared by a large class of other possible litigants.”²⁶⁸ And in *Massachusetts v. Environmental Protection Agency*,²⁶⁹ the Supreme Court, in upholding the standing of the State of Massachusetts to bring a suit relating to climate change, stated “[t]hat these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.”²⁷⁰

The inconsistency in the Court’s decisions involving generalized injury is perhaps explicable based on the case law indicating that these cases flow from prudential considerations rather than constitutional requirements.²⁷¹ However, the Court has not explained why this requirement is prudential rather than constitutional or when the requirement is applicable and when it is not. In the meantime, it appears that the Court is not willing to uphold standing based on generalized injury in taxpayer cases, but is willing to, in its unexplained discretion, in other cases.

Fifth, the Supreme Court has said that standing requirements are necessary to protect the Court. In *Valley Forge*, the Court stated that when the power of the courts to declare governmental actions unconstitutional is “employed unwisely or unnecessarily it is also the ultimate threat to the

²⁶³ 524 U.S. 11 (1998).

²⁶⁴ *Id.* at 24.

²⁶⁵ *Id.*

²⁶⁶ 412 U.S. 669, 687 (1973).

²⁶⁷ 422 U.S. 490 (1975).

²⁶⁸ *Id.* at 501.

²⁶⁹ 549 U.S. 497 (2007).

²⁷⁰ *Id.* at 522 (quoting *Fed. Election Comm’n v. Akins*, 524 U. S. 11, 24 (1998)); see also *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449–50 (1989) (“The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under [the Federal Advisory Committee Act] does not lessen appellants’ asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.”).

²⁷¹ See *supra* notes 220–221 and accompanying text.

continued effectiveness of the federal courts in performing that role.”²⁷² However, the Court did not explain how the dismissal of cases based on standing where the constitutional claim would have been found to be valid protects the courts.²⁷³ Under such circumstances, failure to entertain valid constitutional claims undermines the effectiveness of the federal courts in performing their responsibilities.

Recently, in *Arizona Christian School Tuition Organization v. Winn*, the Court similarly stated that “[f]ew exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.”²⁷⁴ The Court went on to state that standing law was particularly necessary to protect the Court in an era of “sweeping injunctions.”²⁷⁵ There is nothing in any of these cases to support the claim that standing law is needed to protect the authority of the federal courts. This is particularly so since the requirements of standing have nothing to do with prudential judgments about what cases the courts should be deciding consistent with protecting their reputation.

Sixth, the Court has stated that, where there is no need to protect the interests of the plaintiff, “allowing courts to oversee legislative or executive action ‘would significantly alter the allocation of power . . . away from a democratic form of government.’”²⁷⁶ However, the Court did not explain why the same kinds of cases with the same kinds of issues and causing the same kinds of injuries do not threaten democratic government if brought by an injured individual, but do threaten it when brought, for example, by an organization dedicated to these issues.²⁷⁷

On the other hand, several public policy considerations weigh strongly against the doctrine of standing. First, the denial of standing often means that the same litigation can be brought by other plaintiffs.²⁷⁸ To the extent that this is so, the denial of standing in the earlier litigation hardly serves an important purpose. The courts are likely to be just as burdened by a future case. Indeed, the burden is greater since the earlier case is usually dismissed on the ground of standing only after the case has progressed through at least

²⁷² 454 U.S. 464, 473 (1982).

²⁷³ *Id.* at 489 (discussing that mere constitutional error is not sufficient to confer standing, but not elaborating on how this protects the Court).

²⁷⁴ 131 S. Ct. 1436, 1449 (2011).

²⁷⁵ *Id.*

²⁷⁶ *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

²⁷⁷ *Id.* at 489–99.

²⁷⁸ *See, e.g., Lujan*, 504 U.S. 555, 563–64 (1992) (holding that plaintiffs did not have standing to challenge an agency action that allegedly threatened endangered species because they did not have any concrete plans to visit the affected area). This holding implies that another plaintiff who *did* have definite plans to visit the affected area could challenge the agency action on the same grounds and a court would have to reach the merits.

the preliminary stages of litigation and often after considerable discovery or even on appeal.

Moreover, standing litigation generally is a substantial burden on both the parties and the court. My firm, Terris, Pravlik & Millian, LLP, has litigated approximately 100 citizen suits under the the Resource Conservation and Recovery Act,²⁷⁹ the Clean Air Act,²⁸⁰ and Clean Water Act. Standing has been raised in virtually every one of these cases.²⁸¹ Only two or three of these cases have ultimately been dismissed on standing grounds, although several other dismissals in the district courts have been reversed in the courts of appeals.²⁸²

Since a motion for summary judgment based on standing is a dispositive motion, both sides usually expend major effort on it. When the cases are brought by organizations, plaintiffs' attorneys search for members who have been injured.²⁸³ Whether the plaintiffs are individuals or organizations when faced with a motion for summary judgment, plaintiffs need to obtain affidavits, defend against standing depositions, file briefs, and sometimes present witnesses at trial.²⁸⁴ Later, the losing party in the district court often then litigates the standing issues in the court of appeals.²⁸⁵ Hundreds or even thousands of hours of attorney time can be expended on each side.

The litigation of standing is not only burdensome and costly, but substantially delays the resolution of the case. For example, in *Friends of the Earth v. Gaston Copper Recycling Corp. (Gaston Copper III)*,²⁸⁶ the litigation over standing lasted nineteen years.²⁸⁷ Numerous other cases under

²⁷⁹ Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012); ENVIRONMENTAL, PRESERVATION, LAND-USE AND ZONING MATTERS HANDLED BY TERRIS, PRAVLIK & MILLIAN, LLP 1, 3–4, 22–23, available at http://tpmlaw.com/global_pictures/tpmenvironmental_resume.pdf.

²⁸⁰ 42 U.S.C. §§ 7401–7671q (2012).

²⁸¹ *Id.*

²⁸² *E.g.*, *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, No. 6:94–CV–489, 1995 WL 17133045, at *1 (E.D. Tex. 1995) (dismissed on standing grounds). *But see, e.g.*, *Am. Canoe Ass'n Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 538–39 (6th Cir. 2004) (reversing the district court's dismissal for lack of standing); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. (Gaston Copper II)*, 204 F.3d 149, 151 (4th Cir. 2000) (reversing the district court's dismissal for lack of standing).

²⁸³ *See Gaston Copper II*, 204 F.3d at 150–51 (citing as the basis for standing “a CLEAN member who owns a lake only four miles downstream from Gaston Copper's facility” and reduced his use of the lake as a result of illegal discharges).

²⁸⁴ *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. (Gaston Copper I)*, 9 F. Supp. 2d 589, 595 (D.S.C. 1998) (“In response to a summary judgment motion, however, the plaintiff can no longer rest on such ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts’ . . . which for purposes of the summary judgment motion will be taken to be true.”).

²⁸⁵ *See Gaston Copper II*, 204 F.3d at 151 (reversing the district court after reconsidering the standing issue).

²⁸⁶ 629 F.3d 387 (4th Cir. 2011).

²⁸⁷ The complaint was filed in September, 1992 (*see Gaston Copper I*, 9 F. Supp. 2d 589, 593 (D.S.C. 1998)); the motion to dismiss on standing grounds was filed in October 1992 (*see* Brief

the Clean Water Act have been similarly delayed or defeated by extended litigation over standing.

Congress intended cases under the Clean Water Act to be decided quickly and simply. The Senate Report on the Act provides:

One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay

The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct.²⁸⁸

Standing litigation frequently renders impossible the implementation of Congress's mandate. It deters even plaintiffs who can satisfy standing requirements from bringing actions about violations of federal law because they know that they will be required to expend their resources in large part on litigating about themselves rather than the allegedly illegal conduct.²⁸⁹

On the other hand, standing doctrine sometimes results in no plaintiffs being able to bring suit. As the Court itself stated in *SCRAP*, “[t]o deny standing to persons who are in fact injured simply because many others are

for Appellant at 1, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999) (No. 98-1938); the motion was denied in June 1993 (*Id.*); the case was tried on standing and the merits in July 1995; the case was dismissed based on standing in 1998. *See Gaston Copper I*, 9 F. Supp. 2d 589. The Court of Appeals for the Fourth Circuit first affirmed the dismissal, 179 F.3d 107 (4th Cir. 1999), but, on rehearing *en banc*, reversed. *See Gaston Copper II*, 204 F.3d at 149, 154. It found standing based on the Supreme Court's then recent decision in *Laidlaw*. On remand, the district held for the plaintiffs and imposed a \$2,340,000 penalty. *Gaston Copper III*, 629 F.3d at 393. In 2003, after the plaintiffs learned that the member of the plaintiff-organization on whom the court of appeals had relied for standing had died, the litigation of standing resumed in the district court. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 263 F. App'x 348, 352 (4th Cir. 2008). The district court reaffirmed plaintiffs' standing based on another member of the organization. *See id.* at 352. On a new appeal in 2008, the court of appeals found that an important factual issue relating to standing had not been decided by the district court and, while retaining jurisdiction, remanded this issue to the district court. *See id.* at 353. The court of appeals then, in 2011, upheld the plaintiffs' standing, but dismissed 855 of the 858 violations on a ground that it had not reached in its earlier decisions, namely, the adequacy of notice prior to the start of the litigation. *See Gaston Copper III*, 629 F.3d at 403 .

²⁸⁸ S. REP. NO. 92-414, at 64-65 (1971), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 1482-83. Although this statement appears in the discussion of Clean Water Act Section 309, which deals with federal enforcement of the Act, Congress intended that the standards for government and citizen enforcement would be the same. S. REP. NO. 92-414 (1971).

²⁸⁹ *See* Kimberly Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 694 (“Not only does the Commission's defensive strategy misdirect resources, it necessitates complex standing litigation that is expensive for private parties to undertake.”).

also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.²⁹⁰ As a result, government agencies or private parties may continue to take actions that violate the law. While it is said that Congress has various powers to force government agencies to conform to statutory requirements, these powers are frequently indirect and frequently ineffective.²⁹¹ Congressional hearings often do no more than embarrass government officials. New legislation can be passed, but such measures can equally be ignored. Congress might not even try to enforce the legislation it previously passed, either because it considers other issues of greater importance, or the congressional representatives responsible for the statute have left office. In any event, it is surely not good public policy in a well-run government for important statutes to be ignored.

In other situations, the government is violating the Constitution, for example, state violations of the Establishment Clause of the First Amendment, as incorporated in the Fourteenth Amendment. Under the Supreme Court's standing rules, often no citizens have standing to challenge such state actions. While Congress might have the power to pass legislation under the Fourteenth Amendment to stop the alleged state violations of that Amendment, it has not done so. The result is that allegedly unconstitutional state action cannot be challenged and therefore continues unabated.

In *Schlesinger v. Reservists Committee to Stop the War*, the Court stated that “[o]ur system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”²⁹² However, there are numerous reasons why the political process is not a realistic remedy. Frequently, the illegal conduct has the approval of a majority of citizens or, even if it does not, the political bodies may have political or other reasons to do nothing. In a society supposedly governed according to law, there is no good reason why citizens cannot seek review in the courts. As Professor Louis Jaffe has written based on his review of Anglo-American precedent:

[T]he availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity. It is no doubt logically possible for the immediate possessor of power to keep within imposed limits. For the most part he does so Yet there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures. . . . This was the

²⁹⁰ *SCRAP*, 412 U.S. 669, 688 (1973). The Court then stated that “[w]e cannot accept that conclusion.” *Id.* However, the Court has accepted that conclusion not only in individual cases, but as a general rule of law. See discussion *supra* notes 272–283 and accompanying text.

²⁹¹ See, e.g., OLIVER HOUCK, *THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION* 20 (1999) (discussing the federal water pollution control legislation that predated the Clean Water Act, and stating that “[t]he Senate found the standards weak . . . largely unenforced, and probably unenforceable”).

²⁹² 418 U.S. 208, 227 (1974).

situation and tradition which we inherited in colonial times and which we carried over more or less intact into the states and the nation. Our Revolution emphasized once more the themes of a limited government and a limited executive.²⁹³

Similar reasons support the need for judicial review of legislative actions as well.

X. CONCLUSION

The discussion above demonstrates that there is little, if any, justification for the Supreme Court's constitutional requirements of standing. However, this is not an argument for removing all standing requirements. Such requirements might well be adopted under particular federal statutes or even generally.²⁹⁴ Congress should decide such issues, just as it decides other issues of federal court jurisdiction. As the Supreme Court itself has said, "Congress can, of course, resolve the question [of standing] one way or another, save as the requirements of Article III dictate otherwise."²⁹⁵

The only limitation on Congressional power should be to prohibit the courts from considering issues that are not within the traditional powers of the judiciary. Thus, Congress should not have the power to redefine the political question doctrine so as to allow the courts to render decisions traditionally regarded as political. However, this limitation on Congressional power should relate to the kind of issues to be decided by the courts, not the characteristics of the plaintiffs.

It is of course asking a great deal from the Supreme Court to admit its repeated errors over a ninety year period and to overrule dozens of cases. However, it has happened before. In 1842, the Supreme Court held in *Swift v. Tyson*²⁹⁶ that in cases involving diversity of citizenship, federal courts were required under the Judiciary Act of 1789 to apply only state statutes and real estate law, but were free to ignore state common law.²⁹⁷ Almost 100 years later, in *Erie R.R. Co. v. Tompkins*,²⁹⁸ the Court overruled *Swift v. Tyson* and held that neither Congress nor the federal courts had the constitutional power to declare state common law.²⁹⁹ Justice Brandeis reasoned: "If only a

²⁹³ Louis Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 403-04 (1958).

²⁹⁴ Jaffe, *supra* note 88, at 280-82 (Professor Jaffe has argued that Congress may provide that plaintiffs should be required to show injury in some circumstances and not in others).

²⁹⁵ *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (citing *Muskrat v. United States*, 219 U.S. 346 (1911)); *see also* *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing."); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima.").

²⁹⁶ 41 U.S. 1 (1842).

²⁹⁷ *Id.* at 12-13.

²⁹⁸ 304 U.S. 64 (1938).

²⁹⁹ *Id.* at 79.

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question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied for nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.³⁰⁰

In between the two decisions, the Supreme Court had reaffirmed *Swift v. Tyson* at least twenty times.³⁰¹ In *Erie R.R. Co. v. Tompkins*, the Court ultimately realized that no matter how many times it had repeated its original error, it was still error. In light of the lack of support for the Supreme Court's standing cases, there is equally no justification for its failing to admit its longstanding error and to restore to Congress the power that it should always have had.

³⁰⁰ *Id.* at 77.

³⁰¹ *Id.* at 75–76 nn.11–18.