STANDING BETWEEN PRIVATE PARTIES

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Standing is generally framed as a doctrine about plaintiffs. The basic question, the Supreme Court has said, is "whether the plaintiff is the proper party" to invoke the federal judicial power. Asking that question tends to obscure a natural corollary: Against whom? This Article attends to the other side of the "v." It argues that suits against private parties should be treated differently from suits against government officials for standing purposes because these two types of suits raise different structural concerns. Notwithstanding its focus on plaintiffs, the Supreme Court has said repeatedly that standing is "built" on the "single basic idea" of "the separation of powers." When a government official is sued, a particular structural problem arises: If a court entertains the suit, it will be put in the position of supervising another branch of the government. And without some sort of injury requirement, the political branches might be subjected to continuous judicial oversight. As a historical matter, Article III standing doctrine developed primarily in this context.

But the structural concern prompted by that context is absent when one private party sues another private party. There is no prospect that such a suit will yield a remedy against a government official. The suit may, of course, raise other constitutional problems, but those other problems should not be shoehorned into standing—an avowedly transsubstantive jurisdictional doctrine that derives from Article III.

This theoretical claim is bolstered by a striking fact: Until 2020, the Supreme Court had never dismissed a case for lack of Article III standing when the defendant was a private party on the ground that the injury alleged was insufficient. And, as it followed this pattern, the Court was notably more generous in recognizing standing in cases against private parties than in cases against governmental parties.

But the Court recently broke this pattern. In two closely divided opinions, the Court held—for the first time—that private parties could not sue other private parties because the injuries alleged were inadequate. Congress's attempt to authorize those suits thus violated Article III. This paper critiques

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those decisions, situates them in the broader arc of the development of standing law, and surveys the prospects for doctrinal reconstruction. To do so, it proposes a novel framework to return the law of standing to its historical and conceptual moorings. Under that framework, standing doctrine should not limit Congress's (or the states') power to authorize lawsuits between private parties in federal court.

INTRODUCTION

Article III of the Constitution limits the federal "judicial power" to certain kinds of "cases" and "controversies."[1] One aspect of that limitation, according to the Supreme Court, is that a plaintiff in federal court must have standing to sue.[2] Any law student could rattle off the three-part test for standing that the Court has devised: "A plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief."[3] A plaintiff satisfying this test has presented a legal "case" that can be the proper stuff of federal adjudication.

Standing doctrine has few friends. For all its familiarity, the current doctrine has provoked a torrent of academic and judicial criticism from the moment it was first articulated about fifty years ago.[4] And one can see why. Standing doctrine lacks a firm foothold in the Constitution's text.[5] It lacks a substantial originalist basis and has a dubious historical pedigree, at least in the century following Article III's ratification.[6] And

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1. U.S. CONST. art. III, § 2. This Article follows modern conventions of capitalization when quoting the Constitution.

2. *See Warth v. Seldin*, 422 U.S. 490, 498–99 (1975).

3. *FEC v. Cruz*, 142 S. Ct. 1638, 1646 (2022) (citation omitted).

4. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1062 (2015); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 306 (2012).

5. As then-Judge Antonin Scalia put it, standing doctrine is "[s]urely not a linguistically inevitable conclusion" from Article III; rather, it has been linked to Article III "for want of a better vehicle." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). *See also* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 101 (7th ed. 2015) ("[T]he Constitution contains no Standing Clause.") [hereinafter HART & WECHSLER].

6. *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 248 (2023) ("According to a near consensus among scholars, the modern law of standing is substantially a twentieth-century invention of the Supreme Court."). *See also Wright v. Spaulding*, 939 F.3d 695, 700 n.1 (6th Cir. 2019) ("We asked the parties to file supplemental briefs on the original meaning of Article III's case-or-controversy requirement, specifically whether the corpus of Founding-era American English helped illuminate that meaning. . . . [W]e agree with the parties that corpus linguistics turned out not to be the most helpful tool in the toolkit."). Even the most prominent historical defense of standing doctrine is fairly modest: It does "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." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004). It only argues "that history does not *defeat* standing doctrine." *Id.* And the justice most influenced by Woolhandler and Nelson's historical approach has recently found himself in dissent. *See infra* notes 563–69 and accompanying text.

it has given rise to a sprawling, thickly tangled body of case law that is hard to defend on its own terms.[7] The "injury-in-fact" requirement, in particular, while purporting to rest on a factual judgment about the world, has seemed in reality to turn on value judgments about what interests are or are not worthy of judicial solicitude.[8] Justice John Marshall Harlan II may have said it best long ago: constitutional standing seems like "a word game played by secret rules."[9]

This state of affairs would be one thing if standing law were a sleepy backwater. But it could hardly be more important; standing questions arise again and again in many of the Court's most salient cases.[10] Given the importance of standing and its apparent lack of grounding in the Constitution, proposals to reform the law of standing have proliferated. These reform efforts have fallen roughly into three (sometimes overlapping) schools. The first and most widespread—which one might call the "cause-of-action" school—maintains that standing is not an independent inquiry: One should simply ask whether, on the merits, the plaintiff has a cause of action.[11] In other words, "[a] plaintiff has

7. *See, e.g.*, *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1121 (11th Cir. 2021) (Newsom, J., concurring) (arguing that Article III standing doctrine "is difficult to apply in practice and (at least arguably) incoherent in theory"); William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 227 (calling the standing inquiry "both indefinite, but more importantly, misguided").

8. *See, e.g.*, *Sierra*, 996 F.3d at 1129 (Newsom, J., concurring) ("The question whether a party has been 'injured' is inescapably value-laden."); Richard H. Fallon, Jr., *How To Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 105 (2014) ("It is a commonplace that the Justices of the Supreme Court routinely manipulate standing doctrine to promote their ideological goals . . . .").

9. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

10. William Baude & Samuel L. Bray, Comment, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 153 (2023) ("In the last Term at the United States Supreme Court, standing was the critical question in several major cases . . . .").

11. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Lee A. Albert, *Standing To Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); *Sierra*, 996 F.3d at 1132 (Newsom, J., concurring). In this Article, the phrase "cause of action" refers to a plaintiff's "legal entitlement to sue." *See* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1771 (2022). *Cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 137 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing a cause of action as a "species" of "remedial power"—the capacity of a plaintiff to "invoke the judgment of a tribunal" and obtain an appropriate remedy). That entitlement may be "legislatively conferred," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014), or "judge-made," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015). While it may technically be incorrect to refer to a "cause of action" in equity, at least as a historical matter, the phrase is used frequently by courts, lawyers, and scholars in that context, and this Article follows

standing . . . if she can show that she is entitled to sue under the particular statutory or constitutional provision at issue."[12] The second school, which has gathered momentum recently, might be called the "private rights" school. It argues that standing should depend on whether a plaintiff alleges a violation of the plaintiff's own "private" rights, rather than a right shared by the general public.[13] This school has won a notable adherent in Justice Clarence Thomas.[14] The third school (which is admittedly a bit of a catch-all category) is the "pluralist" school. This school suggests that the general rules of standing should and do apply differently in "coherently distinguishable contexts."[15] Accordingly, courts and scholars should not aspire to universal consistency in the entire body of standing law, but rather should analyze how the general "rules apply to particular plaintiffs seeking particular forms of relief under particular constitutional or statutory provisions."[16]

Both the Supreme Court's standing doctrine and these various reform schools share a premise: that standing doctrine is about *plaintiffs*. The Court has repeatedly indicated that the "standing inquiry focuses on whether the *plaintiff* is the proper party to bring this suit."[17] The leading federal courts casebook concurs, describing the standing question as

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that convention (with this footnote's definitional caveat). *Cf.* Bray & Miller, *supra*, at 1775–76.

12. Fletcher, *supra* note 11, at 249.

13. *See, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 343 (2016) (Thomas, J., concurring); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008); Woolhandler & Nelson, *supra* note 6; Elizabeth Earle Beske, *Charting a Course Past* Spokeo *and* TransUnion, 29 GEO. MASON L. REV. 729 (2022).

14. *See Spokeo*, 578 U.S. at 343 (Thomas, J., concurring).

15. Fallon, *supra* note 4, at 1064.

16. *Id.* at 1063. *See, e.g.*, Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1191 (2014) (arguing that, while "the injury-in-fact requirement appears to shift from case to case and context to context," in practice there is a "pattern" in which "the Court tends to afford standing to persons with the greatest stake in obtaining the requested remedy"); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 175 (2012) (arguing for "frank recognition that the Case or Controversy Clause has two tiers, one for cases where Congress has created procedural rights and made it clear that they can be enforced without meeting the normal injury, causation, and redressability requirements . . . and another tier for all other cases, where the normal requirements apply"); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 646 (1973) (arguing that "it is necessary . . . to distinguish the different contexts in which an issue of standing is said to arise," and "to keep them distinct").

17. *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (emphasis added). *See also Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction . . . ." (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

"who constitutes a proper *plaintiff* to invoke federal judicial power."[18] The three reform schools described above likewise focus on the plaintiff and the plaintiff's asserted claims.[19]

This Article questions that shared premise by attending to the other side of the "v." It argues that standing doctrine should factor in the identity of the *defendant*. Specifically, for purposes of standing, suits against private parties should be treated differently from suits seeking injunctive or declaratory relief against government officials.[20]

Why? In short, because suits against private parties and suits against government officials give rise to very different structural concerns. Standing doctrine is, at bottom, structural constitutional common law. It is "constitutional common law" because it is part of a judge-fashioned "substructure" of rules drawing their "inspiration and authority" from Article III, though not required by the constitutional text.[21] And standing doctrine is "structural" because it aims to situate and limit the federal "judicial power" in relation to other forms of public power.[22] The Court has recognized the preeminence of structural concerns in standing law, saying repeatedly that Article III standing "is built on a single basic idea—the idea of separation of powers."[23] In this context, the "separation of powers" cannot be understood narrowly; the idea encompasses not just the relationship *between* the branches, but also the relationship between the federal and state governments and the nature of the federal judicial power itself.[24] Standing doctrine, then, addresses one of the ultimate

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18. HART & WECHSLER, *supra* note 5, at 49 (emphasis added).

19. *See supra* notes 11–16 and accompanying text.

20. Richard Fallon has made the broad point that standing cases often seem to reflect a judicial reluctance to enter certain remedies. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 670 (2006) ("[I]n deploying standing doctrine's notoriously pliable injury requirement, the Supreme Court and its individual Justices frequently shape their rulings in light of concerns about unacceptable remedies."). This is the first Article that focuses on Article III standing in suits between private parties and that argues this category of cases warrants separate conceptual and normative treatment.

21. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975).

22. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

23. *Allen v. Wright*, 468 U.S. 737, 752 (1984). *See also United States v. Texas*, 143 S. Ct. 1964, 1969 (2023); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *Raines v. Byrd*, 521 U.S. 811, 820 (1997); Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2353 (2018) ("[T]he most prominent justification for standing doctrine in its current form is the separation of powers.").

24. *Cf.* Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33 (2016) (describing "structural constitutional law" as focused on "how power is distributed between and

structural questions: the "role of the [federal] courts in a democratic society."[25]

A problem should now be coming into focus: The "separation of powers" is not a "single . . . idea."[26] It is a family of ideas, framed at different levels of generality, about the structure and relationships of various government institutions.[27] It embraces everything from the highly specific Pocket Veto Clause to the "unitary executive" theory. Broad invocations of the "idea of separation of powers," then, cannot resolve particular, contextualized disputes about the limits of federal judicial power. When it comes to standing doctrine, different kinds of cases present very different kinds of questions that may fall under the separation-of-powers umbrella.[28] This Article disaggregates these structural questions by looking at the identity of the defendant.

As a theoretical and historical matter, standing doctrine developed in a particular context: Suits seeking equitable relief against government officials.[29] Virtually all of the canonical standing cases fit that mold. That kind of case presents a particular structural problem: To the extent a court entertains the plaintiff's suit, the court will find itself in the position of reviewing some action (or inaction) by an official in another branch (usually the executive).[30] The judicial anxiety triggered by this circumstance can be traced all the way back to *Marbury v. Madison*,[31]

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among government institutions," and "encompassing separation of powers, presidential power, federalism, and the administrative state").

25. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); HART & WECHSLER, *supra* note 5, at 49 (noting that standing, along with other justiciability doctrines, helps to "define the role of the federal courts in our constitutional structure").

26. *TransUnion*, 141 S. Ct. at 2203.

27. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2032 (2022) (noting that the term separation of powers "has been used to describe a loosely interconnected bundle of political ideas").

28. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 468 (2008); F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673 (2017).

29. *See infra* Part I. When this Article refers to "equitable" relief against government officials, it includes declaratory relief. Although technically a declaratory judgment is a "statutory remedy rather than a traditional form of equitable relief," as a practical matter, "a declaratory judgment will result in precisely the same interference with" government action as an injunction in most cases. *Samuels v. Mackell*, 401 U.S. 66, 70, 72 (1971). Further, injunctive and declaratory remedies are almost always sought together. *Cf.* 28 U.S.C. § 2202 (providing that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted"); FED. R. CIV. P. 8(a)(3) (providing that plaintiffs may seek "relief in the alternative or different types of relief").

30. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

31. 5 U.S. (1 Cranch) 137 (1803).

which was, after all, an action seeking mandatory relief against an executive official.[32] The broader the class of plaintiffs that is eligible to sue, the more likely (and more often) it will be that a court is put in that supervisory position.[33]

But that structural problem is irrelevant when the defendant is a private party: There is no prospect that such a suit will yield a remedy against a government official. The decision to impose the strictures of standing doctrine in a suit against a private defendant, then, must rest on some other structural basis. One candidate is that a private plaintiff suing another private plaintiff may be usurping the president's power to enforce the law.[34] Even if one accepts this concern as valid, it is an Article II problem, not an Article III one, and standing doctrine is not a sound way to address it.[35] Fundamentally, a court is not ousted of jurisdiction when a private plaintiff improperly exercises executive power.

A second possibility is that standing doctrine keeps courts in their traditional lane of resolving disputes, rather than opining abstractly on questions of law. From both a historical and theoretical point of view, however, deciding whether a private party has acted unlawfully on a particular set of facts is perfectly consistent with the judiciary's traditional role.[36] And that does not change when a case is initiated by an uninjured party, as in a criminal prosecution or a qui tam action.[37]

These conceptual points are reinforced by a striking fact: Until 2020, the Supreme Court had *never* dismissed for lack of Article III standing a private party's claim against another private party on the

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32. *Id.* at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."). This anxiety continued later into the nineteenth century. *See* MASHAW, *supra* note 4, at 210 (noting "the extreme reticence of courts to interfere with administrative judgments by writs of mandamus or injunction").

33. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("Relaxation of standing requirements is directly related to the expansion of judicial power. . . . We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." (footnote omitted)). On the influence of Justice Lewis F. Powell's concurrence, see Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1172–73 (2009).

34. The Supreme Court has recently gestured in this direction. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009).

35. *See infra* Section II.C.

36. *See infra* Section II.D.1. As then-Judge Ruth Bader Ginsburg once put it, "private actors suing other private actors" is "traditional grist for the judicial mill." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990). Such a "suit does not raise the concerns that may arise when a public agency or officer is sued to achieve change in a government policy." *Id.*

37. *See infra* notes 457–61 and accompanying text.

ground that the alleged injury was inadequate.[38] Put another way, every time the Court dismissed a case for lack of injury in fact, the defendant was a government official and the plaintiff sought some form of equitable relief. To be sure, the Court ostensibly applied the same three-part test in suits against private defendants. But it applied the test in a notably more generous fashion.[39] This pattern reflects an important intuition: Suits against private parties do not raise the same structural concerns as suits seeking equitable relief against government officials. This idea should be brought to the doctrinal surface.[40]

Unfortunately, in the last few terms, the Court has veered off course. In two majority opinions authored by Justice Brett Kavanaugh—the first in *Thole v. U.S. Bank N.A.*[41] and the second in *TransUnion LLC v. Ramirez*[42]—the Court broke its long streak: It held that private plaintiffs could not sue other private parties because they were not adequately injured.[43] As a result, Congress's attempt to authorize the suits (the Court held) was inconsistent with the Constitution.[44] Those decisions were not just aberrant but misguided. They lack a persuasive structural basis, and they depart from the Court's longstanding adjudicatory practice.[45] But all hope is not lost. The Court is in a period

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38. This pattern has not been noticed or discussed before in the academic literature. For more on how it was verified, and for discussion of a few arguable exceptions, see *infra* Part I, and specifically notes 136, 154, 240, 290, and 304. The Court once denied standing on the "redressability" prong when a plaintiff sought only a fine payable to the U.S. Treasury for wholly past violations. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). For further discussion, see *infra* Section I.B.

39. *Infra* Section I.C.

40. Methodologically, this Article could be described as an exercise in "doctrinal Realism." *See* Fallon, *supra* note 8, at 107, 115. This approach takes case law seriously, but "emphasizes the distinction between the forms of words that judges use in laying down and describing legal doctrine and the kinds of facts that actually drive judicial decisions." *Id.* at 106. In other words, the approach seeks to uncover the principles that are immanent in the Court's adjudicative practice. *See* Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429, 429 (1998); Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1338 (2015). As Richard Fallon has recognized, the law of standing—because of its complexity and apparent inconsistencies—is particularly amenable to this form of analysis. Fallon, *supra* note 8, at 126.

41. 140 S. Ct. 1615 (2020).

42. 141 S. Ct. 2190 (2021).

43. *Thole*, 140 S. Ct. 1615; *TransUnion*, 141 S. Ct. at 2205–06, 2214.

44. *Thole*, 140 S. Ct. at 1619–21; *TransUnion*, 141 S. Ct. at 2205–06, 2214.

45. *TransUnion* has already provoked a few critical scholarly responses. *See, e.g.*, Beske, *supra* note 13; Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349; Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269 (2021), https://www.nyulawreview.org/wp-content/uploads/2021/10/Chemerinsky-fin-1.pdf [https://perma.cc/82YC-L9ES]; Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of*

of concentrated engagement with questions of standing,[46] and it will, in all likelihood, have the opportunity to rethink or refine *TransUnion* soon.[47] It should stem *TransUnion* before it blossoms further.[48]

Such pruning is important for reasons that go beyond the conceptual coherence of the Court's standing doctrine. Private litigation is a critical tool for Congress and state legislatures to pursue their regulatory objectives.[49] Antidiscrimination law, environmental law, antitrust, privacy, consumer protection, labor law, and financial regulation—to name only a few—depend pervasively on private enforcement mechanisms.[50] The supercharged reading of Article III heralded by *TransUnion* could undercut Congress's capacity to take advantage of private enforcement, at least in federal court.[51] Further, while standing

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TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62 (2021) https://www.bu.edu/bulawreview/files/2021/07/SOLOVE-CITRON-2.pdf [https://perma.cc/SEB7-QMS6]. This Article situates *TransUnion* in the broader arc of the Court's standing doctrine in suits between private parties.

46. *See* Curtis A. Bradley & Ernest A. Young, *Standing and Probabilistic Injury*, MICH. L. REV. (forthcoming) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350160 [https://perma.cc/58CC-F2ES]. Consider how many controversial and complex standing questions the Court addressed in the 2022 Term. *E.g.*, *United States v. Texas*, 143 S. Ct. 1964 (2023); *Dep't of Educ. v. Brown*, 143 S. Ct. 2343 (2023); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023); *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023); *Reed v. Goertz*, 143 S. Ct. 955 (2023).

47. In the 2023 Term, the Court granted certiorari to decide the scope of "tester" standing in suits against private parties for violations of the Americans with Disabilities Act. *See Acheson Hotels, LLC v. Laufer*, No. 22-429 (Dec. 5, 2023). The case asked the Court to confront the disjuncture between *TransUnion* and its prior adjudicatory practice, but it was dismissed as moot after the plaintiff voluntarily dismissed her complaint. *Id.*

48. The impact of *TransUnion* is already being felt in lower courts. *See, e.g.*, Recent Case, Hunstein v. Preferred Collection & Management Services, Inc.*, 48 F.4th 1236 (11th Cir. 2022)*, 136 HARV. L. REV. 1724, 1731 (2023); Recent Case, Clemens v. ExecuPharm Inc.*, 48 F.4th 146 (3d Cir. 2022)*, 136 HARV. L. REV. 2004, 2006 n.25 (2023).

49. Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662–66 (2013) (listing potential advantages of private enforcement mechanisms). *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES (2010).

50. Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483 (2022); Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1357 (2012).

51. *See* Note, *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 HARV. L. REV. 1222 (2023). Congress can always pass laws that are enforceable in state courts because state courts are not bound by Article III limits. Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211 (2021). But the fact that Congress might be forced to resort exclusively to state courts to enforce some federal laws only highlights the structural deficiencies of *TransUnion*.

questions arise much more frequently in the Supreme Court in suits against the government,[52] in the lower courts standing questions arise routinely in suits against private parties.[53] As a practical matter, then, it is important to sort out the problem of standing in private litigation, given that the vast bulk of Article III adjudication unfolds in lower courts.[54]

This Article has three Parts. Part I traces the development of standing doctrine with a special focus on suits against private defendants, informed partly by some original archival research. It makes three descriptive claims. First, it shows that standing doctrine has its origins in public law cases against government defendants and developed to address the structural concerns triggered by that context. Second, though the Court has ostensibly applied its standing test in suits between private parties, in reality the test has not meant the same thing. Indeed, prior to 2020, the Court had never dismissed a case between private parties because the injury alleged was insufficient. Third, as the Court kept up that streak, it was notably more generous in recognizing injuries in suits against private parties than in suits seeking equitable relief from government officials.

Part II discusses the Court's recent wrong turn. In *Thole* and *TransUnion*, the Court held for the first time that Article III prohibited a suit between two private parties because the plaintiff was not adequately injured. Congress was thus powerless to authorize the suits. These cases have no sound basis in Article III. Indeed, given that standing developed to *limit* the occasions of judicial review of government action, it is especially ironic to use standing to invalidate a statute seeking only to regulate private conduct.[55] None of the constitutional or prudential bases for standing doctrine given by the Court in the public context support the outcomes in *Thole* and *TransUnion*. Lastly, this Part argues that Article III standing doctrine is not a proper vehicle for enforcing Article II concerns about private plaintiffs exercising executive power.

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52. *Infra* note 296; Fallon, *supra* note 20, at 687 ("Justiciability questions frequently arise in governmental litigation."); Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1887 (2022) ("[T]he overwhelming majority of cases that have shaped the Court's contemporary standing jurisprudence have involved claims for equitable relief.").

53. *See Laufer v. Arpan LLC*, 29 F.4th 1268, 1270 (11th Cir. 2022) ("Another day, another standing case."), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023).

54. Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 832 & n.10 (2022). *Cf.* Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031 (2023) (documenting the different functions of the political question doctrine in the Supreme Court and in lower courts).

55. *See* Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 891 (2017).

Part III proposes a standing framework that is tailored to the different structural concerns raised by different configurations of private and government parties.[56] Under this framework, standing doctrine should not limit Congress's or the states' power to authorize suits against private parties in pursuit of their regulatory objectives. *Other* constitutional principles or provisions, of course, may impose some limits, but the Court should not use the exceedingly spare terms of Article III to enforce those limits indirectly through standing doctrine.[57] This final Part will also situate the proposed framework among existing academic and judicial critiques of standing doctrine—including the "private rights" model that has won some adherents on the Court.

In the end, the function of doctrine is to focus judicial attention on the questions that ought to drive the resolution of a case.[58] Accordingly, doctrine should implement, in workable form, the constitutional text or value that underlies it.[59] Where a single doctrine is asked to do the work of implementing two very different constitutional values, it may lapse into incoherence.[60] That is where standing doctrine finds itself: it has been tasked with answering too many different kinds of structural questions. But there may be a way out of the present aporia—indeed, the way out has long been immanent in the Court's decisional practice in standing cases. It requires acknowledging that standing doctrine can and should vary based on who the defendant is, and that suits against private defendants should be placed in a different constitutional category. At the very least, the different constitutional values implicated by suits against private parties should be separated and articulated clearly.[61]

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56. As a matter of current doctrine, the identity of the defendant may factor into the second two prongs of the familiar three-prong standing test: causation and redressability. This Article's claim is that the defendant's identity has had a more pervasive influence on standing outcomes than it would if confined to those particular doctrinal openings. Indeed, it will show how the identity of the defendant has colored what the Court has called "the '[f]irst and foremost' of standing's three elements"—injury in fact—which is ostensibly about plaintiffs alone. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)).

57. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2040 (2011).

58. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1271 (1995) ("Doctrine is a tool that directs judicial attention to issues deemed relevant to the legal resolution of a case.").

59. *See generally* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

60. *Cf.* Post, *supra* note 58, at 1270–74 (arguing that the Court's First Amendment doctrine is incoherent because it is premised incorrectly on the idea that "speech" has a single, general constitutional value); Hessick, *supra* note 28, at 678.

61. As Henry Monaghan once observed in an effort to unknot another one of standing law's intricate skeins, "[c]larity of understanding is gained when organizing

I. THE DEVELOPMENT OF STANDING IN SUITS AGAINST PRIVATE PARTIES

The history of standing doctrine has been recounted before.[62] This Part explores that history with a special focus: suits against private parties. In broad strokes, standing doctrine developed to address a particular structural concern: limiting the judiciary in suits seeking equitable relief against "coequal department[s]" of the government.[63] After the injury-in-fact test first appeared in the 1970s, this facet of standing doctrine migrated (at least nominally) to suits against private parties as well. Having made that jump, though, it was applied in a far more generous fashion, in implicit recognition of the different structural values at stake in private-private suits. That state of affairs persisted more or less until *Thole* and *TransUnion*, which are addressed in Part II.

A. Public Law Origins

Despite its present ubiquity, the word "standing" apparently was not used by the Court to describe constitutional limits on the judicial power until the 1940s.[64] In the nineteenth century, the function of standing was largely served by the forms of action.[65] In other words, if one of the common law writs furnished a basis to sue, or if there were grounds for relief from a court of equity, then there was no separate Article III question that had to be asked.[66] In Chief Justice Marshall's words, the judicial "power is capable of acting only when the subject is submitted

concepts are sorted out coherently." Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 301 (1984).

62. *See, e.g.*, JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS 85–138 (2021); Magill, *supra* note 33; Woolhandler & Nelson, *supra* note 6; Sunstein, *supra* note 11.

63. *Massachusetts v. Mellon*, 262 U.S. 447, 488–89 (1923).

64. *See* Hessick, *supra* note 13, at 291 n.93 ("The Court did not link standing and Article III until the 1940s." (citing *Stark v. Wickard*, 321 U.S. 288, 307–11 (1944))); Sunstein, *supra* note 11, at 169. This is not to say that the concept of standing did not have some earlier antecedents, even if couched in different words. *See* Woolhandler & Nelson, *supra* note 6, at 691; Baude & Bray, *supra* note 10, at 155.

65. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 947 (2011); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 817–27 (2004).

66. Sunstein, *supra* note 11, at 170; Bray & Miller, *supra* note 11, at 1771, 1795.

to it by a party who asserts his rights in the form prescribed by law."[67] But once a "subject" is so submitted, "[i]t then becomes a case."[68]

Several developments in the late nineteenth and early twentieth centuries gave rise to a separate doctrine of "standing." First, in 1875, in the wake of the Civil War, Congress conferred general federal question jurisdiction upon the federal courts (with an amount-in-controversy requirement).[69] Courts interpreted that jurisdictional grant as authorizing federal courts to hear bills in equity seeking to enjoin government action alleged to be in violation of federal law.[70] The growth of the administrative state, beginning around the same time, increased the amount of government activity potentially reviewable in court.[71] Meanwhile, a wave of procedural reforms was engulfing the country, culminating for federal courts in the promulgation of the Federal Rules of Civil Procedure in 1938.[72] These reforms merged law and equity, and abolished the old forms of action (in federal court).

This was a powerful brew: federal courts were increasingly asked to grant equitable remedies against the burgeoning activities of government, at the very time that the traditional procedural mechanisms they had used to screen for proper cases were being retired.[73] The courts needed a way to figure out who could file a suit for judicial review of government action. Standing doctrine arose to fill that need.

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67. *Osborn v. Bank of the U.S.*, 22 U.S. 738, 819 (1824).

68. *Id. See also* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1640, at 507 (1833).

69. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

70. Merrill, *supra* note 65, at 949; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 128 (1998). For an example, see *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("[I]n case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."). This was a significant American innovation over English practice because "English equity performed only private law functions." Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2079 (2022). Indeed, the "only three cases" cited in *McAnnulty* "for the proposition that errors of law were generally reviewable" were all "contests between private parties concerning public lands." MASHAW, *supra* note 4, at 249. The rise of the bill in equity also marked a departure from the standard nineteenth century model of judicial review, which proceeded largely in the form of tort-like actions for damages or specific relief against officials in their individual capacities. *See id.* at 139, 306.

71. The Interstate Commerce Commission, the "first major national regulatory agency," was created in 1887. Merrill, *supra* note 65, at 950.

72. *See generally* Kellen Funk, *The Union of Law and Equity: The United States, 1800–1938*, *in* EQUITY AND LAW: FUSION AND FISSION 46 (John C. P. Goldberg, Henry E. Smith & P. G. Turner eds., 2019).

73. *See* Bellia, *supra* note 65, at 827.

The doctrine that crystallized in the first half of the twentieth century allowed for judicial review by two routes.[74] On route one, a plaintiff could obtain judicial review of government action if the government action violated some "legal interest" held by the plaintiff.[75] That legal interest could be granted by common law or statute.[76] On route two, a plaintiff could obtain judicial review if a statute granted a cause of action.[77] This was the state of the law when Congress passed the Administrative Procedure Act (APA) in 1946, which was probably intended to codify this regime (or at least not to disturb it).[78]

The Supreme Court (and lower courts) liberalized standing in the 1960s.[79] But the real doctrinal revolution arrived in 1970: In *Association of Data Processing Service Organizations, Inc. v. Camp*,[80] the Court unexpectedly broke from its existing standing framework, and laid the groundwork for the modern test.[81] *Data Processing* was a "competitor's suit"; that is, the plaintiffs alleged that they would face increased competition as a result of an action by a federal agency (here, a ruling by the Comptroller of the Currency that national banks could provide "data processing services" to customers).[82] This was a familiar standing problem.[83] But the Court used the case to articulate a new test for standing. "The first question," the Court said, "is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic

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74. *See generally* Magill, *supra* note 33, at 1135–49.

75. *Id.* at 1135–39.

76. *Id.* at 1136; Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 VA. L. REV. 703, 716 (2019). *See, e.g.*, *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939).

77. Magill, *supra* note 33, at 1135, 1139–49. *See, e.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 8, 16–17 (1942). According to the Court, litigants in this latter situation had "standing . . . as representatives of the public interest." *Id.* at 14. Judge Jerome Frank coined the term "private Attorney General[]" in a suit of this kind, seeking equitable relief against a government officer. *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). *See also* Magill, *supra* note 33, at 1145–47; Nelson, *supra* note 76, at 723 & n.85.

78. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of Title 5 of U.S. Code). *See* Magill, *supra* note 33, at 1150; Nelson, *supra* note 76, at 727.

79. *See* Nelson, *supra* note 76, at 730 ("[T]he Warren Court did establish various doctrines that effectively expanded rights of action in many areas of federal practice.").

80. 397 U.S. 150 (1970).

81. *Id.* at 151–54.

82. *Id.* at 151–52 (emphasis omitted).

83. *See, e.g.*, *Ala. Power Co. v. Ickes*, 302 U.S. 464, 475 (1938); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

or otherwise."[84] The second question, the Court said, is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[85] The injury-in-fact test was born.[86]

It took several more years for this test fully to take shape. The *Data Processing* Court was unclear about the extent to which its new test was compelled by Article III.[87] A few early cases treated "injury in fact" as a gloss on the APA's statutory cause of action.[88] By 1974, though, the Court had clarified that "injury in fact" was a "requirement" of Article III.[89] Then, in two opinions by Justice Lewis F. Powell, the Court added more requirements to the "minimum constitutional mandate."[90] The "injury in fact" had to be "distinct and palpable"; it had to be caused by (or fairly traceable to) the defendant; and it had to be redressable by the court.[91] By 1976, the now-familiar standing catechism was more or less in place.

Since then, the Court has decided many more standing cases fleshing out this basic standard. Probably the most significant was *Lujan v. Defenders of Wildlife*,[92] written by Justice Antonin Scalia.[93] *Lujan* confirmed what had only been implied earlier: the three elements of standing are an "irreducible constitutional minimum,"[94] meaning any attempt by Congress to authorize standing in the absence of that minimum would be unconstitutional. The plaintiffs in *Lujan* sought to challenge a rule promulgated by the Secretary of the Interior under the Endangered Species Act. The Act contained a "citizen-suit" provision, providing that

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84. *Data Processing*, 397 U.S. at 152.

85. *Id.* at 153.

86. Magill, *supra* note 33, at 1161 & n.107 ("[T]he Supreme Court had never before used the term 'injury in fact' in connection with standing law.").

87. *Id.* at 1163 & n.116.

88. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *United States v. Students Challenging Regul. Agency Procs.* (*SCRAP*), 412 U.S. 669, 686, 689 n.14 (1973).

89. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1974). *See also* Magill, *supra* note 33, at 1164 n.116. The "zone of interests" test, by contrast, has been regarded as a question of statutory interpretation. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129–30 (2014).

90. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26 (1976). *See* Magill, *supra* note 33, at 1174–75 (calling Justice Powell the "key architect" of the Court's mid-1970s shift in standing doctrine, and noting that he "established the now boiler-plate language on both the meaning and source of the injury-in-fact requirement").

91. *Warth*, 422 U.S. at 498–502; *Simon*, 426 U.S. at 37–46.

92. 504 U.S. 555 (1992).

93. *Id. See* Sunstein, *supra* note 11, at 165 ("*Lujan* may well be one of the most important standing cases since World War II.").

94. *Lujan*, 504 U.S. at 560.

"any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."[95] *Lujan* held that the plaintiffs lacked standing, and that this cause of action was unconstitutional to the extent it purported to authorize the plaintiffs to sue.[96]

While this holding was undoubtedly significant, *Lujan* was a consummation of standing revolution launched by *Data Processing* and then Justice Powell in the 1970s.[97] Again, the Court has decided many standing cases since then in suits against the government, but they are normal science within an existing paradigm.

B. Doctrinal Drift: Suits against Private Parties

Every case in the story just told was a suit seeking equitable relief against the government.[98] This Section describes how the standing test came to be applied in suits between private parties. Tom Merrill has suggested that, in public law, doctrinal innovation often is not "self-consciously chosen by judges," but "may simply be a mutation produced by the pressures of litigation, which is then seized upon as something that 'works' better than what came before."[99] Merrill gives "modern standing doctrine" as an example.[100] I would label this phenomenon doctrinal drift, and it seems to be an especially apt description of the migration of the injury-in-fact test to private suits.

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95. *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g)).

96. *Id.* at 576–78.

97. *See* Magill, *supra* note 33, at 1181; John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1226 & n.47 (1993).

98. In *Warth v. Seldin*, an intervenor organization had sought damages as well as equitable relief. 422 U.S. 490, 515 (1975). The Court held that an organization does not have "standing" to seek damages for an economic injury to one of its members, at least absent some sort of assignment. *Id.* at 515–16. As a general matter, Article III standing issues arise in damages suits against the government only rarely. Fallon, *supra* note 4, at 1110; Young, *supra* note 52, at 1906 & n.136. Such suits typically involve a past physical or economic harm that easily satisfies the injury-in-fact requirement. Suits seeking forward-looking relief, by contrast, are more likely to be brought by plaintiffs who simply disagree with the government and thus more likely to present difficult questions under present standing doctrine.

99. Merrill, *supra* note 65, at 972.

100. *Id. Cf.* MASHAW, *supra* note 4, at 249 (suggesting that the "law of judicial review of administrative action" develops through "selective myopia").

1. BEGINNINGS: THE FHA TRILOGY

It was only two years after *Data Processing*, in another opaque opinion by Justice William O. Douglas, that the Court first used the phrase "injury in fact" in a suit between private parties. The case, *Trafficante v. Metropolitan Life Insurance Co.*,[101] is worth considering in some detail. The plaintiffs were tenants of an apartment complex.[102] They sued the owner of the apartment complex under the Fair Housing Act (FHA), "alleg[ing] that the owner had discriminated against nonwhite rental applicants."[103] The tenants claimed three injuries:

> (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto."[104]

The question before the Court was whether the plaintiffs had standing to sue on the basis of these alleged injuries.

The district court and the Ninth Circuit both dismissed the suit on statutory grounds.[105] The district court held that the plaintiffs were "not 'persons aggrieved' under" the FHA and therefore had no cause of action.[106] The district court also opined that "[t]he enforcement of the public interest in fair housing enunciated in Title VIII of the Act and the creation of integrated communities to the extent envisioned by Congress are entrusted to the Attorney General . . . , and not to private litigants such as those before the Court."[107] The plaintiffs had "heavily relied upon" the recent opinion in *Data Processing*, but the district court distinguished it: that case "was brought under the Administrative Procedure Act" and "involved action by a government agency and not the activities of private individuals such as are involved here."[108] The district court, then, did not think that the Court's new standing test,

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101. 409 U.S. 205 (1972).
102. *Id.* at 206.
103. *Id.* at 207–08.
104. *Id.* at 208.
105. *Id.*
106. *Trafficante v. Metro. Life Ins. Co.*, 322 F. Supp. 352, 353 (N.D. Cal.), *aff'd*, 446 F.2d 1158 (9th Cir. 1971), *rev'd*, 409 U.S. 205 (1972).
107. *Id.*
108. *Id.*

articulated in a suit against the government, applied in a suit between private litigants.

The Ninth Circuit affirmed.[109] Despite the district court's misgivings, the Ninth Circuit applied *Data Processing*.[110] But it only discussed the "zone of interest" portion of the test, and did not quote the "injury in fact" language.[111] Accordingly, the court of appeals also focused on the statutory question whether the FHA had granted plaintiffs standing.[112]

When the case arrived at the Supreme Court, the plaintiff-petitioners opened the argument section of their merits brief in the Court with a citation to *Data Processing*'s injury-in-fact test.[113] But they did not explain or defend its application; rather, they said that they "assumed" that "the test of standing to be applied" is the *Data Processing* test, because that was "the view adopted by the Ninth Circuit."[114] The respondents, in turn, led off their own argument sections with citations to *Data Processing* and other standing precedents.[115]

Justice Douglas assigned the opinion to himself[116] and dashed off a longhand draft very quickly—the case file suggests it took two days.[117]

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109. *Trafficante*, 446 F.2d 1158.

110. *Id.* at 1160–61.

111. *See id.*

112. *Id.* at 1162–63 ("[T]he intent of Congress [was] to provide . . . methods of redress for persons who are the objects of discriminatory housing practices . . . .").

113. Brief of Petitioners at 9, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972) (No. 71-708), 1972 WL 136276, at *9.

114. *Id.* at 9 n.5. The brief continued: "However, to the extent that different legal standards apply in private civil rights litigation, they would presumably be even more expansive in view of the frequently recognized public policy favoring such actions . . . ." *Id.*

115. Brief of Respondent Metropolitan Life Insurance Co. at 6–8, *Trafficante*, 409 U.S. 205 (No. 71-708), 1972 WL 136278, at *6–8; Brief of Respondent Parkmerced Corp. on the Merits at 13–14, *Trafficante*, 409 U.S. 205 (No. 71-708), 1972 WL 136277, at *13–14. The Solicitor General argued that the *Data Processing* test was not applicable because, here, the statute had "specific provision conferring standing on a defined class of persons." Brief for the United States as Amicus Curiae at 17 n.30, *Trafficante*, 409 U.S. 205 (No. 71-708), 1972 WL 136282, at *17 n.30. The Solicitor General thought that standing was governed by *Sanders Brothers*. *Id.*

116. Memorandum from Justice Douglas to Chief Justice Burger (Nov. 20, 1972) (William O. Douglas Papers, Files on *Trafficante v. Metro. Life Ins.*, No. 71-708, Box 1594, Library of Congress, Manuscript Division, Washington, D.C.). Though Chief Justice Warren Burger ultimately joined Douglas's opinion, at conference he indicated that he "would prefer to affirm" the Ninth Circuit. Memorandum from Chief Justice Burger to Justice Douglas (Nov. 30, 1972) (William O. Douglas Papers, Files on *Trafficante v. Metro. Life Ins.*, No. 71-708, Box 1594, Library of Congress, Manuscript Division, Washington, D.C.).

117. Though the handwritten draft in the file is undated, Justice Douglas assigned the opinion to himself on November 20, 1972, *see* Memorandum from Justice

Apparently picking up on the parties' (and Ninth Circuit's) framing, the Court unanimously held that the plaintiff-petitioners had adequately alleged "injury in fact" by claiming that "exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations."[118] And it found that this was sufficient to state a claim under the FHA. Justice Douglas's opinion did not analyze whether it made sense to apply the *Data Processing* test in the context of a private suit. Like the parties, the Court seems to have simply assumed its applicability. The Court did, though, decisively reject the lower courts' view that "enforcement of the public interest" is "entrusted to the Attorney General," and not "private litigants."[119] On the contrary, the Court said, "complaints by private persons are the primary method of obtaining compliance with the Act."[120]

Trafficante was thus significant in a few respects. For the first time, it employed the injury-in-fact concept in a suit between private parties. This was a prime instance of doctrinal drift: neither the parties nor the Court defended the test's application, but the Court did a serviceable job of glossing the scope of the FHA's cause of action. As for constitutional implications, *Trafficante* did not say that the "injury in fact" test set an Article III limit on *Congress*; it was, rather, opaque (like *Data Processing* itself) about whether the test had a constitutional or statutory source. To be sure, the Court decided that the FHA intended "standing as broadly as is permitted by Article III."[121] But it did not say that the "injury in fact" test defined that outer limit.[122] And the opinion endorsed

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Douglas to Chief Justice Burger, *supra* note 116, and there is a typed draft in the file marked "OK for Printer" dated November 22, 1972. Justice Douglas, Opinion Draft, *Trafficante v. Metro. Life Ins.*, No. 71-708, at 1 (Nov. 22, 1972) (William O. Douglas Papers, Files on *Trafficante v. Metro. Life Ins.*, No. 71-708, Box 1594, Library of Congress, Manuscript Division, Washington, D.C.).

118. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–10 (1972).

119. *Trafficante v. Metro. Life Ins. Co.*, 322 F. Supp. 352, 353 (N.D. Cal.), *aff'd*, 446 F.2d 1158 (9th Cir. 1971), *rev'd*, 409 U.S. 205 (1972).

120. *Trafficante*, 409 U.S. at 209.

121. *Id.* (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971), *abrogated by Thompson v. N. Am. Stainless, LP.*, 562 U.S. 170, 176 (2011)). Justice Byron White's concurrence, while adverting to Article III limits, was also an affirmation of Congress's broad power to expand the class of injuries that can suffice for Article III standing in private suits. *Id.* at 212 (White, J., concurring). As Richard Fallon has observed, "[n]o actionable injury plausibly could have been thought to exist [in *Trafficante*] in the absence of the statute." Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 50 (1984).

122. The Court gave the following hint about what it understood to be Article III's limit: "Injury is alleged with particularity, so there is not present the abstract question raising problems under Art. III of the Constitution." *Trafficante*, 409 U.S. at 211. Thus the Court suggested that to answer an "abstract question" would pose an

Congress's flexibility in taking advantage of "private attorneys general" to carry out its chosen policies, without suggesting that it raised any constitutional concerns, whether under Article II or III.[123]

By the next time the issue of standing against private defendants landed in the Court, the "injury-in-fact" test had both expanded and hardened. The case, *Gladstone, Realtors v. Village of Bellwood*,[124] also arose under the FHA.[125] The plaintiffs in the case were the Village of Bellwood, "a municipal corporation and suburb of Chicago," and several residents of the area.[126] The defendants were two real estate brokerage firms.[127] The Court upheld the plaintiffs' standing in an opinion by Justice Powell,[128] who had been "the key architect" of the standing revolution in the Court over the preceding years.[129]

After some preliminaries, the Court began its opinion with a four-paragraph summary of the "doctrine of standing in the federal courts," which (it said) is "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[130] All five cases the Court cited flesh out the three-pronged test and the purposes of standing were suits against the government.[131] This summary made two important doctrinal innovations, relative to *Trafficante*. First, having loosely employed the "injury in fact" idea in *Trafficante* to judge whether the plaintiffs had a cause of action, the Court in *Gladstone* imported the other two standing requirements that had developed in the intervening years: causation and redressability.[132] And second, while *Trafficante* had been vague about the nature of any Article III limits on Congress's power to confer a cause of action, *Gladstone* stated explicitly that "[i]n no event . . . may Congress abrogate the Art. III minima."[133] These

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Article III problem, but it did not elaborate. *Id.* This understanding of Article III hearkened back to *Aetna Life Insurance Co. v. Haworth*, a declaratory judgment action between two private parties, which distinguished a "justiciable controversy" from "a difference or dispute of a hypothetical or abstract character." 300 U.S. 227, 240 (1937).

123. *Trafficante*, 409 U.S. at 210–12.

124. 441 U.S. 91 (1979).

125. *Id.* at 93.

126. *Id.* at 93–94.

127. *Id.*

128. *Id.* at 93, 115.

129. Magill, *supra* note 33, at 1174.

130. *Gladstone*, 441 U.S. at 99–100 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

131. *Id.* (citing *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59 (1978); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26 (1976); *Warth*, 422 U.S. 490; *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)).

132. *Id.*

133. *Id.* at 100.

innovations were neither acknowledged nor discussed; the Court seems to have assumed that, since the Court had applied its then-existing standing test in *Trafficante*, it should apply the now-existing standing test in *Gladstone*.[134]

But the Court upheld the plaintiffs' standing. Starting with the municipal plaintiff, the Court accepted the allegation that the two brokerage's "steering practices" had reduced the number of buyers in the Bellwood market, driving housing prices downward and therefore diminishing the municipality's tax base.[135] As for the individual plaintiffs, the Court found standing on the basis of two injuries: First, that the "transformation of their neighborhood from an integrated to a predominantly [Black] community" deprived them of the "social and professional benefits of living in an integrated society."[136] And second, an "economic injury" due to the "diminution in value of the individual [plaintiffs'] homes," which allegedly resulted from the defendant brokers' steering practices.[137] The Court thus "conclude[d] that the facts alleged in the complaints and revealed by initial discovery [we]re sufficient to provide standing under Art. III," though it noted that these facts could be contested at trial.[138]

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134. There was an interesting back and forth in the parties' Supreme Court briefs about standing. The plaintiff-respondents did not dispute that the general Article III test would apply in the case, but they did distinguish public and private suits: The defendants, they argued, "are *private* real estate firms, and [defendants] have not cited a single case against a *private* defendant where this Court has denied standing." Brief for Respondents at 50, *Gladstone*, 441 U.S. 91 (No. 77-1493), 1978 WL 207178, *50. The defendant-petitioners did not offer a case in reply, but responded that the "distinction is not persuasive because the nature of an injury cannot depend upon the identity of the defendant." Reply Brief for Petitioners at 28, *Gladstone*, 441 U.S. 91 (No. 77-1493), 1978 WL 207179, *28. "The injury alleged—being denied the benefits of living in an integrated society—is equally generalized, whether the defendant is a private real estate firm charged with racial steering or a municipality charged with purposely excluding minorities and persons of low income." *Id.* at 28–29. The Supreme Court—again without any analysis or acknowledgement of the dispute—sided with the defendant-petitioners on that point. That is the conceptual misstep at the heart of this Article.

135. *Gladstone*, 441 U.S. at 110–11.

136. *Id.* at 111.

137. *Id.* at 111, 115.

138. *Id.* at 115. The Court did affirm the dismissal of the case as to two plaintiffs who lived outside the Bellwood neighborhood. *Id.* at 112 n.25. The reason was that the complaints "claim[ed] injury only to that area and its residents," and contained no "allegations of harm to individuals residing elsewhere." *Id.* But the Court recognized that "on remand" the district court might permit these two plaintiffs "to amend their complaints to include allegations of actual harm." *Id.* Because the problem here was that the plaintiffs had failed to provide *any* allegations of injury, and because the Court expressly recognized that that problem might be cured on remand, it does not seem a significant exception to the Court's general pattern of upholding standing in private suits.

The Court's next encounter with standing between private parties was *Havens Realty Corp. v. Coleman*.[139] As the case came to the Court, there were there were three plaintiffs: a Black individual, a White individual, and a non-profit organization called "HOME" that provided a "housing counseling service" and "investigat[ed] and referr[ed] complaints concerning housing discrimination."[140] The defendant, Havens Realty, "owned and operated two apartment complexes" in a suburb of Richmond, Virginia.[141] The two individual plaintiffs were "testers" employed by HOME—that is, "individuals who, without an intent to rent or purchase a home, . . . pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."[142]

The Court analyzed standing based on three different theories. First, the Court held that the Black tester had standing because the defendant had told her that apartments were not available, when in fact they were.[143] The Court reasoned that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[144] The FHA makes it unlawful "[t]o represent to any person because of race . . . that any dwelling is not available" when in fact it is.[145] When a person is "the object of a misrepresentation made unlawful under" the FHA, the Court reasoned, they have "suffered injury in precisely the form the statute was intended to guard against, and therefore ha[ve] standing."[146] That is so even if the tester "approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home."[147] In sum, the Court seemed to accept that standing was appropriate based on nothing more than a statutory violation.[148]

Second, the individual plaintiffs also alleged that the defendant's "steering practices deprived them of the benefits that result from living

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139. 455 U.S. 363 (1982).

140. *Id.* at 367–68, 370–71.

141. *Id.* at 368. One of Havens's employees was also joined as a defendant. *Id.* at 366.

142. *Id.* at 368, 370–73.

143. *Id.* at 374.

144. *Id.* at 373 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

145. 42 U.S.C. § 3604(d).

146. *Havens Realty*, 455 U.S. at 373–74.

147. *Id.* at 374.

148. *See* Baude, *supra* note 7, at 201 ("The key [in *Havens*] was the injury to her statutory rights to truthful and nondiscriminatory information."). The White tester plaintiff apparently conceded in the Court that standing was inappropriate on this basis as to him because the defendant had responded truthfully to his inquiries, and so the Court noted that he had neither a cause of action nor standing under the FHA. *Havens Realty*, 455 U.S. at 374–75, 375 n.15.

in an integrated community."[149] The plaintiffs had pleaded that "they were residents of the Richmond metropolitan area"—comprising hundreds of square miles and hundreds of thousands of residents.[150] The defendant operated only two apartment complexes in that area. While noting that it would be "implausible to argue that the [defendant's] alleged acts of discrimination could have palpable effects throughout the *entire* Richmond metropolitan area," the Court—rather remarkably—did not reject standing outright.[151] "[W]e cannot say as a matter of law that no injury could be proved," because "[f]urther pleading and proof might establish that [the plaintiffs] lived in areas where [defendant's] practices had an appreciable effect."[152] The Court instructed the district court on remand to "afford the plaintiffs an opportunity to make more definite the allegations."[153]

Third, the Court found that the organization HOME had standing too. HOME alleged that the defendant's "steering practices ha[d] perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers."[154] The Court found that to be sufficient: "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the

149. *Havens Realty*, 455 U.S. at 375.

150. *Id.* at 377.

151. *Id.*

152. *Id.*

153. *Id.* at 378. Justice William Brennan's initial draft opinion was even broader: it stated that "even if we were prepared to . . . read the complaint as alleging injury to the entire Richmond metropolitan area, dismissal on the pleadings would not be appropriate." Justice Brennan, Opinion 1st Draft, *Havens Realty Corp. v. Coleman*, No. 80-988, at 12 n.18 (Jan. 19, 1982) (William J. Brennan, Jr. Papers, Box I.567, Folder 3, Library of Congress, Manuscript Division, Washington, D.C.). When Justice Powell suggested he would dissent on the issue of "neighborhood" standing, Justice Brennan proposed that Powell submit "some wording changes that might satisfy both of us." Memorandum from Justice William J. Brennan, Jr., to Justice Lewis F. Powell, Jr. (Jan. 25, 1982) (William J. Brennan, Jr. Papers, Box I.567, Folder 3, Library of Congress, Manuscript Division, Washington, D.C.); Memorandum from Justice Lewis F. Powell, Jr., to Justice William J. Brennan, Jr. (Jan. 26, 1982) (William J. Brennan, Jr. Papers, Box I.567, Folder 3, Library of Congress, Manuscript Division, Washington, D.C.). Justice Powell drafted two paragraphs that, with some edits, were incorporated into the majority opinion. Memorandum from Justice William J. Brennan, Jr., to Justice Lewis F. Powell, Jr. (Jan. 27, 1982) (William J. Brennan, Jr. Papers, Box I.567, Folder 3, Library of Congress, Manuscript Division, Washington, D.C.). Interestingly, Justice Powell's law "clerk working with me on this case" was none other than "Dick Fallon"—whose academic work is cited frequently in this Article. Memorandum from Justice Lewis F. Powell, Jr., to Justice William J. Brennan, Jr. (Feb. 4, 1982) (William J. Brennan, Jr. Papers, Box I.567, Folder 3, Library of Congress, Manuscript Division, Washington, D.C.).

154. *Havens Realty*, 455 U.S. at 379.

organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."[155]

To sum up: *Havens* concluded the Court's initial private-party standing trilogy. This trilogy established—as explained above, by "drift" rather than by deliberation—that the same standing requirements would nominally apply in suits between private parties, and that these requirements were constitutionally compelled. But the theories of standing that the Court accepted were notably generous, especially when juxtaposed to suits against the government (an exercise the next Section will undertake).

2. MATURATION

The Court's next significant encounter with private-party standing was a pair of environmental law cases.[156] In *Steel Co. v. Citizens for a Better Environment*,[157] the Court for the first time (and only time before *Thole*) dismissed a case between two private parties for lack of standing—though on the redressability prong of standing doctrine, not the injury prong.[158] Less than two years later, *Steel Co.* was largely nullified in

155. *Id.* The Court's generous articulation of organizational standing in *Havens* may have caused its own kind of doctrinal drift when applied to organizational standing in suits against the government. Judge Patricia Millett has argued, for instance, that it has become too easy for organizations to challenge government policies under a line of D.C. Circuit cases originating in *Havens*. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1099 (D.C. Cir. 2015) (Millett, J., *dubitante*). For an especially expansive and controversial claim of organizational standing, see *Alliance for Hippocratic Medicine v. FDA*, 78 F.4th 210, 233–41 (5th Cir.), *cert. granted*, 2023 WL 8605746 (2023).

156. In *Diamond v. Charles*, the Court held that a private-party doctor, who had intervened in the court of appeals, did not have standing to appeal a judgment holding a state statute unconstitutional when the state itself declined to appeal. 476 U.S. 54, 56, 68 (1986). And in *Karcher v. May*, the Court held that two state legislators who had intervened in their official capacities to defend a state statute did not have standing to appeal a judgment finding the statute unconstitutional after they left office. 484 U.S. 72, 74, 81 (1987). While these two cases were technically between private parties by the time they got to the Court, they started as typical public law suits against state officials and presented structural concerns not present in the typical private-private suit. *Cf. Hollingsworth v. Perry*, 570 U.S. 693 (2013) (holding official sponsors of ballot initiative lack standing to appeal a district court decision as agents of the state). In *East River Steamship Corp. v. Transamerica Delaval Inc.*, the Court dismissed one count of an admiralty complaint for lack of "standing." 476 U.S. 858, 863 (1986). Though the Court cited *Warth*, it seems clear from context that the Court was dismissing for failure to state a claim under the relevant federal common law, and not on constitutional grounds. *Id.*

157. 523 U.S. 83 (1998).

158. *Id.* at 86, 105.

another private-party suit, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[159]

Steel Co. involved an environmental statute requiring users of toxic chemicals to file certain forms with the government.[160] An environmental organization notified the government that a manufacturing company had failed to file the requisite forms, and the company, upon receiving notice, promptly remedied the oversight.[161] Though the EPA chose not to bring an enforcement action, the organization sued, invoking the statute's citizen-suit provision.[162] The injury alleged by the plaintiff organization was that it "seeks, uses, and acquires data reported" under the statute for its own advocacy work and for conveying to its members, some of whom frequented the area around the defendant's facility.[163]

The Court "assume[d]" that the plaintiff had suffered an injury in fact, but dismissed the case for lack of redressability.[164] The plaintiff had sought injunctive relief and civil penalties.[165] As for injunctive relief, the Court explained that if the plaintiff "had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm."[166] Because the plaintiff had made "no such allegation," and because the defendant had filed all of the required forms, the Court held that an injunction would not remediate plaintiff's injury.[167] As for civil penalties, the Court said that they "might be viewed as a sort of compensation or redress to [the plaintiff] if they were payable to" the plaintiff.[168] But the penalties were "payable to the United States Treasury."[169] As a result, the Court said, the plaintiff sought "not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution" of the law.[170] Citing *Lujan* and *Fairchild*, the Court held that was improper.[171]

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159. 528 U.S. 167 (2000).

160. *Steel Co.*, 523 U.S. at 86–88.

161. *Id.*

162. *Id.* at 88. The citizen-suit provision is codified at 42 U.S.C. § 11046(a)(1).

163. *Steel Co.*, 523 U.S. at 104–05.

164. *Id.* at 105.

165. *Id.* The plaintiff also sought declaratory relief and litigation costs. *Id.*

166. *Id.* at 108.

167. *Id.* at 108–09.

168. *Id.* at 106.

169. *Id.*

170. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992)).

171. *Id.* The Court also held that the plaintiff lacked standing to seek a declaratory judgment for past violations because there was no dispute between the parties that the defendant's past failures violated ECPRA, and the plaintiff lacked standing to

Justice John Paul Stevens concurred in the judgment. He would have resolved the case on statutory grounds.[172] But without offering a firm conclusion on standing, he noted that the Court's analysis "represents a significant extension of prior case law."[173] One of the reasons he offered—which resonates with this Article's themes—was that "[i]n every previous case in which the Court has denied standing because of a lack of redressability, the plaintiff was challenging some governmental action or inaction," and was not attempting to "impose a statutory sanction on another private party."[174] "This distinction is significant," Justice Stevens explained, "as our standing doctrine is rooted in separation-of-powers concerns."[175] Justice Stevens acknowledged the argument "that this citizen suit somehow interferes with the Executive's power to 'take Care that the Laws be faithfully executed.'"[176] But he thought such a view inconsistent with the "deeply rooted" practice of qui tam litigation.[177] In response, the Court denied that it was "motivated" by Article II concerns.[178] It did not, however, specify a separation-of-powers rationale beyond keeping courts "within their prescribed sphere of action."[179]

Less than two years later, the Court faced a similar set of facts and sapped *Steel Co.*'s standing analysis of much of its practical significance. The plaintiffs in *Laidlaw* were three environmental organizations, and the private-party defendant was the owner of a hazardous waste incinerator.[180] The defendant was discharging "mercury, an extremely toxic pollutant," into a river, in amounts exceeding what was allowed under the Clean Water Act (CWA).[181] After providing notice, the plaintiffs filed a citizen suit seeking declaratory and injunctive relief and civil penalties.[182] The defendant continued to violate the "mercury

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seek litigation costs because "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Id.* at 106–08.

172. *Id.* at 112 (Stevens, J., concurring).

173. *Id.* at 124 (Stevens, J., concurring).

174. *Id.* at 125 (Stevens, J., concurring).

175. *Id.* at 125 n.20 (Stevens, J., concurring). The Court did not provide a substantive response to this argument; it merely stated in a footnote that "[t]here is no conceivable reason why" redressability should "depend on the defendant's status as a governmental entity." *Id.* at 103 n.5 (majority opinion).

176. *Id.* at 129 (Stevens, J., concurring) (quoting U.S. CONST. art. II, § 3).

177. *Id.* at 129–30 (Stevens, J., concurring).

178. *Id.* at 102 n.4 (majority opinion).

179. *Id.*

180. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 175–76 (2000).

181. *Id.* at 176.

182. *Id.* at 176–77.

discharge limitation" for more than two years after the suit was filed (though the violations ceased before judgment was rendered).[183]

The defendant contested Article III standing, pointing to a finding of the district court at the remedial phase that the "violations at issue in this citizen suit did not result in any health risk or environmental harm."[184] The Court (with Justice Scalia in dissent) rejected that argument. It relied on "affidavits and testimony" from the plaintiffs "assert[ing] that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests."[185] For instance, one member averred that he lived near Laidlaw's facility and "would like to fish, camp, swim, and picnic in and near the river . . . , but would not do so because he was concerned that the water was polluted by Laidlaw's discharges."[186]

The defendant also argued that the plaintiffs lacked standing to seek civil penalties payable to the Treasury, relying on *Steel Co.*[187] But the Court rejected that argument too, finding that civil penalties may satisfy the redressability requirement because of their deterrent effect.[188] Civil penalties "encourage defendants to discontinue current violations and deter them from committing future ones."[189] The Court explained that *Steel Co.* had only held "that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit."[190] *Laidlaw* was thus distinguishable because the statutory violations had not entirely stopped when the complaint was filed.

In a sharp dissent, Justice Scalia opined that the Court's standing analysis had "grave implications for democratic governance."[191] Though he again disclaimed reliance on Article II, Justice Scalia was plainly disturbed by the delegation of enforcement power to private plaintiffs: "By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of

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183. *Id.* at 177–78. The Court had held in a prior case that the CWA does not authorize citizen suits for violations that end before a complaint is filed. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

184. *Laidlaw*, 528 U.S. at 181 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 956 F. Supp. 588, 602 (D.S.C. 1997), *vacated*, 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000)).

185. *Id.* at 171, 183–84.

186. *Id.* at 181–82.

187. *Id.* at 187.

188. *Id.*

189. *Id.* at 186.

190. *Id.* at 187.

191. *Id.* at 202 (Scalia, J., dissenting).

enforcing the law."[192] The Court majority was less troubled. It wrote that "the dissent's broader charge" about democratic governance "seems to us overdrawn."[193] It noted that the executive branch had supported citizen suits without worrying about the dissipation of its authority.[194] Further, the government could always foreclose a citizen suit by filing its own action and could always intervene as a matter of right in a suit filed by someone else.[195] In all, Justice Scalia's concerns about private delegation did not carry the day.[196]

The upshot of *Steel Co.* and *Laidlaw* was that the "redressability" prong of standing prevented a very narrow category of suits: those seeking payment exclusively to the Treasury for statutory violations that had ceased by the time the suit was filed. And the precise structural concern identified by Justice Scalia—"turn[ing] over to private citizens the function of enforcing the law"—sounded more in Article II than in Article III.[197]

Later during the same term as *Laidlaw*, the Court confronted a related question: whether Article III erects any barrier to a qui tam action proceeding in federal court.[198] The action in question was filed under the False Claims Act (FCA), which imposes civil liability on "any person" who presents a "false or fraudulent claim for payment" to the United States.[199] An FCA action can take two forms. Either the United States can itself sue to recover the amount it was defrauded (plus treble damages and civil penalties), or a private person, known as a relator, can bring a qui tam action "in the name of the Government."[200] The relator gets to

192. *Id.* at 209 (Scalia, J., dissenting).

193. *Id.* at 188 n.4. (majority opinion)

194. *Id.*

195. *Id.*

196. Justice Anthony Kennedy concurred to say that Article II might separately impose some limits on private enforcement, but that they were beyond the scope of the question presented. *Id.* at 197 (Kennedy, J., concurring).

197. *Id.* at 209 (Scalia, J., dissenting).

198. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768–69, 771 (2000). Qui tam refers to an "[a]ction brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

199. 31 U.S.C. §§ 3729(a), (b)(2).

200. 31 U.S.C. §§ 3730 (a)–(b)(1).

keep a share of the proceeds of the action.[201] Most FCA cases are filed against private parties.[202]

Qui tam actions present a conundrum for standing doctrine. A private relator need not have suffered any prior injury whatsoever in order to sue to recover a bounty. A relator, then, is a plaintiff without an injury in fact, and would seem therefore to lack standing. On the other hand, qui tam suits are deeply rooted in Anglo-American law. "In the first decade of the nation's existence, Congress created a number of qui tam actions."[203] It would be odd to say that Article III renders unconstitutional a kind of "case" that the founders plainly thought permissible.

The Court acknowledged that standing doctrine was not a neat fit. While the *United States* had suffered an injury in fact, that would not do: To satisfy Article III, the injury must belong "to the complaining party."[204] And while the statutory bounty gives a relator an interest in the litigation, "interest unrelated to injury in fact is insufficient to give a plaintiff standing."[205] The Court cut the Gordian knot by invoking "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor."[206] "The FCA," the Court reasoned, "can reasonably be regarded as effecting a partial assignment of the Government's damages claim," which means that injury in fact to the United States could confer standing on a relator.[207] The Court also noted that it was "confirmed in this conclusion by the long tradition of *qui tam*

201. *Vt. Agency*, 529 U.S. at 769–70. The relator must give a copy of the complaint and supporting evidence to the government to give it an opportunity to intervene. *Id.* at 769. The share of the proceeds that the relator takes may depend on whether the government chooses to intervene. *Id.* at 769–70.

202. *See* Press Release, Off. of Pub. Affs., Dep't of Just., False Claims Act Settlements and Judgements Exceed $2 Billion in Fiscal Year 2022 (Feb. 7, 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022 [https://perma.cc/9FAF-9EXC] (summarizing major FCA cases from 2022, almost all of which were against private parties). As it happens, *Vermont Agency* was a suit against a state entity. But the *Vermont Agency* Court held that the FCA did not authorize suits against states after confirming that there was Article III standing. 529 U.S. at 787–88.

203. Sunstein, *supra* note 11, at 175. *See generally* Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 342–43 (1989).

204. *Vt. Agency*, 529 U.S. at 771 (emphasis omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

205. *Id.* at 772.

206. *Id.* at 773.

207. *Id.* at 773–74.

actions in England and the American Colonies."[208] The Court, employing the device of assignment, allowed an entirely uninjured plaintiff to sue.

The Court's next two treatments of standing between private parties were the high-water mark of its pre-*TransUnion* jurisprudence. In *MedImmune, Inc. v. Genentech, Inc.*,[209] MedImmune entered into a patent license agreement with Genentech.[210] Genentech sent MedImmune a letter stating that one of its products infringed the licensed patent.[211] Though MedImmune thought the patent invalid, it did not want to expose itself to an infringement action, so it decided to pay royalties under the license.[212] But MedImmune still wanted to challenge the validity of the patent, so it also filed a declaratory judgment action in federal court.[213]

As the Court framed the case, MedImmune's relevant "injury in fact" for standing purposes was an "enforcement action" by Genentech, the owner of the patent.[214] There was no dispute that, if MedImmune had stopped paying royalties under the license, there would be Article III standing, because Genentech had threatened suit to protect its patent. The problem was that MedImmune itself was "preventing the complained-of injury from occurring" by continuing to pay royalties under the license.[215] In other words, "the continuation of royalty payments [made] what would otherwise be an imminent threat at least remote, if not nonexistent."[216] As a result, MedImmune's "own acts" had "eliminate[d] the imminent threat of harm."[217] The Court found standing nonetheless, on the apparent ground that MedImmune would be injured if it stopped paying royalties.[218]

And then the following term, the Court took *Vermont Agency* (the qui tam case) a large step further. The new case—*Sprint Communications Co. v. APCC Services, Inc.*[219]—involved payments owed by long-distance carriers to payphone operators.[220] Many payphone operators, if they were

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208. *Id.* at 774. In a footnote, the Court left open "the question whether *qui tam* suits violate Article II." *Id.* at 778 n.8. In a separate opinion, Justice Stevens noted that, in his view, the "historical evidence" of qui tam litigation and private prosecution was "sufficient to resolve the Article II question." *Id.* at 801 (Stevens, J., dissenting).

209. 549 U.S. 118 (2007).

210. *Id.* at 121.

211. *Id.*

212. *Id.* at 121–22.

213. *Id.*

214. *Id.* at 128 & n.8.

215. *See id.* at 128 n.8.

216. *Id.* at 128.

217. *Id.*

218. *Id.* at 773–75, 777.

219. 554 U.S. 269 (2008).

220. *Id.* at 271.

owed money by a carrier, would assign their claim against the carrier to "billing and collection firms called 'aggregators.'"[221] Typically, aggregators would collect a bunch of these claims from many payphone operators and then pursue them against carriers through litigation or settlement.[222] According to the assignment agreements, the aggregator would not keep any of the proceeds of their efforts; they "promise[d] to remit to the relevant payphone operator (*i.e.*, the assignor of the claim) any . . . compensation that is recovered."[223] Instead, they would be paid a fee by the payphone operators for their services.[224] That last feature of the arrangement gave rise to a standing problem when a group of aggregators sued long-distance carriers in federal court: because the plaintiff (*i.e.*, the aggregator) would not get any of the compensatory remedy awarded in the lawsuit (because it would be remitted to the payphone operator per the assignment agreement), the lawsuit arguably ran afoul of the third prong of standing doctrine—redressability.

The Court upheld the aggregator plaintiffs' standing.[225] Its opinion was short on doctrine and long on history. The opinion (by Justice Stephen Breyer) spent ten pages (plus an appendix[226]) tracing the history of assignments in English and American law.[227] The Court concluded that "[a]ssignees of a claim, including assignees for collection, have long been permitted to bring suit."[228] And it found "history and precedent 'well nigh conclusive' in respect to the issue before us."[229] After canvassing the history, the Court turned to the carriers' redressability argument, based in current standing doctrine. As noted, the argument was that any award in the litigation could not possibly remedy the plaintiff aggregators' (assigned) injuries, because the money would just go to the payphone operators.[230] The Court's solution was that the obligation to remit was just something that the aggregators would do *after* the litigation.[231] Standing would not be defeated, the Court reasoned, if the plaintiff decided to donate its damages award to charity.[232] So too here.

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221. *Id.*
222. *Id.* at 272.
223. *Id.*
224. *Id.*
225. *Id.* at 286.
226. *Id.* at 298.
227. *Id.* at 275–85.
228. *Id.* at 275.
229. *Id.* at 285 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, U.S. 765, 777 (2000)).
230. *Id.* at 286.
231. *Id.* at 287.
232. *Id.*

Stepping back: In *Sprint*, the Court upheld Article III "standing" even though the plaintiff had not suffered an injury in fact, and even though the remedy awarded by the federal court would be paid entirely to another party not before it.[233] It would be hard to imagine a more complete circumvention of the three-part, plaintiff-focused test. To be clear, the *result* was correct. But the fact that it took a doctrinal Rube Goldberg machine to get there was powerful evidence that something was amiss with the doctrine.

3. SLOUCHING TOWARDS *TRANSUNION*

In 2012, the Court seemed poised to resolve an issue that had haunted its early standing cases about the Fair Housing Act: whether, in a suit between private parties, the violation of a legal right conferred by Congress gives rise to Article III standing. *Havens* seemed to say yes, while *Gladstone* adverted to some outer Article III limit. Specifically, the Court granted certiorari in *First American Financial Corp. v. Edwards*[234] to decide whether a private plaintiff could sue the provider of mortgage services for having a conflict of interest, even though the conflict did not affect the price or quality of the services actually provided to the plaintiff.[235] Congress had authorized a suit for statutory damages in that circumstance.[236] After the oral argument, the Court seemed poised to extend *Lujan*—and in particular its hard constitutional limit on Congress's power to define injuries by statute—to a suit between private parties.[237] The case thus had "the potential to undercut significantly Congress's ability to use private attorneys general."[238] One commentator called it "the sleeper case of the Term."[239]

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233. Chief Justice John Roberts's dissent protested that the Court had "never approved federal-court jurisdiction over a claim where the entire relief requested will run to a party not before the court." *Id.* at 302 (Roberts, C.J., dissenting). Justice Breyer responded that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit." *Id.* at 287 (majority opinion). As examples, Justice Breyer offered trustees suing to benefit trusts, guardians suing for their wards, receivers for receiverships, assignees in bankruptcy, and executors suing to benefit estates. *Id.* at 287–88. Note that these examples are generally private lawsuits.

234. 567 U.S. 756 (2012) (per curiam).

235. Petition for a Writ of Certiorari at i, *First Am. Fin. Corp. v. Edwards*, 567 U.S. 756 (2012) (No. 10-708), 2010 WL 4876485, at *i. *See also* Baude, *supra* note 7, at 209–10.

236. *See* 12 U.S.C. §§ 2607(a), (d)(2).

237. Baude, *supra* note 7, at 210–11 (summarizing argument).

238. Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 58 (2012).

239. Kevin Russell, First American Financial v. Edwards: *Surprising End to a Potentially Important Case*, SCOTUSBLOG, http://www.scotusblog.com/2012/06/first-

But the sleeper never woke. On the last day of the term—the same day the Court decided the blockbuster *NFIB v. Sibelius*[240]—it mysteriously dismissed the writ of certiorari as improvidently granted.[241] As usual, the Court gave no explanation. Given the timing, though, it seems "unlikely that the Court had suddenly discovered a 'vehicle problem'" that made the case unsuitable for deciding the question presented.[242] "Rather," as a number of Court watchers have speculated, "it seems that the Court had some difficulty *answering* the question."[243] That difficulty is a predictable consequence of where the Court's standing doctrine in suits between private parties had arrived: increasingly complex and unmoored from any convincing justification in the separation of powers or any other constitutional principle.

The Court's next forays into the problem were not much more illuminating.[244] In 2015, the Court granted cert in a case about a "people search engine" called Spokeo that contained inaccurate information about an individual named Robins.[245] Robins filed a putative class action, alleging that Spokeo had violated the Fair Credit Reporting Act of 1970

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american-financial-v-edwards-surprising-end-to-a-potentially-important-case/ [https://perma.cc/MTT6-AU4V] (June 28, 2012, 7:00 PM); Karlan, *supra* note 238, at 61 (agreeing).

240. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

241. *First Am. Fin. Corp. v. Edwards*, 567 U.S. 756, 757 (2012).

242. Baude, *supra* note 7, at 211 (quoting Karlan, *supra* note 238, at 62)).

243. *Id. See also* Russell, *supra* note 239 (noting that "if . . . the Court dismissed the case because it could not reach agreement on a workable constitutional test, then revisiting the question may be on hold for some time").

244. The year after the *First American* dismissal as improvidently granted, the Court decided *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013). Nike sued Already, alleging that Already's sneakers violated its trademark. Already filed a declaratory judgment counterclaim, alleging that Nike's trademark was invalid. *Id.* at 88–89. Nike then issued a broad "Covenant Not to Sue" and moved to dismiss its own claims with prejudice. *Id.* But Already wished to continue pursuing its counterclaim of invalidity. *Id.* The question before the Court was whether the covenant not to sue had mooted the counterclaim. The Court held that it did: there was no longer a live trademark dispute, and the voluntary cessation doctrine did not save the case. *Id.* at 90–96. Having lost on that issue, Already raised a few "alternative theories" to "save the case from mootness," including that investors could be scared off and that it "inherently" had standing as a competitor. *Id.* at 96. The Court held that "none of these injuries suffices to support Article III standing." *Id.* That sentence is an arguable exception to the pattern described to this point. But the case is unusual, because no one disputed (and the Court agreed) that "[a]t the outset of this litigation, both parties had standing to pursue their competing claims in court." *Id.* at 91. The Court's discussion of other, backup theories of injury thus unfolded in a narrow context—to determine whether they could overcome the mooting of the initial controversy. As a result, it does not seem a significant exception to the pre-*Thole*/*TransUnion* pattern. In any event, the most it shows is that the Court was drifting in that direction seven years before.

245. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 333 (2016).

(FCRA) (the same statute at issue in *TransUnion*).[246] As relevant, FCRA requires "consumer reporting agenc[ies]" to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports, and to provide certain notices to providers and users of consumer reports.[247] The Ninth Circuit found standing.[248] According to the Ninth Circuit, Robins had alleged that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and "Robins's personal interests in the handling of his credit information are individualized rather than collective."[249]

The Supreme Court vacated without deciding whether Robins had standing.[250] It held that "the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization," which are both requirements of Article III injury, and it remanded for further consideration.[251] The Court equivocated on the role of Congress in defining injuries. On the one hand, the Court said that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements," so "its judgment" is "instructive and important."[252] On the other hand, the Court said that "Article III standing requires a concrete injury even in the context of a statutory violation."[253] There was thus a "fundamental tension" at the heart of the Court's opinion in *Spokeo*, which was not helped by the opaque and "mysterious" concept of "concreteness" invoked by the Court.[254] This tension was on display in the Ninth Circuit's opinion on remand, which ultimately upheld standing again.[255] The court of appeals, in an opinion by Judge Diarmuid O'Scannlain, found that FCRA was intended to "protect consumers' (like Robins's) concrete interest in accurate credit reporting about themselves," and that the statutory violations alleged by Robins posed a "material risk of harm" to that concrete interest.[256]

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246. *Id.* at 336.

247. 15 U.S.C. §§ 1681e(b), (d).

248. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 414 (9th Cir. 2014), *vacated and remanded*, 578 U.S. 330 (2016).

249. *Id.* at 413.

250. *Spokeo*, 578 U.S. at 343. Justice Thomas concurred, proposing for the first time that standing doctrine should apply differently to public and private rights. *Id.* (Thomas, J., concurring). This theory is discussed in detail *infra* Section III.C.

251. *Spokeo*, 578 U.S. at 342–43.

252. *Id.* at 341.

253. *Id.*

254. Baude, *supra* note 7, at 214–15.

255. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112–13, 1118 (9th Cir. 2017).

256. *Id.* at 1115–17.

C. Some Juxtapositions

That is where things stood when the Court took up *Thole* and *TransUnion*. It is worth pausing for a moment to appreciate the extraordinary breadth of the standing theories that the Court adopted in line of cases from *Trafficante* through *Sprint*. Indeed, though the Court nominally transposed its standing test from public law suits to suits between private parties, it was more generous in recognizing standing in the latter context. This becomes clear when one considers a few juxtapositions between private-party suits and suits against government officers.

1) In *MedImmune, Inc. v. Genentech, Inc.*, a suit between private parties, a plaintiff sought a declaratory judgment that the patent it had licensed was invalid—even though it was paying royalties under the license, had no intention of ceasing payments, and was therefore not infringing the patent.[257] The Court held that the licensee had suffered an adequate injury in fact for standing even while conceding that the "threat" of an infringement suit was "remote, if not nonexistent."[258] Contrast *Clapper v. Amnesty International USA*,[259] a suit against several federal government officials that came a few years later.[260] There, the plaintiffs alleged that they communicated with people that were likely targets of government surveillance, and that the threat of surveillance had injured them in a variety of ways.[261] The Court dismissed the case, holding that the threatened injury was too remote: an "objectively reasonable likelihood standard," the Court wrote, "is inconsistent with our requirement that 'threatened injury must be *certainly impending* to constitute injury in fact.'"[262]

The private suit went forward even though the relevant "threat" was "remote, if not nonexistent";[263] the government suit was dismissed because the "threatened injury" was not "certainly impending."[264]

2) In *Laidlaw*, a suit between private parties, the plaintiffs sought to fine the defendant for unlawful discharges into a river.[265] The district court had found that these discharges "did not result in any health risk or

257. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 121–22 (2007).

258. *Id.* at 128 & n.8, 133–35, 137.

259. 568 U.S. 398 (2013).

260. *Id.*

261. *See id.* at 406–07.

262. *Id.* at 410 (emphasis added) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

263. *MedImmune*, 549 U.S. at 128.

264. *Clapper*, 568 U.S. at 410.

265. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 177 (2000).

environmental harm," and the Supreme Court did not question that holding.[266] But it held that the plaintiffs had standing nonetheless, because they wanted to use the river for recreation and had "*reasonable concerns* about the effects of those discharges."[267] Contrast *Laird v. Tatum*.[268] The plaintiffs there challenged an Army surveillance program collecting "information about public activities that were thought to have at least some potential for civil disorder."[269] The plaintiffs alleged that the existence of this Army program had "a 'chilling' effect on the exercise of their First Amendment rights."[270] The Court dismissed for lack of standing.[271] "Allegations of subjective 'chill,'" the Court explained, "are not an adequate substitute for a claim of specific present objective harm."[272] In a similar vein, the Court held in *City of Los Angeles v. Lyons*[273] that a plaintiff who had been subjected to an unlawful chokehold did not necessarily have standing to seek the forward-looking relief of an injunction against government defendants.[274] Though the plaintiff "feared he would be choked in any future encounter with the police," the Court opined that "[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."[275] Put another way, the "emotional consequences of a prior act simply are not a sufficient basis" for standing to seek an injunction.[276] Likewise, the *Clapper* Court rejected the plaintiffs' "contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm."[277]

The private suit went forward based on "reasonable concerns" about unlawful discharges, even in the absence of "any health risk or environmental harm";[278] a series of government suits were dismissed

266. *Id.* at 181 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 956 F. Supp. 588, 602 (D.S.C. 1997)).

267. *Id.* at 183–84 (emphasis added).

268. 408 U.S. 1 (1972).

269. *Id.* at 6.

270. *Id.* at 3.

271. *Id.* at 15.

272. *Id.* at 13–14.

273. 461 U.S. 95 (1983).

274. *Id.* at 107–08.

275. *Id.* at 107 n.8.

276. *Id.*

277. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

278. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181, 183 (2000) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 956 F. Supp. 588, 602 (D.S.C. 1997)).

because "subjective apprehensions"[279] and "reasonable reaction[s]"[280] were insufficient without the "*reality*" of injury.[281]

3) In *Havens*, a suit between private parties, a "tester" plaintiff was misled about the availability of apartments in a housing complex.[282] She had no "intent to rent or purchase an apartment"; she "pose[d] as [a] renter[] or purchaser[] for the purpose of collecting evidence."[283] Indeed, she may have been "fully expecting that [s]he would receive false information."[284] The Court upheld that the plaintiff had been injured in fact, because the defendants had violated her "legal right to truthful information about available housing."[285] Contrast *United States v. Richardson*.[286] In that case, the plaintiff alleged that he was deprived of "information concerning detailed expenditures of the Central Intelligence Agency,"[287] which the plaintiff claimed violated the constitutional requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[288] The plaintiff argued that "without detailed information on CIA expenditures—and hence its activities—he cannot intelligently follow the actions of Congress or the Executive, nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office."[289] The Court held that this claimed information injury was a "generalized grievance" and dismissed for lack of standing.[290]

In a private suit, the deprivation of "truthful information about available housing" was deemed to be a "specific injury," even though the plaintiff was not in fact interested in housing and expected to be lied to;[291] in the government suit, the deprivation of information about CIA

279. *Lyons*, 461 U.S. at 107 n.8.
280. *Clapper*, 568 U.S. at 416.
281. *Lyons*, 461 U.S. at 107 n.8; *Clapper*, 568 U.S. at 416.
282. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).
283. *Id.* at 373.
284. *Id.* at 374.
285. *Id.* at 373–74.
286. 418 U.S. 166 (1974).
287. *Id.* at 168.
288. *Id.* at 167–68 (quoting U.S. CONST. art. I, § 9, cl. 7).
289. *Id.* at 176.
290. *Id.* at 176–77, 180. The Court subsequently recognized informational standing in a suit against the government. *FEC v. Akins*, 524 U.S. 11, 21–25 (1998). In *Akins*, the existence of a *statutory* entitlement to information seems to have overcome whatever structural concerns the Court otherwise had about entering relief against the FEC. *Id.* at 21–22.
291. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982).

expenditures—allegedly in violation of the Constitution—was deemed to be a "generalized grievance" that could not support an Article III case.[292]

4) A final note: In *Vermont Agency*, the Court allowed an action to proceed even though the plaintiff himself had not been injured in fact in any manner.[293] Then in *Sprint*, the Court allowed an uninjured plaintiff to proceed even though the Court's remedy would not benefit the plaintiff.[294] In both cases, the Court relied on the notion that, although the plaintiff was uninjured, an injured party had assigned its claim to the plaintiff. And both cases had a distinct air of fiction. Reading them, one feels that the Court had jerry-rigged a reconciliation between standing doctrine on the one hand and practices whose historical pedigree was too deep to question on the other. It is notable, though, that the Court has never allowed a similar fiction in suits seeking equitable relief against a government entity. The fiction has served as an escape-hatch out of standing doctrine in suits against private parties.[295]

Taken together, these cases display a notable pattern: The Court has been more generous in recognizing standing in suits against private defendants. That is not to say, of course, that all of these cases are irreconcilable on their own terms. Lawyerly distinctions can be (and have been) drawn to support the holdings. On the whole, though, they suggest powerfully that the Court has evaluated claims of standing in private suits in a more generous mood. Each time a lawyerly distinction had to be drawn, the distinction favored standing as long as the defendant was a private party. Perhaps the best evidence of this generosity is the aggregate fact stated above in the Introduction: until 2020, the Supreme Court had never dismissed for lack of Article III standing a private party's claim against another private party on the ground that the alleged injury was inadequate.[296] Of course, the Court has routinely dismissed cases against the government for lack of standing.

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292. *Richardson*, 418 U.S. at 176–77.

293. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000).

294. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 271 (2008).

295. This sentence requires a narrow qualification. Though qui tam suits are generally against private-party defendants, the Court has read the False Claims Act to authorize suits against municipalities. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003). These suits, though, seek monetary recovery for defrauding the federal government and do not generally present the same structural concerns as a suit against other state or federal executive officials seeking equitable relief.

296. To verify this claim, my research assistants created a spreadsheet of Article III standing cases decided by the Supreme Court. They first assembled this list of cases by using Westlaw Key 170Ak103.1 through 170Ak103.5, which covers "Standing in General" (and various subcategories). Then they supplemented that initial list with cases from targeted Westlaw searches and secondary sources. This yielded over 250 cases. For each of the cases, they coded the identity of the parties (*i.e.*, governmental, including

The path to reconciling the tensions in the Court's standing cases described above, then, is not to insist that "injury in fact" has a fixed, transsubstantive content that just needs to be discerned and purified. Rather, the phrase has been a chameleon, its meaning colored by the underlying structural context.

D. Takeaways

Before turning to *Thole* and *TransUnion*, a few things about the story just told:

First, standing developed in the public law context. Consider the familiar canon of standing law one encounters in (pre-*TransUnion*) Federal Courts casebooks. All are suits seeking equitable relief against the government: *Muskrat v. United States*,[297] *Massachusetts v. Mellon*,[298] *Coleman v. Miller*,[299] *Colegrove v. Green*,[300] *Doremus v. Board of Education*,[301] *Joint Anti-Fascist Refugee Committee v. McGrath*,[302] *Flast v. Cohen*,[303] *Data Processing*, *Warth v. Seldin*,[304] *Linda R.S. v. Richard D.*,[305] *Allen v. Wright*,[306] *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[307] *Sierra Club v. Morton*,[308] and *Lujan*, all the way up through *Clapper* and *California v. Texas*[309] in more modern times.[310] Indeed, every principal case in the

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state, municipal, and legislative officials/bodies, or private), whether the relief sought was equitable (including declaratory judgments or vacatur, in administrative law cases), and how the case was resolved. The arguable exceptions to the broad pattern described above the line are discussed in either the text or notes above. I would also note that I first conceived the idea for this Article in 2011. Since then, as a law clerk, then a litigator, and now an academic, I have had my eyes open for any exceptions ever since then. I have not encountered one.

297. 219 U.S. 346 (1911).

298. 262 U.S. 447 (1923).

299. 307 U.S. 433 (1939).

300. 328 U.S. 549 (1946).

301. *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429 (1952).

302. 341 U.S. 123 (1951).

303. 392 U.S. 83 (1968).

304. 422 U.S. 490 (1975).

305. 410 U.S. 614 (1973).

306. 468 U.S. 737 (1984).

307. 454 U.S. 464 (1982).

308. 405 U.S. 727 (1972).

309. 141 S. Ct. 2104 (2021).

310. One early exception to this trend is a set of cases about the constitutionality of declaratory judgments, which sometimes (though not always) involved private parties as defendants. *See, e.g.*, *Willing v. Chi. Auditorium Ass'n*, 277 U.S. 274, 289 (1928) (holding, before the passage of the Declaratory Judgment Act, that to grant a "declaratory judgment" is "beyond the power conferred upon the federal judiciary"); *Aetna Life Ins.*

"Plaintiffs' Standing" section of the Hart & Wechsler casebook is a suit against the government.[311] Putting aside that canonizing casebook, a meaningful majority (roughly eighty percent) of all the standing cases decided by the Supreme Court had a government official as a defendant.[312] The doctrine of standing was forged in the crucible of public law at the Supreme Court.[313]

Co. v. Haworth, 300 U.S. 227, 239–41 (1937) (upholding the Declaratory Judgment Act). Those cases involved a question different from a typical standing case: whether declaratory relief is consistent with the "judicial power" at all, even assuming the plaintiff is injured in some sense. *See, e.g.*, *Gordon v. United States*, 117 U.S. 697, 702 (1864) ("The award of execution is . . . an essential part of every judgment passed by a court exercising judicial power.").

Tara Grove has suggested that the Court "applied the same principles" as *Fairchild* to a "purely private dispute" in *L. Singer & Sons v. Union Pacific Railroad Co.*, 311 U.S. 295 (1940). *See* Grove, *supra* note 34, at 803. *Singer* does not need to be read as a constitutional decision. The plaintiff sold food at a market in Kansas City and sued under the Transportation Act of 1920 to prevent an extension of railroad tracks to a rival market. *Singer*, 311 U.S. at 297–98. The statute "provide[d] that suit for an injunction may be instituted" by various "public authorities" and by "any 'party in interest.'" *Id.* at 303; *id.* at 297 n.1 (quoting the Transportation Act, 1920, Pub. L. 66-152, § 402, 41 Stat. 456, 476–78 (1920)). The Court, focusing on congressional intent, held that this cause of action did not extend to any party that suffered an indirect competitive harm: "We cannot think *Congress* supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injunction against a carrier seeking only to serve a competing market . . . ." *Id.* at 304 (emphasis added). *See also id.* at 305 (opinion of Frankfurter, J.) (explaining that resolution of the case "depends on the scheme of enforcement that Congress has devised for the Act"). The Court did not say that Congress *could* not, as a constitutional matter, confer such a cause of action if it wished, only that Congress *had* not. Indeed, the injury alleged (lost business from increased competition) would plainly be sufficient under current standing doctrine. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970). And if there were an Article II problem lurking (rather than an Article III problem), it is unclear how the Court could have concluded that it is acceptable for a *state* entity to bring suit to pursue the "general or common interest." *Singer*, 311 U.S. at 304. After all, a state agency is no more part of the federal executive branch than a private plaintiff. *See generally* Litman, *supra* note 40, at 1337–54. In sum, the *Singer* case exemplifies how the standing analysis *should* work in private-party cases: it should simply ask whether Congress (or a state) has created a cause of action. *See infra* Section III.A.

311. HART & WECHSLER, *supra* note 5, at xi (listing *Fairchild v. Hughes*, *Allen v. Wright*, and *Lujan v. Defenders of Wildlife* as principal cases).

312. This percentage was calculated using the spreadsheet described *supra* note 296.

313. This is not to suggest that the imbalance in standing cases in the *Supreme* Court implies that standing issues arise in a similar proportion in lower courts. The predominance of standing issues in cases against the government in the Supreme Court could simply reflect that the Court is more likely to grant certiorari in cases challenging the legality of government action than in cases between private parties. The point is that

Second, when the Court explained the structural significance of standing doctrine, it was sensitive to that context. Again and again, the Court has emphasized that one of the basic functions of standing doctrine is to limit the occasions for judicial supervision of the political branches. In *Massachusetts v. Mellon*, for instance, the Court said that the requirement of a "judicial controversy" prevents the Court from "assum[ing] a position of authority *over the governmental acts of another and coequal department*"—not over private parties.[314] This emphasis continued through the articulation of the injury-in-fact test in the 1970s. As noted, though Justice Douglas first imported the phrase "injury in fact" in *Data Processing*,[315] it was Justice Powell who was the "key architect" of Article III modern standing doctrine.[316] In his 1974 concurrence in *United States v. Richardson*,[317] which "set the stage" for developments to come,[318] he was quite explicit about standing's structural function. He tied standing doctrine to the imperative to "be ever mindful of the contradictions that would arise if a democracy were to permit *general oversight of the elected branches of government* by a nonrepresentative, and in large measure insulated, judicial branch."[319] Justice Scalia sounded the same theme in his majority opinion in *Lujan*. Expatiating on the "separation-of-powers significance" of "the concrete injury requirement," he wrote: to weaken standing requirements "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,' and to become 'virtually continuing monitors of the wisdom

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the doctrine predominantly developed in the Supreme Court in a particular context and reflects the structural concerns prompted by that context.

314. 262 U.S. 447, 488–89 (1923) (emphasis added). *See also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam). This reticence had deep roots. MASHAW, *supra* note 4, at 307 ("Judicial review of administrative action has always been understood as fraught with separation-of-powers issues.").

315. *See supra* notes 116–20.

316. Magill, *supra* note 33, at 1173.

317. 418 U.S. 166, 180 (1974) (Powell, J., concurring).

318. Magill, *supra* note 33, at 1173.

319. *Richardson*, 418 U.S. at 188 (Powell, J., concurring) (emphasis added); *id.* at 189 (Powell, J., concurring) ("Unrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government."). The Court has extended this concern to oversight of the activities of *state* governments. *See O'Shea v. Littleton*, 414 U.S. 488, 499–502 (1974); *infra* notes 521–23 and accompanying text.

and soundness of Executive action.'"[320] Again, one could easily multiply examples, going all the way back to *Marbury* itself.[321]

Academic commentary from standing's early days confirms this preoccupation. Indeed, the apparent origin of the "injury-in-fact" test is an article by Kenneth Culp Davis revealingly titled "Standing to Challenge Government Action."[322] Consider also how Louis Jaffe began his two-part article on standing in 1961: "The law of standing raises acute questions concerning the role of judicial review, or, more broadly, *judicial control of public officers*."[323] For Alexander Bickel, "standing" was a limit on "the judiciary's power to construe and enforce the Constitution against the other departments."[324] Henry Monaghan described standing as a "vehicle[] for avoiding constitutional questions," reflecting "ambivalence about . . . frequent judicial intervention in the political process."[325] The consensus assumption of these leading early scholars of justiciability is striking: the doctrine of standing served primarily as a tool to limit judicial power in confrontations with the other branches, not to limit the sorts of cases that Congress (or the states) can authorize against private parties.

Third, standing's structural function is reflected in the pattern described in this Part. For many years, the Court was notably more generous when assessing standing in the context of suits between private parties, as compared to suits against the government.[326] The Court seems to have intuited that a suit against a private party implicates different—and far more tenuous—structural concerns. Robert Post has written in the First Amendment context that "the Court's instincts have proved truer than its doctrine, for underlying its actual judgments there is discernible

320. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (first quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923); and then quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)).

321. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145–46 (2011); *California v. Texas*, 141 S. Ct. 2104, 2116 (2021). The Court's newest member articulated the value of standing in similar terms at a recent oral argument. Transcript of Oral Argument at 72–74, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-506), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-506_k53l.pdf [https://perma.cc/95M4-Q3U7].

322. Sunstein, *supra* note 45, at 349. *See* Kenneth Culp Davis, *Standing To Challenge Governmental Action*, 39 MINN L. REV. 353, 365 (1955).

323. Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1265 (1961) (emphasis added).

324. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

325. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–66 (1973).

326. *See supra* Section I.C.

a more or less defensible pattern of decision."[327] The same could be said of this corner of standing—suits between private parties—in the first fifty years of modern standing doctrine.

II. THE WRONG TURN: *THOLE* AND *TRANSUNION*

The Court, then, had reached an equilibrium when presented with standing questions against private parties: the nominal doctrine was the same, but it was applied in a context-sensitive manner that allowed the Court's sound structural instincts to prevail. This equilibrium was somewhat unstable, however, especially as the Court's composition changed: There was a lurking danger that the Court would transplant its standing precedent root and branch to a context—suits between private parties—for which it was neither designed nor suited. Put differently, there was a danger that "words" would prevail over "things."[328]

That danger was realized in the last few terms.

A. The Decisions

1. *THOLE V. U.S. BANK*

Thole v. U.S. Bank was a suit under Employee Retirement Income Security Act of 1974 (ERISA).[329] ERISA protects "the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."[330] An ERISA fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[331] The fiduciary must act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."[332] Fiduciaries who breach their duties are "personally liable to make good to such plan any losses to the plan

327. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1833 (1987). This point echoes the method of doctrinal Realism described *supra* note 40.

328. *Cf.* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899) ("We must think things not words . . . .").

329. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020).

330. 29 U.S.C. § 1001(b).

331. 29 U.S.C. § 1104(a)(1).

332. 29 U.S.C. § 1104(a)(1)(A).

resulting from each such breach."[333] ERISA authorizes a "civil action" by either the Secretary of Labor or by a "participant" or "beneficiary" against fiduciaries who breach their duties.[334]

The *Thole* plaintiffs were participants in an ERISA plan.[335] They alleged the defendants, the plan administrators, had breached their fiduciary duties by investing in their own mutual funds and by investing plan assets exclusively in equities,[336] resulting in nearly $750 million in losses to the plan.[337] And they sued under ERISA's express causes of action, seeking to represent a Rule 23 class.[338]

A closely divided Court held that it would be unconstitutional under Article III for a federal court to adjudicate the case. Justice Kavanaugh, writing for the majority, emphasized the fact that the relevant ERISA plan was a defined-benefit plan,[339] meaning an "employee, upon retirement, is entitled to a fixed periodic payment" from a "general pool of assets."[340] In the Court's view, because the plaintiffs (as plan participants) would receive the same monthly payment from the plan regardless of the outcome of the lawsuit, they had "no concrete stake in th[e] lawsuit" and thus lacked Article III standing.[341] It did not matter that Congress had specifically authorized the suit; the existence of a statutory cause of action for the plaintiffs, the Court explained, "does not affect the Article III standing analysis."[342]

The Court parried a few counterarguments. First, the plaintiffs analogized the case to trust law, which would allow the beneficiaries of a trust to sue a trustee for breach of fiduciary duty.[343] The Court responded that a "defined-benefit plan is more in the nature of a contract," because "benefits paid . . . are not tied to the value of the plan."[344] Hence the "trust-law analogy" did "not fit."[345] Second, the Court found that the claims in question had not been "legally or

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333. 29 U.S.C. § 1109(a).

334. 29 U.S.C. §§ 1132(a)(2), (3). ERISA also authorizes suits by other fiduciaries. *Id.*

335. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020).

336. *Thole v. U.S. Bank, Nat'l Ass'n*, 873 F.3d 617, 623–24 (8th Cir. 2017), *aff'd*, 140 S. Ct. 1615 (2020).

337. *Thole*, 640 U.S. at 1618–19; *id.* at 1624 (Sotomayor, J., dissenting).

338. *Id.* at 1618–19 (majority opinion).

339. *Id.* at 1618.

340. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (quoting *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993)).

341. *Thole*, 140 S. Ct. at 1619.

342. *Id.* at 1620.

343. *Id.* at 1619–20.

344. *Id.* at 1620.

345. *Id.*

contractually assigned to [the plaintiffs]."[346] Third, the Court held that the Department of Labor would have the authority and motive to "pursue fiduciary misconduct" in the absence of private enforcement.[347] Finally, the Court rejected the argument that mismanagement of the plan led to a higher risk that benefits would not be paid. Though the plaintiffs had alleged that the plan was underfunded for a time, the "bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."[348]

The Court's brisk, four-and-a-half-page opinion[349] did not appreciate that it was making a significant break with the Court's prior practice in private-party cases, and it did not attempt to justify the outcome in terms of the underlying structural values of standing doctrine.

2. *TRANSUNION LLC V. RAMIREZ*

TransUnion LLC v. Ramirez, decided the following term, would attempt a fuller justification. The case, like *Spokeo*, involved FCRA. TransUnion is a major credit reporting agency.[350] It compiles reports about consumers for banks, landlords, car dealerships and others so that they can assess a potential customer's creditworthiness.[351] TransUnion has a product called "OFAC Name Screen Alert."[352] OFAC refers to the Office of Foreign Assets Control in the Treasury Department. OFAC keeps a list of "specially designated nationals" who have committed serious crimes, like terrorism.[353] TransUnion would compare the first and last names of individuals with credit reports to the OFAC list.[354] If the names were similar, TransUnion would include an OFAC alert in the individual's file, which would be visible to someone who requested a credit report and purchased the OFAC product.[355] TransUnion did not compare birthdays, social security numbers, middle initials, or any other

346. *Id.* (citing *Sprint* and *Vermont Agency* in comparison).

347. *Id.* at 1621.

348. *Id.* at 1622. Justice Thomas concurred, joined by Justice Neil Gorsuch. *Id.* at 1622 (Thomas, J., concurring). He employed the distinction that he had developed in a separate opinion in *Spokeo* between "public" rights and "private" rights, *id.* at 1623 (Thomas, J., concurring), which is taken up below. *See infra* Section III.C.

349. *Thole*, 140 S. Ct. 1618–22. Granted, four and a half pages in the *Supreme Court Reporter*, not the *U.S. Reports* (where it has not been published yet).

350. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2201 (2021).

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

available information to confirm an OFAC match.[356] As a result, the OFAC alerts produced a large number of false positives.[357]

The named plaintiff in *TransUnion* was Sergio Ramirez.[358] He went with his wife and father-in-law to buy a car at a Nissan dealership.[359] The salesman ran a credit check, which included a (false) OFAC alert.[360] The salesman told Ramirez he would not sell him a car because he was on a "terrorist list."[361] Ramirez's wife had to buy the car in her name.[362] Understandably disturbed by this incident, Ramirez requested and received a copy of his credit report from TransUnion.[363] The report did not include anything about the OFAC alert.[364] Later, TransUnion sent a "courtesy" letter noting the OFAC match.[365] The letter did not include a description of Ramirez's rights or any information on how he might dispute the OFAC designation.[366]

Ramirez sued TransUnion, alleging three violations of FCRA. First, he alleged that TransUnion had failed to "follow reasonable procedures to ensure the accuracy" of credit reports, as required by the statute.[367] Second, he alleged that TransUnion had failed to provide "*all* the information in his credit file when requested."[368] Third, he alleged that TransUnion had failed to provide a "summary of his rights" along with the courtesy letter.[369] FCRA's cause of action provides that "[a]ny person who willfully fails to comply with any requirement imposed [by FCRA] with respect to any consumer is liable to that consumer" for actual damages, statutory damages, punitive damages ("as the court may allow"), and attorney's fees.[370] Ramirez sued under that provision, on behalf of himself and a class of individuals who were also falsely labeled an OFAC match and requested a copy of their credit reports during a

356. *See id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.* at 2216 (Thomas, J., dissenting).
366. *Id.* (Thomas J., dissenting).
367. *Id.* at 2202 (majority opinion); 15 U.S.C. § 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.").
368. *TransUnion*, 141 S. Ct at 2202; 15 U.S.C. § 1681g(a)(1).
369. *TransUnion*, 141 S. Ct at 2202; 15 U.S.C. § 1681g(c).
370. 15 U.S.C. § 1681n(a).

seven-month period in 2011.[371] The district court certified the class and held a trial.[372] A jury awarded nearly $1,000 in statutory damages and about $6,000 in punitive damages to each class member.[373] The Ninth Circuit mostly affirmed, though it reduced the punitive damages award to about $4,000 per class member, setting the total award at about $40 million.[374]

The Supreme Court granted certiorari and reversed in part, with Justice Kavanaugh again writing for the five-justice majority. (Justice Thomas wrote a dissent, joined by Justices Breyer, Elena Kagan, and Sonia Sotomayor.[375]) The Court drew a distinction between two types of class members. For 1,853 class members, the parties stipulated that TransUnion had sent a credit report to a third-party business during a seven-month period in 2011.[376] For the remaining 6,332 class members, a credit report had been sent directly to the consumer when requested, but *not* to a third party during that same seven-month period.[377] The Court held that only the first category of plaintiffs had standing to challenge whether TransUnion had followed "reasonable procedures" to assure the accuracy of their credit reports.[378]

The Court reasoned that the injury stemming from dissemination "bears a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation."[379] As a result, the 1,853 class members whose credit reports were sent to third parties "suffered a concrete harm that qualifies as an injury in fact."[380] But the other 6,332 class members were out of luck. The Court explained that "[p]ublication is 'essential to liability' in a suit for defamation."[381] In the absence of a historical analog, the Court held that the "mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm."[382] The plaintiffs had argued that these

371. *TransUnion*, 141 S. Ct. at 2202.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* at 2214 (Thomas, J., dissenting). Justice Kagan wrote an additional dissent (joined by Justice Breyer and Justice Sotomayor) "differ[ing] with Justice Thomas on just one matter." *See id.* at 2225 (Kagan, J., dissenting).

376. *Id.* at 2197 (majority opinion).

377. *Id.* at 2200.

378. *Id.*

379. *Id.* at 2208 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

380. *Id.* at 2209.

381. *Id.* (quoting RESTATEMENT (FIRST) OF TORTS § 577 cmt. a (AM. L. INST. 1938)).

382. *Id.* at 2210.

class members faced at least a risk of future harm.[383] But the Court held that, while a risk of future harm may be sufficient to seek injunctive relief, it "cannot qualify as a concrete harm" in a suit for damages.[384]

The plaintiffs' other claims were that TransUnion had omitted the OFAC match from their credit reports, and then failed to include a summary of plaintiffs' rights when it separately mailed about the OFAC match.[385] The Court, quite uncharitably (and dubiously), called these "formatting errors."[386] And it held that "the format of TransUnion's mailings" did not cause the plaintiffs harm "with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[387] The United States had argued, as an amicus, that the plaintiffs had suffered an informational injury by the FCRA violations, but again the Court rejected this, suggesting that the plaintiffs had not been deprived of any information, but rather only "received it *in the wrong format*."[388] In other words, because all the information was eventually made it to the plaintiffs—though in separate mailings and not in the manner prescribed by FCRA—there was no concrete harm to any plaintiff but Ramirez.[389]

As noted above, *Spokeo* had sent a mixed message about whether the violation of a statute could alone give rise to a concrete injury. *TransUnion* answered no. The conceptual heart of the opinion is the following sentence: "[U]nder Article III, an injury in law is not an injury in fact."[390] Justice Thomas rightly seized on this statement in his dissent. "Never before has this Court declared that legal injury is *inherently* insufficient to support standing."[391] Indeed, it had said the opposite in *Havens*.[392]

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383. *Id.*

384. *Id.* 2210–11. For an in-depth analysis of how the risk of future harm should factor into standing doctrine, see Bradley & Young, *supra* note 46.

385. *TransUnion*, 141 S. Ct. at 2213.

386. *Id.* at 2200.

387. *Id.* at 2213.

388. *Id.* at 2214.

389. *Id.* On Ramirez himself, the Court affirmed the lower courts without explaining why his situation was different. *Id.* at 2213 n.8.

390. *Id.* at 2205. This idea traces at least to the oral argument in *First American*, where the Chief Justice said that he "underst[ood]" injury-in-fact "to be in contradistinction to injury-in-law." Transcript of Oral Argument at 32, *First Am. Fin. Corp. v. Edwards*, 567 U.S. 756 (2012) (No. 10-708), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-708.pdf [https://perma.cc/2QLA-QM8V]. *See* Karlan, *supra* note 238, at 60 ("The distinction the Chief Justice drew—injury-in-fact versus injury-in-law—was novel.").

391. *TransUnion*, 141 S. Ct. at 2221 (Thomas, J., dissenting).

392. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

"In the name of protecting the separation of powers," Justice Thomas wrote, "this Court has relieved the legislature of its power to create and define rights."[393] Justice Kagan sounded a similar theme in her dissent.[394] This Article gives Justice Thomas's and Justice Kagan's charge a little more specificity: standing, a doctrine born of the felt need to limit the judicial power in confrontation with other branches of government, had been used to disable the other branches to define the kinds of rights that may be enforced against private parties in federal court.

Which prompts the question: Why did standing finally jump the tracks in *Thole* and *TransUnion* to this new context? One plausible answer has to do with the procedural elephant in the room: Rule 23.[395] None of the cases against private defendants discussed above in Part I prior to *First American* and *Spokeo* was a class action. Both *Thole* and *TransUnion*, on the other hand, were class actions. It is no secret that the Court in recent decades has been "deeply hostile to aggregate litigation (particularly lawyer-driven small-claims litigation) that nonetheless involves aggregate claims that would result in substantial money damages."[396] And that hostility was probably aggravated by the fact that FCRA authorized statutory damages unconnected to actual harm, that could mount very quickly when aggregated through Rule 23.[397]

These policy concerns are not totally groundless. Aggregating statutory penalties can quickly add up to ruinous damages awards. Justice Ruth Bader Ginsburg once fretted in a dissent that "[w]hen representative plaintiffs seek statutory damages, . . . a class action poses the risk of massive liability unmoored to actual injury."[398] And she asked at the oral argument in *Spokeo*—another class action seeking statutory penalties—whether there might be some mechanism to deny class certification.[399] But standing law is too blunt and powerful a weapon to pursue these kinds

393. *Id.* (Thomas, J., dissenting).

394. *See id.* at 2225 (Kagan, J., dissenting).

395. Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1819 (2016).

396. *Id.* at 1819–20.

397. *See id.* at 1819. Skepticism of lawyer-driven class actions is one manifestation of a broader trend, tracing to the 1980s, of gumming up the machinery of private enforcement through judicial decisions on procedural issues like pleading, class certification, and fee awards. *See generally* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

398. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

399. Transcript of Oral Argument at 27, *Spokeo, Inc. v. Robins*, 575 U.S. 330 (2016) (No. 13-1339), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/13-1339_j5fl.pdf [https://perma.cc/6ZV5-4WDG].

of policy goals—too blunt because standing rules apply to individual and class actions, and too powerful because resting on Article III disables a legislative override.[400] Indeed, the fact that standing's malleable requirements have, at times, been put in the service of contestable policy ends is the reason that it so frequently elicits charges of Lochnerism.[401]

B. TransUnion*'s Empty Core*

The *TransUnion* opinion began in a familiar place: "The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'"[402] Let's take *TransUnion* on its own terms. What separation-of-powers value does standing serve in a suit against a private defendant?

After summarizing standing doctrine, here's how the *TransUnion* Court described standing's separation-of-powers function:

> Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only "the rights of individuals," *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 2 L.Ed. 60 (1803), and that federal courts exercise "their proper function in a limited and separated government," Roberts, Article III Limits on Statutory Standing, 42 Duke L. J. 1219, 1224 (1993). Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts

400. *See* BURBANK & FARHANG, *supra* note 397, at 234.

401. Beske, *supra* note 13, at 768–73; Sunstein, *supra* note 11, at 187; *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring); Baude, *supra* note 7, at 224. Richard Fallon suggested another possible explanation of *Thole* and *TransUnion* to me: they are utilizing Article III as a vehicle for giving effect to the "gravitational force" of other constitutional principles (to use Randy Barnett's phrase). *Cf.* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 423 n.37 (2013) (describing "the influence of originalist interpretation on even nonoriginalist doctrinal construction"). Carlos M. Vázquez, *Converse-*Osborn*: State Sovereign Immunity, Standing, and the Dog-Wagging Effect of Article III*, 99 NOTRE DAME L. REV. 717, 719 (2023) (citing *TransUnion* as an "example of jurisdictional doctrines operating as a limit on Congress' substantive legislative power"). As explained below, Article III is not well-suited to implementing other constitutional values. *See infra* Section II.C. And more broadly, it betrays the ideal of judicial candor to smuggle constitutional innovations through open-ended and undertheorized provisions like Article III when the same innovations cannot be achieved directly. *See generally* Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265 (2017). *Cf.* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2149 & n.193 (2015).

402. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

> do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions. As Madison explained in Philadelphia, federal courts instead decide only matters "of a Judiciary Nature." 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966).[403]

The first thing that leaps ups from this paragraph is that every cited source comes from the context of a suit against the government. *Marbury*, of course, was a suit against an executive official.[404] The full context of the Court's quote is: "The province of the court is, solely, to decide on the rights of individuals, *not to enquire how the executive, or executive officers, perform duties in which they have a discretion*."[405] The "Roberts" article was written by the chief justice while in private practice, and it was a defense of the Court's decision in *Lujan*.[406] The article was keyed to that context; without standing requirements, it argued, courts would be transformed "into ombudsmen of the administrative bureaucracy, a role for which they are ill-suited both institutionally and as a matter of democratic theory."[407] Again, *TransUnion* did not present that particular danger; no avatar of the "administrative bureaucracy" was a party. As for the Madison quotation, it too was limited: "The right of *expounding the Constitution* in cases not of this nature ought not to be given to that Department."[408] The Court was not "expounding the Constitution" in *TransUnion* (except, of course, by invoking Article III to prevent the case from going forward at all).

The Court does slip in a reference to private parties in that paragraph: "Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, *or of private entities*."[409] But the Court does not explain where the italicized text comes from. After all, while *general* legal oversight may be problematic, it is a core judicial task to determine liability and award remedies when the law provides a

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403. *Id.* at 2203.

404. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

405. *Id.* at 170 (emphasis added).

406. Roberts, *supra* note 97. He was the Principal Deputy Solicitor General when *Lujan* was argued and decided (the office represented the government defendant-petitioner). *Id.* at 1219 n.†.

407. *Id.* at 1232.

408. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) (1787) (emphasis added).

409. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (emphasis added).

cause of action.[410] Later, invoking *Lujan*, the Court posits that "the public interest that private entities comply with the law cannot 'be converted into an individual right by a statute that denominates it as such.'"[411] But *Lujan* said no such thing, because it was not about forcing private entities to comply with the law.[412] In fact, as noted above, *Lujan* was carefully limited *not* to reach the question of a suit against a private entity. "[I]t is clear," said the *Lujan* Court, "that *in suits against the Government, at least*, the concrete injury requirement must remain."[413] The *Lujan* Court also distinguished "the unusual case in which Congress has created a concrete private interest in the outcome of a suit *against a private party* for the government's benefit, by providing a cash bounty for the victorious plaintiff."[414]

Right after *Lujan*, Cass Sunstein elaborated on the meaning of these hints. If Congress were to allow citizens to proceed without a "conventional injury in fact" against a private party and provided a financial bounty to victorious plaintiffs, Sunstein wrote, "*Lujan* is probably inapplicable by its own rationale."[415] The reason is that there is "no risk that courts will usurp executive functions."[416] That, of course, is exactly the issue the Court confronted in *TransUnion*—only to suggest that *Lujan* had already resolved the question.

So the question persists: How might the separation of powers limit Congress's (or the states') ability to authorize private parties to sue one another? The Court gives its most direct answer later: "A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's *Article II* authority."[417] In other

410. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create . . . a private remedy."). Indeed, there is a tension between the Court's insistence on legislative primacy in implied cause of action cases, on the one hand, and the judicially created limits it has imposed on causes of action through standing doctrine, on the other. *See* Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 54 (2023).

411. *TransUnion*, 141 S. Ct. at 428–29 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992)).

412. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–77 (1992).

413. *Id.* at 578 (emphasis added).

414. *Id.* at 572–73 (emphasis added).

415. Sunstein, *supra* note 11, at 232.

416. *Id.*

417. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) (second emphasis added). *See also* Vázquez, *supra* note 401, at 758 ("[T]he only remotely plausible basis for concluding that Congress lacked the power to create their right to damages [in *TransUnion*] is based on the notion that standing doctrine protects the Executive's exclusive right to determine when to vindicate the public interest.").

words, when forced to defend its decision in terms of structural values, the Court ultimately pivots from Article III to Article II. Tara Grove has similarly defended standing doctrine on the ground that it prevents the delegation of prosecutorial power to private plaintiffs.[418] Standing thus "protects individual liberty by shielding private parties from arbitrary exercises of private prosecutorial discretion."[419] For present purposes, I assume that the Article II concern raised by the Court and by Grove has merit.[420] The question then becomes: Should a doctrine that developed to limit the scope of the "judicial power" under Article III be used to enforce Article II?[421]

C. Why Article III and Article II Should Be Kept Distinct

There are three basic reasons why Article III should not be employed as an indirect means of enforcing limits imposed by Article II. First, Article III standing doctrine defines the scope of the "judicial power."[422] In the absence of Article III power, a court does not have jurisdiction to decide the merits of a legal dispute.[423] The scope of Article II, by contrast, is a constitutional merits question that a court can only address if it has jurisdiction. Without an Article III case, then, a court is powerless to opine on the scope of the executive power. For that reason, it would not make sense to say that Article III standing doctrine is meant to impose substantive limits grounded in Article II: To hold that a plaintiff lacks standing is necessarily to hold that a court has no power to opine on the meaning of Article II. The Court's discussion of Article II in *TransUnion* was thus not merely dicta; the Court was "by very definition" acting "ultra vires."[424]

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418. Grove, *supra* note 34, at 784.

419. *Id. See also* Harold J. Krent & Ethan G. Skenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1796 (1993) (concluding that universal citizen standing violates "Article II's establishment of a unitary executive").

420. I intend to take on this concern directly in a future article.

421. To be clear, this Article brackets the possibility that some aspects of standing doctrine—like the requirement that a plaintiff be concretely harmed—may prove relevant to a non-jurisdictional Article II analysis. *Cf. Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1138–39 (11th Cir. 2021) (Newsom, J., concurring). The question is whether the three-part test for Article III standing should itself be employed in suits between private parties (and can be justified) as a means of enforcing Article II.

422. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

423. *See id.* at 101–02 ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (similar).

424. *Steel Co.*, 523 U.S. at 102. This may be why, before *TransUnion*, the Court was careful to eschew direct reliance on Article II in private-party standing cases.

Further, as a practical matter, questions of Article III subject-matter jurisdiction *must* be adjudicated—sua sponte, if necessary—as a threshold matter in every case. For this reason, the Court has carefully limited the issues that may properly be classified as jurisdictional.[425] And it would run headlong into *Ashwander v. Tennessee Valley Authority*[426] to require courts to adjudicate a difficult question of constitutional law under Article II when there are non-constitutional grounds on which to dispose of the case,[427] especially when an Article II issue is not even raised.[428]

Second, the case-or-controversy limitation of Article III standing doctrine defines the scope of the federal judicial power in all suits, whether grounded in state law or federal law. As a matter of current practice, standing limits apply not only to "cases . . . arising under" federal law but also to "controversies . . . between citizens of different states."[429] As a result, the familiar three-part test—injury in fact, causation, redressability—is routinely applied to state law claims filed in federal court.[430] But these cases cannot possibly present issues under Article II. The extent to which a private plaintiff can enforce state law is a question of *state* constitutional law. That is, whether a supposed delegation of executive authority to a private plaintiff is constitutionally problematic is a question of state separation-of-powers law. And *that* is

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See id. at 102 n.4; *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (noting that "the validity of *qui tam* suits under" Article II is not "a jurisdictional issue"); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

425. *See MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 936 (2023) ("The 'jurisdictional' label is significant because it carries with it unique and sometimes severe consequences.").

426. 297 U.S. 288 (1936).

427. *Id.* at 347 (Brandeis, J., concurring).

428. *See Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1136 n.14 (11th Cir. 2021) (Newsom, J., concurring) (noting that the scope of Article II is a "merits" question that need not be raised sua sponte).

429. U.S. CONST. art. III, § 2; PFANDER, *supra* note 62, at 148 (noting that the Court has "tended to equate" cases and controversies "in defining judicial power"); F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 76 (2014) ("[W]hen a plaintiff has standing under state law but not under federal law, federal courts cannot hear the suit.").

430. *See, e.g.*, *Rynasko v. N.Y. Univ.*, 63 F.4th 186, 193 (2d Cir. 2023) (dismissing state law claims for lack of standing); *In re E.I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 87 F.4th 315 (6th Cir. 2023) (same); *Jones v. Ford Motor Co.*, 85 F.4th 570 (9th Cir. 2023) (applying standing doctrine to state law claim). This is not a small category of potential cases: one recent study estimated (conservatively) that there are over 3,500 private causes of action in state laws. Diego A. Zambrano, Neel Guha, Austin Peters & Jeffery Xia, *Private Enforcement in the States*, 172 U. PA. L. REV. 61, 62 (2024).

a "subject" on which the U.S. Constitution "has no voice."[431] That is because "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States."[432] Accordingly, if standing were really an Article II doctrine, it should not apply in diversity cases. But the Court has not suggested that is the case, and lower courts routinely apply federal standing requirements in diversity cases.[433]

Third, standing doctrine does not incorporate the types of concerns that would be relevant to the Article II question. Again, Justice Kavanaugh's claim seems to be that private plaintiffs suing other private parties are exercising "executive" power which is conferred by the Constitution exclusively upon the president or those accountable to him.[434] Article III standing doctrine in its current form is not a sound way to enforce this principle.

First of all, the requirement of "concrete injury" does not correspond to whether a plaintiff is exercising executive power. To the extent one is concerned about private plaintiffs enforcing the law, it is not clear why it would matter if that plaintiff has suffered some slight injury. Think of *TransUnion* itself: Simplifying slightly, the Court held that plaintiffs whose credit reports were sent to third parties had standing, but not plaintiffs whose credit reports were only sent to plaintiffs

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431. *See Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *id.* ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). Similarly, a state can designate agents to represent it in court. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

432. *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980).

433. WILLIAM BAUDE, JACK L. GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, 2023 SUPPLEMENT TO HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM SEVENTH EDITION 30 (2023) (noting "the long-settled rule that a plaintiff suing in federal court, even on a state law claim, must satisfy federal standing rules"). Andy Hessick argues that federal courts should apply state justiciability rules in diversity cases but presents the argument as a departure from current practice. *See* Hessick, *supra* note 429, at 76–77. Jim Pfander has suggested that "controversies" should be distinguished from "cases" in that only the former require contestation between parties. PFANDER, *supra* note 62, at 238. That is consistent with this Article's critique of *TransUnion* and *Thole*. *See id.* at 184. *See also* Robert J. Pushaw, Jr., *Clarifying Standing: Reviving the Original Understanding of Article III*, GEO. MASON L. REV. (forthcoming 2024) (manuscript at 36–37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4622557 [https://perma.cc/UQ6H-W3GZ] ("[T]he Framers consciously shifted from 'Cases' to 'Controversies' because those two words had different meanings . . . .").

434. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). *See* Fallon, *supra* note 20, at 667 n.121. Needless to say, the unitary executive theory is controversial, but a majority of the present Court would subscribe to the label. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020). *See generally* Ashraf Ahmed, Lev Menand & Noah Rosenblum, *Building Presidential Administration: From Reagan to Kagan*, 137 HARV. L. REV. (forthcoming 2024) (on file with author).

themselves.[435] What relationship does that distinction have to whether a plaintiff is exercising the "executive power"? It seems implausible to say that plaintiffs in the first category can sue, consistent with Article II, but that plaintiffs in the second category cannot (unless, presumably, they are appointed "officers of the United States"[436]). Or consider *Thole*: On what basis could one say that ERISA beneficiaries of a defined-benefit plan are exercising "executive power" when they sue a plan fiduciary for mismanagement, but beneficiaries of a defined-contribution plan do not? Again, if doctrine is meant to operationalize substantive constitutional values in workable form, the standing doctrine would be an odd fit for enforcing Article II.[437]

Further, if Article II concerns were in fact decisive, then the degree of supervision of private plaintiffs by the executive branch (probably the Department of Justice) would probably be relevant.[438] For example, the False Claims Act, which authorizes qui tam suits against private parties, furnishes a number of mechanisms for the executive branch to retain some control over the qui tam litigation. After a qui tam suit is filed, the government "may elect to intervene and proceed with the action" during a sixty-day window while the complaint remains under seal.[439] Even if the government chooses not to intervene initially, the United States is a "real party in interest"[440] and may intervene later "upon a showing of good cause."[441] The government also has authority to settle a suit and dismiss a suit over the objection of the qui tam plaintiff.[442] The courts of appeals that have upheld the FCA against Article II challenges have recognized that these features of the FCA are important for the analysis.[443] Yet standing doctrine provides no opening for these

435. *TransUnion*, 141 S. Ct. at 2200.

436. U.S. CONST. art. III, § 2.

437. Justice Amy Coney Barrett made a similar point in a recent concurrence: "While it is possible that Article II imposes justiciability limits on federal courts, it is not clear to me why any such limit should be expressed through Article III's definition of a cognizable injury." *United States v. Texas*, 143 S. Ct. 1964, 1988 (2023) (Barrett, J., concurring). More broadly, she cautioned against taking "an issue that entered the case on the merits" and transforming "it into one about standing." *Id.*

438. *Cf. United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980–81 (2021) (considering "review by a superior executive officer" to be "significant" in assessing an Article II problem (quoting *Edmond v. United States*, 520 U.S. 651, 658 (1997))); Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1842 (2015).

439. 31 U.S.C. § 3730(b)(2).

440. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009).

441. 31 U.S.C. § 3730(c)(3).

442. 31 U.S.C. §§ 3730(c)(2)(A), (B).

443. *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 934 (10th Cir. 2005); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753–55 (9th Cir. 1993).

considerations to come in. To use standing—and particularly the idea of "concrete harm"—as the measure of Article II therefore would obscure relevant aspects of the issue.[444]

Another way to think about the incongruity of using Article III to enforce Article II is this: Article II concerns of the sort raised by *TransUnion* do not impact the nature of the "case" that the federal court is called on to adjudicate. Indeed, cases are commenced in federal courts every day by parties who have not suffered an injury in fact: criminal prosecutions and civil enforcement actions initiated by the government.[445] If a criminal prosecution is initiated by someone who has not properly been appointed, the resulting constitutional problem is not that there is no standing and no "case" or "controversy." The problem is that the putative official initiating the case lacks authority, and indeed the existence of a case allows for that issue to be adjudicated.[446] The Article II problem would not be cured if the "prosecutor" happened to suffer an injury in fact related to the crime.

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444. One could make a similar argument in the context of suits against public parties: if the concern is supervision of executive officials by the judiciary, then perhaps that too should be adjudicated directly under Article II rather than as a matter of Article III standing. *See* Elliott, *supra* note 28, at 514–15. But standing doctrine nonetheless makes more sense in suits against public parties for a few reasons. First, standing doctrine insulates several types of government action from judicial review, not just action by the federal executive. Sometimes a suit challenges the constitutionality of a statute or action by a state official. Second, when courts began entertaining bills in equity challenging the legality of government action, it made sense that they would ask what sorts of suits were traditionally entertained in equity to filter those new cases. *See* Young, *supra* note 52, at 1887–88. And third, standing doctrine reflects what one might call the *Marbury* settlement: a court can coerce an executive official, but only when necessary to protect a person's rights. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding . . . ."). This is not to endorse modern standing doctrine in public cases root and branch—especially when Congress has provided a cause of action—but the doctrine does fit better with its underlying structural mission in that context than in private party cases.

445. *See generally* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999).

446. Imagine if President Trump had asked the Supreme Court for an advisory opinion on whether he had the constitutional power to fire Special Counsel Robert Mueller. The proper response from the Court would be: "This is not a 'case,' and we therefore have no jurisdiction to say what the law of Article II is in these circumstances." The presence of a judicial "case" is what empowers the Court to opine on Article II.

D. Some Other Justifications for TransUnion

Taking stock: Standing doctrine, *TransUnion* tells us, is built on the separation of powers.[447] When a plaintiff files suit seeking equitable relief against the government, the structural concern is plain: If a court entertains the suit, it will be put in the position of supervising or ordering around a coequal branch of government. This is the primary context in which standing doctrine developed. When a private plaintiff sues another private party, however, this concern is irrelevant. To the extent standing doctrine is applied in this different context, then, it must rest on some other structural concern. The primary one offered in *TransUnion* is rooted in Article II; the argument is that to allow an unharmed plaintiff to sue would undermine the executive branch's exclusive prerogative to "enforce[e] a defendant's general compliance with regulatory law."[448] The previous Section explained why that concern, whatever its merits, cannot justify current Article III standing doctrine.

One immediate response to this argument is to challenge the premise: Standing does more than just to implement that single structural value (*i.e.*, the need for limits on judicial review of government activities). And perhaps those *other* justifications warrant the extension of standing doctrine to suits against private parties. This Section considers some possibilities.

1. PRESERVING THE DISPUTE RESOLUTION FUNCTION

A first possible justification for standing doctrine (and for the outcome in *TransUnion*) is that standing confines courts to their core function of resolving disputes, rather than declaring law in the abstract.[449] This argument builds on a familiar distinction from the federal courts literature between two "models" of the judicial function. According to the "dispute resolution" model, a court's power to declare the law is "incidental to its responsibility to resolve concrete disputes."[450] The "law declaration" model, by contrast, "presupposes that federal courts (and especially the Supreme Court) have a special function of enforcing the rule of law, independent of the task of resolving concrete disputes over

447. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

448. *Id.* at 2207.

449. *See* Thomas W. Merrill, *Legitimate Interpretation—or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1403 (2020) (defending this view); Baude & Bray, *supra* note 10, at 161 ("Doctrines like standing operate to ensure that the federal courts act as courts.").

450. HART & WECHSLER, *supra* note 5, at 73.

individual rights."[451] According to this view, the judiciary is "an institution with a distinctive capacity to declare and explicate norms that transcend individual controversies."[452]

There is a longstanding debate about which (or what mixture) of these models best describes the federal judiciary, as both a descriptive and normative matter.[453] But to the extent one believes that adhering to the dispute resolution function is an important facet of judicial legitimacy—as the Supreme Court usually at least professes to do—then perhaps standing could be seen as a means of reinforcing that function.[454] Confining courts to resolving disputes, on this view, protects the separation of powers by limiting federal courts to their core function vis-à-vis the other branches.[455] Put another way, standing is not (just) concerned with invading the prerogatives of the executive branch, but also with keeping courts in their proper lane—which is an aspect of the separation of powers.[456]

Even if one insists that Article III confines federal courts to dispute resolution in some fashion, it would not justify *TransUnion*. That is because a suit between private parties to ascertain whether a private-party defendant violated the law (or to settle the parties' respective legal rights and responsibilities) fits comfortably within the dispute resolution paradigm, even if the plaintiff has not suffered a traditional injury in fact. It is concrete, in that it asks whether the private defendant violated the law based on a particular set of facts; the court's judgment and articulation of relevant legal norms can be tailored accordingly. And it is adversarial, in that the dispute before the court is shaped and propelled by the two clashing parties. Indeed, Lon Fuller himself (often taken as the intellectual fountainhead of the dispute resolution model) suggested as much. In seeking to define the form and limits of adjudication, he noted, "a tempting answer would be that the proper province of courts is

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451. *Id.* at 74.

452. *Id.*

453. *Id.* at 73–76 (describing the debate and citing key participants). *See* Schmidt, *supra* note 54, at 857–58.

454. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 20 (1998) (stating that standing doctrine "helps assure that courts will not 'pass upon . . . abstract, intellectual problems,' but adjudicate 'concrete, living contest[s] between adversaries'" (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting))).

455. This argument reflects what Elizabeth Magill has called a "separation-of-functions" conception of the separation of powers. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–57 (2000).

456. I thank Tom Merrill for articulating—and pressing me to address—this argument.

limited to cases where rights are asserted."[457] "On reflection," though, he "enlarge[d] this to include cases where fault or guilt is charged (broadly, 'the trial of accusations'), since in many cases it is artificial to treat the accuser (who may be the district attorney) as claiming a right."[458] The key structural feature of adjudication for Fuller, then, was *not* a plaintiff claiming a right (the focus of standing doctrine), because adjudication may also properly concern "accusations of fault."[459] Uninjured plaintiffs can make such "accusations" consistent with the traditional form and limits of adjudication.

History also offers strong support for that conclusion. Private enforcement of the law through various bounty systems was common in the nineteenth century.[460] Indeed, even federal criminal prosecution resembled private enforcement until the end of the nineteenth century: U.S. Attorneys (or their equivalents) were unsalaried, part-time officers who were allowed to keep a private practice and who had limited oversight from Washington, and who were paid for criminal prosecutions according to a fee schedule based on trials and convictions.[461]

Think again of *Thole* and *TransUnion*. In the first, the beneficiaries of a retirement plan wanted to sue plan managers for fiduciary breaches; in the second, customers alleged that a credit agency had negligently gathered false information about them. It is implausible to say that suits like *Thole* and *TransUnion* stretch the ideal of dispute resolution in a manner that destabilizes judicial legitimacy. And, to return to this Article's larger themes, part of what drives that intuition is the identity of the defendants. Most discussions of dispute resolution and law declaration implicitly assume a public law frame of suits against the government. Henry Monaghan, for instance, writes: "The dispute resolution model . . . has historically been underpinned by a premise that significant barriers legitimately existed to litigant efforts to obtain judicial review of the constitutionality of *governmental* conduct."[462] A suit about *private* conduct—that is, a suit seeking to ascertain the rights or

457. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 368 (1978).

458. *Id.*

459. *Id.* at 370.

460. *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 24–31 (2013).

461. *Id.* at 263–64, 288–89, 513 n.243.

462. Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012) (emphasis added). *See also* HART & WECHSLER, *supra* note 5, at 73 (noting that the dispute resolution model prevents courts from intruding "upon the prerogatives of the other branches" and from assuming "any role as a general overseer of government conduct").

responsibilities of a private party defendant—lies at the heart of the dispute resolution model.

2. HISTORICAL PRACTICE

The "longstanding 'practice'" of the federal judiciary is another conceivable source of support for the idea that Article III should impose limits on whether Congress may authorize suits between private parties.[463] If there were a solid tradition of disfavoring certain kinds of suits between private parties, perhaps it should be accorded a kind of Burkean deference.[464]

But there is not. If anything, the historical tradition undermines the claim that Article III imposes limits on the sorts of legal rights that Congress can relegate to private enforcement. As noted, private enforcement of various legal obligations by informers and relators has deep roots in Anglo-American law.[465] The Supreme Court has observed that "[s]tatutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government."[466] As the Court recognized in *Vermont Agency*, the "First Congress enacted a considerable number of informer statutes," without any apparent constitutional qualms.[467] These statutes allowed private informers to sue to enforce various federal policies against private parties. This is strong evidence that private enforcement, even by unharmed plaintiffs, was consistent with the original understanding of Article III.[468]

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463. *See NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819)).

464. Even if there were such a tradition, it is not clear that it should be entrenched against change by Congress under the Necessary and Proper Clause. Ernie Young has argued that, while resort to historical practice is frequent in federal courts law, historical practice should generally not be entrenched against legislative change. *See* Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 606 (2016) ("[I]n most cases, historical practices should not be constitutionally entrenched unless they stem clearly and directly from the text of the Constitution.").

465. *See* PARRILLO, *supra* note 460, at 24–31; Caminker, *supra* note 203, at 341–42.

466. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (quoting *Marvin v. Trout*, 199 U.S. 212, 225 (1905)).

467. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776 (2000). *See also* Caminker, *supra* note 203, at 342 & n.3.

468. *Vt. Agency*, 529 U.S. at 775–77. Jim Pfander has recently documented private enforcement efforts under a law passed in 1794 and signed by President George Washington seeking to prohibit the international slave trade. James E. Pfander, *Public*

Even outside the world of qui tam, there are examples of Congress recognizing injuries that would be hard to characterize as "concrete" or "de facto," under *TransUnion*'s definition. Consider, for instance, intellectual property law. The First Congress passed a copyright statute which provided that a copyright holder could sue for a statutory penalty against anyone who "print[ed]" any "copy" of the holder's work without consent.[469] The statute did not require the showing of any harm beyond the copying itself.[470] In what sense are copyright holders injured in fact when someone else copies their work in private? That injury would exist only by virtue of a statutory right created by copyright law. Indeed, it is very similar to the defamatory letter placed in a desk drawer that Justice Kavanaugh hypothesized in *TransUnion* as an example of something that would not inflict concrete harm or give rise to standing.[471] A similar point could be made about patent law. Justice Joseph Story, riding circuit, once confronted an argument that "the making of a machine cannot be an offence, because no action lies, except for actual damage."[472] Story rejected the contention: "[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party," because "[e]very violation of a right imports some damage."[473]

The pattern of decisions described above in Part I is also an important component of historical practice. The fact that the Court virtually never dismissed a case against a private party for lack of standing until recently suggests that historical practice is against *TransUnion*, not behind it.

3. JUDICIAL COMPETENCE

Another justification for standing doctrine sometimes offered is that it assures that the parties are sufficiently motivated to press and ventilate

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Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World, 92 FORDHAM L. REV. 469 (2023). He writes that the Providence Abolition Society's "role in enforcement of the antislavery provisions of the 1794 Act (like other early examples of informer litigation) poses an important challenge to the historical case against citizen suit standing." *Id.* at 473–74. Notably, the defendants in these suits would have been private parties engaged illegally in the slave trade. *See., e.g.*, *id.* at 481 (noting that in March 1797 the Providence Abolitionist Society "brought the first successful prosecution under the new law, targeting [a] Providence-based merchant").

469. *See* Copyright Act of 1790, ch. 15, § 2, 1 Stat. 124, 124–25.

470. *Id. See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting).

471. *TransUnion*, 141 S. Ct. at 2210 (majority opinion).

472. *Whittemore v. Cutter*, 29 F. Cas. 1120, 1120–21 (C.C.D. Mass. 1813) (No. 17,600).

473. *Id.*

fully all the relevant legal arguments. In an adversary system, this helps to ensure that the court is well informed.[474]

This account of standing has never been especially persuasive.[475] As Henry Monaghan observed long ago, "there is no reason to believe that litigants with a 'personal interest' will present constitutional issues any more sharply or ably than the Sierra Club or the ACLU."[476] Moreover, "[a]ny legitimate interest in guaranteeing adverse presentation of issues can easily be handled through the Federal Rules of Civil Procedure," by, for instance, appointing counsel and by inviting (or accepting) amicus participation.[477] The Court has accordingly walked back its reliance on this rationale.[478] In any event, there is no reason to think that, without *TransUnion*, suits would not be sufficiently adversarial. Congress can engineer its enforcement mechanisms to ensure whatever level of motivation it deems appropriate. Qui tam statutes establish bounties for successful relators, and FCRA, the law at issue in *TransUnion*, provides for statutory penalties. These are adequate incentives for vigorous litigation (and courts should not second-guess Congress's judgment on the point).[479] Indeed, if a plaintiff did not feel the requisite personal stake, "presumably they would not have undertaken the trouble and expense of a federal lawsuit."[480]

4. PARTY AUTONOMY

A final justification for standing doctrine is that it protects the autonomy interests of an injured party. As the Court has put it, the "Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order."[481] Put in simple terms: If pedestrians are injured by a reckless driver, it is

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474. *See Flast v. Cohen*, 392 U.S. 83, 99 (1968).

475. *See, e.g.*, Scalia, *supra* note 5, at 891; David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 819 (2004).

476. Monaghan, *supra* note 325, at 1385.

477. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 718 n.154 (1989).

478. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.21 (1982) ("[T]he essence of standing 'is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.'" (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225 (1974))).

479. *See* Caminker, *supra* note 203, at 382–83.

480. Fallon, *supra* note 121, at 49–50.

481. *Valley Forge*, 454 U.S. at 473. *See also* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310 (1979) ("[J]usticiability requirements serve as procedural safeguards for the important liberal value of self-determination.").

generally their choice whether to sue; they might feel that their autonomy has been invaded if some "officious intermeddler" decided to sue against their wishes.[482] In private law, this concept often goes by the label of privity; in public law, if is often embodied in the rules of third-party standing.

However it is conceptualized, this autonomy concern is a question of substance, not jurisdiction. Can a third-party beneficiary enforce a contract? Can an indirect purchaser of a product sue for a design defect, or for an antitrust violation?[483] These are questions of substantive law. Statutes and non-constitutional common law doctrines determine how rights of action are allocated. Indeed, the allocation of the rights in the preceding examples has changed over time. And the assignment of causes of action to different categories of plaintiff should not be rendered practically immutable by constitutionalizing the question. Even in the public law context, the Court has recognized this basic point by describing third-party standing as a "prudential" limit on jurisdiction.[484] The upshot of that classification is that Congress may eliminate or redefine most third-party standing barriers.[485]

III. THE OTHER SIDE OF STANDING: THE WHO AND WHOM

The core point thus far—a point the majority missed in *Thole* and *TransUnion*—is that standing is structural constitutional law, and different defendants present different kinds of structural questions. Standing cases should fall into different doctrinal buckets depending upon the identity of the defendant. Disaggregating the law of standing in this way will make standing doctrine more effective at implementing the constitutional values that underlie it. The new framework will not solve all difficult standing problems; the underlying structural questions are too deeply controverted for that. But by focusing on the other side of standing—the particular structural problems posed by different defendants—courts and commentators will at least be asking the right questions.

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482. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 135–36 (2007).

483. *See, e.g.*, *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019).

484. *Craig v. Boren*, 429 U.S. 190, 193 (1976). *See also* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 17 (2021).

485. Bradley & Young, *supra* note 484, at 18.

A. Disaggregating the Law of Standing

1. PRIVATE V. PRIVATE

There should be virtually no Article III limit on Congress's (or the states') power to recognize new injuries that can be vindicated against private parties.[486] If, for instance, Congress determines that someone is injured when a credit agency negligently compiles false information about them, and creates a cause of action, that should be the end of the matter. There is a "case" as far as Article III is concerned. And a court should not undertake the inescapably value-infused judgment about whether the harm in question is "concrete" enough.[487] In the wake of *TransUnion*, the en banc Eleventh Circuit held that a federal lawsuit cannot proceed against a medical debt collector who violated federal law because the violation did not resemble closely enough a traditional common law tort.[488] When "an element 'essential to liability' at common law is missing from an alleged harm," the court explained, "the common-law comparator is not closely related to that harm."[489] This goes a long way toward freezing the common law in the place via Article III and suggesting that Congress and the states cannot recognize new legal interests in response to changing times. It is an (anti)canonical misuse of judicial power.[490]

Admittedly, this proposal will remove a constitutional barrier to some suits that may be unwarranted or vexatious. Some think, for

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486. It will be clear in most cases whether the defendant is a governmental or private party. In rare cases of ambiguity, courts can resort to existing doctrinal tests for ascertaining whether a party should be characterized as public or private. *See, e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940–43 (1982); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399–400 (1995). The fact that a government defendant is sued in a "personal" rather than "official" capacity should not matter, as long as the suit in substance concerns an act taken by an official in the course of doing their job. That distinction is pertinent to sovereign immunity, not standing.

487. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1129 (11th Cir. 2021) (Newsom, J., concurring) ("The question whether a party has been 'injured' is inescapably value-laden.").

488. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1239–40 (11th Cir. 2022) (en banc).

489. *Id.* at 1244 (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2209 (2021)).

490. *See* Sunstein, *supra* note 11, at 191 ("Whether an injury is cognizable, however, should not depend on its familiarity or its common law pedigree; this approach would represent a conspicuous reintroduction of *Lochner*-era notions of substantive due process."). *Cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (noting that *Lochner* is part of "the American anticanon").

instance, that citizen-suit provisions result in overenforcement.[491] Bounty-hunter statutes like Texas's recent anti-abortion law are justifiably controversial.[492] If this is right, there would be no Article III *standing* obstacle to such suits proceeding in federal court.

This proposal, however, would not amount to a radical change in practice. It is common ground that Article III standing limitations are not applicable in state court of their own force.[493] As a result, Congress or state legislatures can authorize injury-less suits to proceed in many state courts. The only question is whether such a suit can additionally proceed in *federal* court. Say, for instance, that prior to *Dobbs v. Jackson Women's Health Organization*[494] Congress wanted to make all civil actions filed under Texas's anti-abortion law removable to federal court, in order to better protect the right to an abortion. *TransUnion* could render such a removal statute unconstitutional in many of its applications, because many state suits would be initiated by uninjured plaintiffs.[495]

And, of course, other constitutional limitations may apply even if Article III standing doctrine should not. The Texas law violated the *Roe*/*Casey*[496] framework at the time of its passage. It also allowed repetitious litigation and manipulated preclusion and attorney's fee rules in a manner that raised obvious procedural due process questions. This Article also brackets whether some federal causes of action raise Article II problems. The point, again, is simply that Article III standing doctrine does not impose any separate restriction on the litigable interests that

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491. *E.g.*, Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 344 (1990) ("Private enforcers . . . tend to overenforce the law."). *But see* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 4 (2006) ("[A] strong consensus is emerging among experts that the ADA's public accommodations title is underenforced."). The Article does not grapple with the complex question of how to set the relevant baseline against which under- and overenforcement should be measured.

492. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021); James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, TEX. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4403476 [https://perma.cc/R992-4ADN].

493. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . . .").

494. 142 S. Ct. 2228 (2022).

495. The Court once left open the question whether Article III standing requirements are applicable to a state-law case removed under the federal officer statute, 28 U.S.C. § 1442(a)(1), on the basis of a federal defense. *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 78 n.4 (1991).

496. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

Congress (or other lawmakers) can recognize,[497] not that the resulting litigation is immune from constitutional scrutiny.

That is not to say there are no standing limits at all. The flipside of saying that there is a "case" as long as there is a "cause of action" is that without a "cause of action" there is no "case."[498] For that reason, under this proposal, there would still be plaintiffs without standing; it is just that, in suits between private parties, statutory standing (*i.e.*, ascertaining whether a plaintiff has a cause of action) would replace constitutional standing as the threshold issue for a court to consider. As a result, if plaintiffs cannot show either that they are legally entitled to sue or that they *in fact* fall within the relevant authorization to sue, their suits would have to be dismissed. Hence a federal court could not "advis[e] what the law would be on an uncertain or hypothetical state of facts."[499] But a federal court could not second guess Congress's recognition of new injuries.

This proposal preserves Congress's (and state legislatures') flexibility in designing enforcement mechanisms that will vindicate its substantive policies. Olati Johnson has noted that private enforcement "reflects deliberate congressional choices to enforce public norms through litigation and (though less explicitly) to cope with state incapacity."[500] Consider, for instance, the Fair Housing Act, which was the subject of the Court's initial encounters with the problem of standing in private suits. As the Court observed in *Trafficante*, the California Department of Justice did not have adequate resources to enforce the FHA.[501] Instead, suits by private parties were the "main generating force" of "assuring fair housing."[502] That choice is fundamentally Congress's (or the states') to make. As Justice Felix Frankfurter once put it:

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497. *Cf.* PFANDER, *supra* note 62, at 184.

498. On the meaning of cause of action, see *supra* note 11.

499. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 262 (1933). *See also O'Shea v. Littleton*, 414 U.S. 488, 494 n.2 (1974) (noting that, while Congress may confer standing by statute, "such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur").

500. Johnson, *supra* note 50, at 1348. On the value of private enforcement to privacy law, see Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 821–22 (2022).

501. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 207 (1972).

502. *Id.* at 210–11. *See also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968) (per curiam) ("[A suit under the Civil Rights Act of 1964 is] private in form only. . . . If [a plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.").

> How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice.[503]

Article III does not circumscribe that "range of choice." Congress's authorization of the private-party suit should itself mollify any structural concerns one might have about the judicial role, especially in light of the Necessary and Proper Clause.[504]

Further, private enforcement is an important tool at Congress's disposal to check against executive underenforcement or deregulation. As then-attorney Merrick Garland once observed, "an agency's failure to implement or enforce a statutory scheme can subvert the will of Congress as readily as can improper implementation."[505] This might be achieved through changes in enforcement priorities,[506] or more indirectly by failing to appoint and hire staff or reducing an agency's budget.[507] Private enforcement allows Congress to resist a president's ability to unilaterally hamstring statutory policies by refusing to vigorously enforce them.[508]

2. PUBLIC V. PRIVATE

Suits initiated by the government have always been an awkward fit for standing doctrine. In its standing cases, the Court has frequently opined that "harm to the 'common concern for obedience to law'" is insufficient to give rise to standing.[509] And yet, day in and day out, the federal courts routinely entertain suits instigated by parties who have

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503. *Tigner v. Texas*, 310 U.S. 141, 148 (1940).

504. Fallon, *supra* note 121, at 52 ("Congressional grants of standing substantially diminish the separation-of-powers concerns that otherwise would be associated with non-Hohfeldian plaintiffs."); John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 6–7 (2014).

505. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 567 (1985).

506. Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010).

507. *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 591–92 (2021).

508. *See* Johnson, *supra* note 50, at 1360.

509. *FEC v. Akins*, 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 303 (1940)) (collecting cases).

suffered that precise harm: criminal and civil actions brought by the government. Indeed, Edward Hartnett has argued that the prevalence of criminal prosecutions shows that "Article III *cannot* require injury in fact."[510] This Article suggests a different solution to this doctrinal puzzle: The injury-in-fact requirement applies only in a suit against government officials. A suit by the government against a private party to enforce the law does not activate the same structural concerns, and Article III imposes no barrier.

Another anomaly that this Article helps to explain is the standing of states suing to enforce federal law against private parties.[511] If a private party cannot sue to vindicate the public interest in law enforcement, then why should a different rule apply when a state official sues to enforce federal law? Consider so-called *parens patriae* standing. This form of standing now allows a state to sue to protect its "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."[512] In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*,[513] the Court allowed Puerto Rico to sue several private parties "engaged in the apple industry" for "failing to provide employment for qualified Puerto Rican migrant farmworkers" in violation of federal law.[514] But the Court drew a sharp line between suits against private parties and suits against the federal government. The Court stated that a "State does not have standing as *parens patriae* to bring an action against the Federal Government."[515] By contrast, a state may "seek[] to secure the federally created interests of its residents against private defendants."[516] This distinction makes perfect sense in light of the framework offered here: Suits against the government must clear a different standing bar from suits against private parties. Where federal law authorizes the states to sue private parties, Article III does not erect a standing barrier.

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510. Hartnett, *supra* note 445, at 2246 (emphasis added).

511. *See, e.g.*, Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 392 (1995) ("[W]hen a state litigates in the courts of another state or in the courts of the federal government, the litigating state's role becomes problematic.").

512. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

513. 458 U.S. 592 (1982).

514. *Id.* at 597–98.

515. *Id.* at 610 n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)).

516. *Id.*

3. PRIVATE V. PUBLIC

This, of course, is the classic context in which standing issues are litigated. As explained above, standing developed to fill a vacuum: After the creation of federal question jurisdiction, the merger of law and equity, and the abolition of the forms of action, federal courts needed a set of tools to filter out valid from invalid suits seeking equitable relief against government officials. Standing borrowed concepts from private law such as injury and causation that could do some of that screening work. It essentially created a generic cause of action for equitable relief against the government. One does not need to agree with standing doctrine in its current form to appreciate that it may serve an important structural function. Without something like standing, federal courts could be thrust into a supervisory position vis-à-vis the other branches of government at the behest of anyone.

By way of illustration, imagine two different lawsuits related to global warming: One against the federal government for not doing enough to forestall climate catastrophe, and the second against private fossil fuel companies for contributing to global warming. From a structural perspective, these suits raise different questions. The first suit, against the government, would require a federal court to closely supervise and direct the activities of the executive branch. When the Ninth Circuit confronted a suit of this sort, it dismissed it for lack of standing for precisely that reason.[517] The second suit, against private parties, does not raise that prospect. And if Congress wanted to authorize any citizen affected by climate change to sue a fossil fuel company, Article III should not be an impediment.

To be sure, the latter suit might raise other questions of constitutional law or institutional choice. There may be a question whether a court can create a common law of "public nuisance" in the absence of legislative action.[518] There may be questions of statutory preemption (whether of state law or federal common law).[519] And there may be questions of delegation of executive power to private enforcers. Those questions would be resolved on the merits in any lawsuit. But, as long as a congressional statute or other relevant substantive law creates

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517. *Juliana v. United States*, 947 F.3d 1159, 1171–72 (9th Cir. 2020).

518. *Cf.* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L., no. 2, 2011, at 1, 6 (arguing that "the legislature must speak before courts use public nuisance law to adjudicate lawsuits targeting controversial social harms"); Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 769 (2023) (noting that public nuisance "raises many concerns about the proper roles of legal actors and their proper relationships to each other").

519. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423–24 (2011).

a cause of action in a plaintiff against a private defendant, there should be no separate question of standing. There is a "case" that falls within the "judicial power."

By lumping all government defendants into a single broad category, this Article has of course papered over important variations. Certain government defendants might raise special sensitivities, and some tailoring of standing doctrine may be appropriate.[520] The most obvious distinction is between state and federal defendants. One's attitude toward that distinction will be shaped by one's attitude toward federalism more broadly. But the Court's doctrine, in my view, has taken a questionable turn. It is increasingly easy and routine for federal courts to enter broad equitable relief, like vacatur and nationwide injunctions, against actions of the federal government, often based on relatively slight injuries.[521] Meanwhile, federal courts have been highly solicitous of state prerogatives and have refused to enter similarly broad equitable relief against state defendants.[522] Kellen Funk has argued that this state of affairs seems upside-down. "The Reconstruction Congress empowered the courts to apply a broad menu of remedies to the unconstitutional practices of the states, and at the height of the Civil Rights Movement, the Supreme Court made this legislative history the centerpiece of its federalism jurisprudence."[523] That is no longer the case. In addition, Thayerian theories of judicial minimalism have often focused on judicial review of *federal* legislation.[524] That is yet another structural anomaly in making federal activity easier to review than state activity.

Not everyone will share the same priors or understanding of the relevant history. But focusing on the defendant helps to focus attention on the proper issues.

4. PUBLIC V. PUBLIC

The final category in this schema is suits between public entities or officials. Historically, this was not a common category of cases for deciding important questions of public law in federal court.[525] However,

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520. *See generally* Fallon, *supra* note 20.

521. *See* Funk, *supra* note 70, at 2090. This development has sparked a large critical literature. *See, e.g.*, Schmidt, *supra* note 54, at 888–89.

522. Funk, *supra* note 70, at 2090 ("Inspired by *Younger* and its progeny, the Supreme Court has for a while maintained that 'federalism concerns' counsel more hesitancy in awarding equitable relief against state as opposed to federal agencies.").

523. *Id.* at 2093–94.

524. *See* Schmidt, *supra* note 54, at 853–54.

525. *See* Monaghan, *supra* note 325, at 1367–68. On the other hand, for an account of an early attempt by Massachusetts to challenge certain Southern laws related

in the past fifteen years or so, a large number of major constitutional cases have had at least one state as a plaintiff, and this category of standing has become considerably more controversial.[526] The U.S. Solicitor General vigorously contested standing in two state-initiated cases this term, and a significant portion of the oral arguments focused on the role that states have played (and should play) in reshaping modern public law litigation. In one of those cases, the Court dismissed for lack of standing and questioned a foundational precedent on which states recently have relied;[527] in the other case, the Court allowed the states to proceed over a strong dissent.[528] William Baude and Samuel Bray have suggested that the Court's most recent term "may have marked a turning point" when it comes to state standing.[529]

A full analysis of this complex set of developments is beyond the scope of this Article, other than noting that the structural issues raised by state standing differ widely depending upon who the defendant is. No one doubts that the states have the power to enforce their own laws against private parties without showing an injury in fact, whether through criminal prosecutions or civil enforcement actions. And the Court has even been generous in affording the states the power to enforce *federal* law against private parties in some instances.[530] For the states to sue the federal government, however, is far more controversial. It is in the heartland of traditional standing doctrine. This is yet another problem that focusing on the defendant's identity illuminates.

B. A Complication: Private-Party Suits Raising Constitutional Questions

Suits that are exclusively between private parties may raise important questions of constitutional law. Take, for example, *Hepburn v. Griswold*,[531] the case in which the Supreme Court held that paper money issued by the U.S. government could not constitutionally be made

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to slavery in federal court, see Maeve Glass, *Citizens of the State*, 85 U. CHI. L. REV. 865, 900–01 (2018).

526. *See, e.g.*, *Trump v. Hawai'i*, 138 S. Ct. 2392 (2018); *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019). *See generally* Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229 (2019); Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015 (2019).

527. *United States v. Texas*, 143 S. Ct. 1964, 1975 & n.6 (2023).

528. *Biden v. Nebraska*, 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting).

529. Baude & Bray, *supra* note 10, at 174.

530. *See generally* Litman, *supra* note 40.

531. 75 U.S. (8 Wall.) 603 (1869), *overruled by Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

legal tender.[532] In a sense, the dispute was private: the plaintiff and defendant entered into a promissory note; the defendant tried to satisfy his debt by paying in "United States notes"; the plaintiff insisted on being paid in gold and silver.[533] But this private dispute turned on a public question of great "delicacy and importance"—"whether Congress has power to make notes issued under its authority a legal tender in payment of [pre-existing] debts."[534] Should standing doctrine treat this as a suit between private parties?

As a preliminary matter, this suit conforms almost perfectly to what Henry Monaghan called the "private rights" model of judicial review.[535] This model held simply that "the Constitution was to be applied as 'ordinary law' by the courts in resolving claims of litigants."[536] It traces all the way to *Marbury*, which declared that the "province of the Court is solely to decide on the rights of individuals," but that in ascertaining and enforcing those rights the Constitution must be applied like any other law.[537] This is probably the least controversial and longest-lived form of judicial review.[538] It sees judicial review as simply the upshot of the judicial "duty 'to decide the litigated case and decide it in accordance with the law,'" which includes the Constitution under the Supremacy Clause.[539] It is perfectly consistent with Article III to adjudicate a constitutional question in this context.[540]

That said, a possible problem lurks: What if Congress created a cause of action between two private parties for the purpose of adjudicating some question of constitutional law?[541] In the unlikely event Congress were to do this, it would call only for an application of *Lujan*.[542] *Lujan* held that in suits "challenging the legality of government action or inaction," Congress cannot validly create a cause of action for a private

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532. *Id.* at 610, 625.

533. *Id.* at 612.

534. *Id.* at 610.

535. *See* Monaghan, *supra* note 325, at 1365–68.

536. *Id.* at 1365.

537. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 177–78 (1803).

538. *See* Monaghan, *supra* note 325, at 1366 (noting that this "view of the judicial function took deep roots, particularly as the nineteenth century wore on").

539. *Id.* at 1367 (alteration removed) (quoting HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 9 (1961)).

540. The Federal Rules require the parties to notify the government "promptly" if a suit "draw[s] into question the constitutionality of a federal or state statute" and to give the government an opportunity to intervene. FED. R. CIV. P. 5.1. There is some question whether the government would be bound by the judgment in a suit to which it has not been made a party. *Cf. Haaland v. Brackeen*, 143 S. Ct. 1609, 1639 (2023).

541. Woolhandler & Nelson, *supra* note 6, at 722 n.159 (posing a variant of this hypothetical).

542. *See infra* note 539 and accompanying text.

plaintiff in the absence of injury in fact.[543] If one accepts *Lujan*—as this Article does—its holding should obtain even if the suit "challenging the legality of government action" takes the form of a suit between private parties. Otherwise, *Lujan* (and the proscription against "test" cases more generally) could be easily circumvented by a determined Congress.[544] But it does not follow that the federal courts should therefore always be able to second guess Congress's (or the states') determinations of what counts as an injury in suits between private parties that have nothing to do with the legality of government action.

C. Other Standing Theories

As noted in the Introduction, critiques of standing doctrine generally fall into one of three schools. The first is the "cause-of-action" school. It argues that a plaintiff has standing as long as "she can show that she is entitled to sue under the particular statutory or constitutional provision at issue."[545] The second is the "private rights" school. Its academic progenitors are Ann Woolhandler, Caleb Nelson, and Andrew Hessick,[546] and it debuted in the *United States Reports* in Justice Thomas's concurrence in *Spokeo, Inc. v. Robins*.[547] The basic idea is that "judicial power of common-law courts was historically limited depending on the nature of the plaintiff's suit."[548] Private rights are "rights 'belonging to individuals, considered as individuals.'"[549] And public rights are "rights that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity.'"[550] According to Justice Thomas, a "plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right."[551] But a plaintiff "seeking to vindicate a

543. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–62, 578 (1992).

544. *Cf. Muskrat v. United States*, 219 U.S. 346, 361 (1911) (striking down congressional cause of action where the "whole purpose of the law is to determine the constitutional validity of this class of legislation").

545. Fletcher, *supra* note 11, at 249.

546. *See supra* note 13.

547. 578 U.S. 330, 343 (2016) (Thomas, J., concurring). Interestingly, four other justices at one time or another have joined an opinion by Justice Thomas relying on this distinction, but it has never commanded a majority of five in a single case. *See infra* note 584 and accompanying text.

548. 578 U.S. at 343 (Thomas, J., concurring).

549. *Id.* at 344 (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1893)).

550. *Id.* at 345 (Thomas, J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1893)).

551. *Id.* at 348 (Thomas, J., concurring).

public right embodied in a federal statute . . . must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population."[552] The public-private distinction thus drives the standing inquiry, for Justice Thomas and adherents to this school, because the "concrete harm" requirement only has teeth to the extent a plaintiff is asserting a "public" right. The third is the "pluralist" school. According to this school, the tripartite test of current doctrine need not necessarily be discarded, but it ought to be applied in a more context-sensitive manner.[553]

My approach draws some inspiration from all three schools. As the pluralist school would suggest, cases against private parties are a discrete category presenting particular structural concerns and should be treated separately. Indeed, before *Thole* and *TransUnion*, this category of cases exhibited a "pattern[]" with "an implicit normative logic" that gave "definition to the law."[554] Suits against private parties should be regarded as a special enclave for purposes of standing. Indeed, this approach would go further than the pluralist school and suggest that, when it comes to suits against private parties, there should be no standing question separate from inquiring whether a plaintiff has a cause of action under governing law.

As that last sentence suggests, this Article also borrows from the core tenets of the cause-of-action school. The "injury in fact" test has not worked well because in difficult cases "injury" is not a fact that can be ascertained in the world without reference to some normative baseline.[555] In general, standing analysis should look at the particular constitutional or statutory provision upon which the plaintiff relies, and ask whether it confers upon the plaintiff a right to sue.[556]

That said, the cause-of-action school has had some difficulty defining exactly where the outer limits are on Congress's power to confer standing. Cass Sunstein, for example, concedes that Congress is probably

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552. *Id.* (Thomas, J., concurring) (emphasis added).

553. These three schools are not perfectly sealed off from one another. The cause-of-action school, for example, could be seen as an extreme version of the pluralist school. Indeed, all three arguably share a single starting point: the law of standing is framed at "too high a level of generality"—that the single, transsubstantive doctrine described above cannot possibly winnow the Article III wheat from the chaff, given the variety of potential cases that come before the federal courts. *See* Fletcher, *supra* note 11, at 223, 290–91. *Cf. Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970) (noting that "generalizations about standing to sue are largely worthless as such"—and then generalizing about standing). Nonetheless, the three "schools" are useful paradigms for exposition.

554. Fallon, *supra* note 4, at 1063.

555. Fletcher, *supra* note 11, at 230–33.

556. *See id.* at 239.

"barred from overcoming the ban on advisory opinions," and it would be problematic to grant standing "to all members of Congress to challenge all executive action."[557] Sunstein puts aside "such exotic examples,"[558] but it is not obvious how such scenarios would be excluded from the judicial power without something bearing a family resemblance to standing doctrine.[559] More importantly, the Court has rejected the "cause-of-action" approach in the public law context going back at least to *Lujan*, if not before. So this Article accepts that that ship sailed long ago.[560]

But *TransUnion* is still within shouting distance of the harbor. And it seems that the cause-of-action approach is exactly right when it comes to suits against private parties. As a matter of adjudicative practice, the Court has followed this approach since the dawn of the injury-in-fact era.[561] And there is no comparable line drawing problem, because giving Congress plenary power to create causes of action against private parties does not raise a similar specter of "exotic" examples undermining the separation of powers.[562] Suits against private parties, then, are where the "cause-of-action" school is strongest.

As for the "private rights" school of standing, it is a step in the right direction—particularly Justice Thomas's recognition that the "separation-of-powers concerns underlying our public-rights decisions are not implicated when private individuals sue to redress violations of their own private rights."[563] After all, Justice Thomas dissented in *TransUnion*. But the approach is nonetheless imperfect in several respects. First of all, the distinction between private rights and public rights, which is defined by

557. Sunstein, *supra* note 11, at 179 n.79.

558. *Id.*

559. *See* Woolhandler & Nelson, *supra* note 6, at 720–25.

560. Baude, *supra* note 7, at 224 (noting that Article III limits on Congress's power to confer standing through statutory rights "seem[s] well entrenched").

561. *See supra* Sections I.B–C.

562. Jane Ginsburg suggested one possible limit case: What if Congress authorized any person to file suit in federal court seeking a declaratory judgment that a patent is invalid? If Congress wanted to take advantage of private initiative to weed out bad patents in that way, Article III should not be construed as an impediment. Indeed, such a suit would resemble in rem cases in admiralty—such as prize and salvage cases against seagoing property—which were often uncontested and apparently uncontroversial in the nineteenth century. PFANDER, *supra* note 62, at 42–46. Further, Congress already *has* authorized this sort of proceeding—it is just filed in the Patent Office as an inter partes review in the first instance, with an appeal available to the Federal Circuit. 35 U.S.C. § 311(a) (providing that an inter partes review can be filed by any person "who is not the owner of a patent"); 35 U.S.C. § 141(c) (providing for appeal to the Federal Circuit). For Congress to allow such suits to be filed in district court would not entail such a great change in practice.

563. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 347 (2016) (Thomas, J., concurring). *Cf.* Hessick, *supra* note 28.

reference to Blackstone's *Commentaries*, seems recondite and difficult to apply. Indeed, it does not seem a recipe for consistent and efficient adjudication to graft one notoriously complex and confusing doctrine—standing—onto another notoriously obscure distinction—public versus private rights.[564] By contrast, a framework that just looks to whether the defendant is a government or private party would make standing cases simpler. And simplicity is a particular virtue for a doctrine that a court is required to reach before the merits—sua sponte, if necessary—in every case.[565] For an example of potential difficulties, imagine a privacy law that requires a company to make certain disclosures before collecting data from consumers. Does that law create a public right or a private right?[566]

Second, the private-public rights distinction does not exactly track the different structural concerns present in different standing cases. A suit against a private party alleging a violation of a public right involves a set of constitutional questions different from a suit against a government party alleging infringement of a public right. However the underlying right is classified, it matters structurally whether the "judicial power" operates on an organ of government or on a private party. Focusing on

564. Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has To Teach Us*, 69 DUKE L.J. 1, 39 (2019) (noting that "public rights doctrine" has been subject to "unending criticism along the lines of coherence and, more importantly, utility"). Justice Thomas has said that the meaning of "public rights" is different for standing purposes than it is for purpose of determining which rights can be adjudicated outside an Article III court. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217 n.2 (2021) (Thomas, J., dissenting). *Cf. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372–74 (2018). But using the same terminology for two Article III–related distinctions may generate confusion, and in Justice Thomas's most recent opinion on the issue he himself blurred the difference. *See Acheson Hotels, LLC v. Laufer*, No. 22-429, slip op. at 6 n.2 (Dec. 5, 2023) (Thomas, J., concurring).

565. *Cf. Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.").

566. In *Bryant v. Compass Group USA, Inc.*, the Seventh Circuit applied Justice Thomas's framework in the context of an Illinois state-law claim about the illegal collection of biometric information. 958 F.3d 617, 626 (7th Cir. 2020). The court held that obtaining biometric information without informed consent amounted to a violation of a private right, thus giving rise to standing. *Id.* at 624. However, the Court continued that the defendant's failure to make certain statutorily required disclosures amounted to a violation of public right, thus defeating standing. *Id.* at 624–27. The court therefore dismissed half the case. This opinion exemplifies not only the difficulties of applying Blackstone's distinction in a decidedly twenty-first century legal dispute, but also the practical problems that such an approach threatens. Because the court found that the plaintiff had standing to assert one privacy claim but not the other, the case had to be bifurcated, with half proceeding in federal court and half proceeding in parallel in state court. It is hard to see what purpose such an arrangement serves.

the identity of the defendant, rather than the nature of the right asserted, is a better proxy for identifying the constitutional stakes.[567]

Finally, it is not clear what the legal basis of Justice Thomas's framework is. As noted above, Justice Thomas invokes the "traditional" practice of "common-law courts."[568] But why should this historical practice be constitutionalized and entrenched against ordinary legal change? As Ernie Young has argued, the "primary role of historical practice in federal courts law is to fill gaps—to supply procedures, remedies, or defenses that are necessary to constitute a functioning judicial system but unspecified in the constitutional text or the various judiciary acts."[569] It is a very different thing to "elevate that practice to entrenched constitutional status."[570] But that is what Justice Thomas would do. Indeed, in *Thole*, Justice Thomas refused to allow ERISA beneficiaries to sue their plan fiduciaries for mismanagement, notwithstanding the fact that Congress specifically empowered plan beneficiaries to sue in that circumstance.[571] His reasoning was that ERISA did not create a "private right" because fiduciary duties were owed to the *plan*, not to plan beneficiaries; therefore, the beneficiaries' suit was inconsistent with Article III.[572]

Thole should have been an easy case: Congress created a cause of action for a plan beneficiary to sue a private defendant for breach of fiduciary duty. The resulting suit was a "case" within the meaning of Article III. And the Court should not have used the exceedingly spare terms of Article III—whether fortified by traditional common law

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567. One might argue that the identity of the party is too mechanical and formalistic a test to get at the underlying structural concerns. But it balances the need for decisional accuracy with the need for a threshold test that can be easily applied. More granular structural concerns can be housed in other constitutional provisions, like Article II, that do not present threshold jurisdictional questions that must be resolved in every case. And it is striking how Article III itself makes the identity of the party a proxy for constitutional values again and again. It extends federal jurisdiction to controversies "to which the United States shall be a Party," "between two or more States," "between Citizens of different States," and so on. U.S. CONST. art. III, § 2. In that sense, this Article's proposal coheres with the rest of Article III.

568. *Spokeo*, 578 U.S. at 343–46 (Thomas, J., concurring).

569. Young, *supra* note 464, at 604.

570. *Id.* at 603. *See also* Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1741 (2015). It is also worth asking why the practice of *common law* courts should be given pride of place: "After all, the overwhelming majority of cases that have shaped the Court's contemporary standing jurisprudence have involved claims for equitable relief." Young, *supra* note 52, at 1887. The historical practice of equity courts should thus be at least as relevant. *Cf.* PFANDER, *supra* note 62, at 178.

571. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622–23 (2020) (Thomas, J., concurring).

572. *Id.* at 1623 (Thomas, J., concurring).

practice or by precedents plucked from the public law context—to disable Congress from authorizing the suit.[573] *Thole* thus exemplifies the pitfalls of the "private rights" school.[574]

D. The Prospects for Doctrinal Reconstruction

Even if one is convinced by this Article thus far, one could fairly ask whether its prescription has any realistic prospect of success. *TransUnion* and *Thole* may have been both wrong, and a stark departure from the Court's prior approach. Are we now stuck with them, at least as a practical matter? Not necessarily. There is a fair prospect of limiting or even undoing the damage, for three basic reasons.

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573. *Cf.* Manning, *supra* note 57, at 2040; Bowie & Renan, *supra* note 27, at 2030.

574. Justice Thomas's most recent opinion on standing, a concurrence in *Acheson Hotels, LLC v. Laufer*, also foregrounds some differences between his approach and mine. Laufer was a "tester" plaintiff; she "systematically searche[d] the web to find hotels that fail to provide accessibility information" without intending to visit those hotels, and "sue[d] to force compliance with the Americans with Disabilities Act of 1990 (ADA)." *Acheson Hotels, LLC v. Laufer*, No. 22-429, slip op. at 1 (Dec. 5, 2023). The Court majority dismissed her case as moot. *Id.* at 3–4. But Justice Thomas wrote separately to explain why, in his view, Laufer did not have standing. Justice Thomas began by arguing that "the ADA prohibits only discrimination based on disability—it does not create a right to information." *Id.* at 7 (Thomas, J., concurring). That is debatable as a matter of statutory interpretation—how is it that the failure to provide accessibility information cannot amount to discrimination?—but the argument at least asks the right question: whether the ADA creates a cause of action for Laufer. Justice Thomas then went further, however.

First, he indicated that Laufer might need something *beyond* a cause of action. Even if one assumes, he wrote, that the regulations accompanying the ADA create a "right" to information, "Laufer asserts no violation of *her own* rights" because she is a tester plaintiff. *Id.* at 7 (Thomas, J., concurring) (emphasis added). It is difficult to see how this position is consistent with *Havens Realty*, which also involved a tester plaintiff alleging a violation of information rights. *See supra* notes 139–48 and accompanying text.

Second, Justice Thomas also devoted three paragraphs to Article II concerns, opining that "'[t]esters exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch,' with none of the corresponding accountability." *Acheson*, slip op. at 8 (Thomas, J., concurring) (quoting *Laufer v. Arpan, LLC*, 29 F.4th 1268, 1291 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023)). But it confuses things to try to implement Article II indirectly through Article III standing doctrine. *Supra* Section II.C. In short, Justice Thomas made the standing question too complicated. The question should simply have been whether the ADA confers a cause of action; if so, there is standing, and any Article II concern could be addressed separately. For more on *Acheson*, see Rachel Bayefsky, *Public-Law Litigation at a Crossroads: Article III Standing and "Tester" Plaintiffs*, N.Y.U. L. REV. ONLINE (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565291 [https://perma.cc/BWY9-VDF4] (arguing that courts should defer to Congress in determining which tester suits are justiciable).

The first is that *TransUnion* is in tension with another decision issued only a few months prior—*Uzuegbunam v. Preczewski*.[575] As explained above, the analytical heart of *TransUnion* is the following sentence: "[U]nder Article III, an injury in law is not an injury in fact."[576] In *Uzuegbunam*, however, the Court (in an opinion by Justice Thomas, the lead *TransUnion* dissenter) canvassed and relied on historical cases showing that "*every* legal injury necessarily causes damage."[577] In other words, injury in law *is* injury in fact (or is at least presumed to be). There are, of course, grounds for distinguishing the two cases; indeed, multiple justices joined both majority opinions. As an analytical matter, they dealt with different strands of standing doctrine: *TransUnion* asked whether the plaintiffs had suffered "concrete harm," while *Uzuegbunam* asked whether nominal damages could "redress" an injury.[578] But the animating logic of the two opinions is in deep tension. When one factors in the conceptual difficulties of the injury-in-fact test, the anomalous nature of *TransUnion* (and *Thole*) among the Court's cases, the tension between *TransUnion* and *Uzuegbunam*, and the vigorous, bipartisan dissent, *TransUnion*'s status as a precedent is shaky.[579] Surely, at the least, *TransUnion* falls into the category of discretionary precedents that the Court could overrule if it wishes.[580]

Assuming the Court formally adheres to *TransUnion*, there are still viable opportunities to cabin its significance. First, neither *Thole* nor *TransUnion* called into question *Vermont Agency*, about qui tam actions, or *Sprint*, about assignments more generally. Indeed, the Court in *Thole* stated that "here, the plan's claims have not been legally or contractually assigned to" the plaintiffs.[581] The implication was that if the claims *had* been assigned, then the plaintiffs would (or at least might) have standing as assignees. So, to the extent Congress still wants to take advantage of private enforcement, it could explicitly assign claims to prospective plaintiffs.[582] It could assign claims held by the United States itself, coupled with a statutory bounty (like a qui tam) action; or it could assign

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575. 141 S. Ct. 792 (2021).

576. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021).

577. *Uzuegbunam*, 141 S. Ct. at 798. *See also id.* at 799–800.

578. *Id.* at 797.

579. *See, e.g.*, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–85 (2018) (analyzing stare decisis factors).

580. *Cf.* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 313–14.

581. *Thole v. U.S. Bank N.A*, 140 S. Ct. 1615, 1620 (2020). *See also id.* at 1622–23 (Thomas, J., concurring).

582. For an extended analysis of this possibility, see Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 341–55 (2001).

claims held by other entities (like an assignment from an ERISA plan to a plan's beneficiaries). This should cure any Article III questions under current doctrine, though by an admittedly formalistic route. And it would allow Congress to get to much the same place as my proposal without having to overrule any case.

Finally, there may be some untapped promise in Justice Thomas's "private rights" proposal. Its legal status is somewhat ambiguous. In *Thole*, Justice Neil Gorsuch signed on to Justice Thomas's concurrence, which explicitly relied on the public-private rights distinction.[583] But then Justice Gorsuch joined the majority in *TransUnion* without explanation. Meanwhile, Justices Breyer, Sotomayor, and Kagan joined Justice Thomas's dissent in *TransUnion*, which again explicitly relied on the public-private rights distinction.[584] At one point or another, then, five justices have joined an opinion by Justice Thomas endorsing the private-public rights distinction. (Justice Breyer has since retired, and Justice Ketanji Brown Jackson has not yet indicated her position.) So, Justice Thomas's view may be beetling on the edge of majority status.

The "private rights" approach is an improvement on the Court's decision in *TransUnion*, but it is less than ideal. Part of the reason is that drawing the distinction between public and private rights based on Blackstone's *Commentaries* will give rise to difficult satellite litigation over jurisdiction and will not perfectly track underlying structural values.[585] But if the public-private distinction were to win a majority of the Court, it could be tweaked to lessen those problems. The proposal would be this: A case presents a "private" right as long as it is between two private parties. A case can only implicate a public right if it arises between the government and others. If this strikes the reader as gerrymandered to track my framework, consider that Justice William Brennan's plurality opinion (for four justices) in *Northern Pipeline*[586] proposed a similar approach to distinguishing public and private rights. He wrote that, while the "distinction between public rights and private rights has not been definitively explained in our precedents," it is

583. *Thole*, 140 S. Ct. at 1623 (Thomas, J., concurring).

584. Justice Kagan, joined by Justice Breyer and Justice Sotomayor, wrote separately to say that she continues to adhere the view that Article III requires a concrete harm even in the context of a statutory violation, but that courts should defer to Congress's view on whether something causes harm. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2225–26 (2021) (Kagan, J., dissenting).

585. The right to information at issue in *Acheson* is another example of a difficult-to-classify right. *See* Bayefsky, *supra* note 574. Indeed, Justice Thomas did not even attempt to classify it, saying instead that there would be no standing regardless of whether it is classified as public or private. *Acheson Hotels, LLC v. Laufer*, No. 22-429, slip op. at 6–7 (Dec. 5, 2023) (Thomas, J., concurring).

586. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

nonetheless true that "a matter of public rights must at a minimum arise '*between the government and others*.'"[587] And Justice Scalia agreed "that the public rights doctrine requires, at a minimum, that the United States be a party to the adjudication."[588] If the Court adopted Justice Thomas's focus on private versus public rights, but then discarded Blackstone's gloss on that distinction for Justice Brennan's and Justice Scalia's, it would arrive more or less where this Article proposes it should be.

It seems unlikely that Justice Thomas himself would bring this change to doctrinal fruition. But, if this Article has shown anything, it is that the path of judicial doctrine may display some surprising sinuosities.

CONCLUSION: STANDING AND THE PUBLICIZATION OF PRIVATE LAW

Though the Supreme Court splintered in *Thole*, one proposition commanded the universal assent of the justices: "Courts sometimes make standing law more complicated than it needs to be."[589] The irony of that lament appearing where it did was that *Thole*—and its close sequel, *TransUnion*—did as much damage to the coherence of standing law as any recent opinion.

This Article offers a path to simplification. As the Court has often repeated, the law of standing is "built on a single basic idea—the idea of separation of powers."[590] But the Court has not articulated a compelling theory why the separation of powers demands court-created, Article III limits on Congress's power to authorize private parties to sue other private parties. The closest it has come is to express misgivings about the exercise of enforcement discretion by private plaintiffs. But this discretion is a pervasive feature of private law. And, to the extent it is a valid concern, it presents a question under Article II, not Article III. It should not be enforced through a transsubstantive doctrine designed to circumscribe the scope of the "judicial power" in all cases. For almost fifty years, the Court recognized this basic point by rebuffing almost all

587. *Id.* at 69 (emphasis added) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). Justice Brennan continued in a footnote that it was "clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'" *Id.* at 69 n.23.

588. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 70 (1989) (Scalia, J., concurring). To be sure, the Court as a whole has not always adhered to this maxim in the context of its case law about the sorts of disputes that may be assigned to non–Article III federal tribunals. *See* James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 549–53 (2021).

589. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020); *id.* (Thomas, J., concurring) (agreeing); *id.* at 1637 (Sotomayor, J., dissenting) (same).

590. *United States v. Texas*, 143 S. Ct. 1964, 1969 (2023) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

attempts to dismiss cases between private parties for lack of standing. *TransUnion* threatens to upend this sound practice.

In an influential article called "Standing and the Privatization of Public Law," Cass Sunstein argued that courts had improperly imported concepts from private law through standing doctrine to limit the sorts of interests vindicable in court in public law cases.[591] The result, Sunstein warned, was that the interests of regulated entities would be systematically favored over those of regulatory beneficiaries.[592] *TransUnion* gives that story a surprising new twist. Standing doctrine, again, began as an import from private law to public law. Its requirements—injury, causation, redressability—add up to a generic cause of action that the Court imposed in public law cases seeking equitable relief against government officials. This served to prevent, in Justice Powell's words, the "general oversight of the elected branches of government by" the courts.[593] But now standing doctrine is being used as a limit in *private* law cases as well.[594] A generic cause of action has migrated from private law to public law and back again. If standing once allowed the Court to use private law to limit plaintiffs in public law cases, it has now become a means to use public law—structural principles loosely inspired by the spare terms of Article III—to limit plaintiffs in private law cases.

This is a misuse of Article III. As the Court observed long ago—in a case between private parties, no less—"the judiciary clause of the Constitution 'did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.'"[595] And it does not limit the kinds of interests that Congress may recognize as the basis for a federal lawsuit. For a very long time, the Court adhered to that principle in practice. But *Thole* and *TransUnion* broke the pattern. It remains to be

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

592. *Id.* at 1433.

593. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

594. This is not the place to engage the vexed question of how to distinguish public and private law in any comprehensive way. But it is notable that Tom Merrill, after canvassing the various ways that the distinction has been drawn, concluded that "the most widely invoked factor is the presence or absence of the government as a party." Thomas W. Merrill, *Private and Public Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 575, 576 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith, eds. 2020). That is how the distinction is understood here, and it suggests that this Article's standing framework coheres with other efforts to distinguish public and private law.

595. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (quoting *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933)).

seen how much damage has been done to the structure of standing and to what extent *TransUnion* will undermine private enforcement.[596] When the Court next confronts a question of standing between private parties, it should return the law of standing to its historical and conceptual moorings.

596. These questions are percolating in lower courts. *See, e.g.*, *Laufer v. Arpan LLC*, 29 F.4th 1268, 1276 (11th Cir. 2022) (Jordan, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023). ("*Havens Realty* may be inconsistent (in whole or in part) with current standing jurisprudence.").

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