The Standing Doctrine's Dirty Little Secret

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THE STANDING DOCTRINE’S DIRTY LITTLE SECRET

For at least forty years, the Supreme Court has insisted that the standing doctrine’s requirements of imminent injury-in-fact, causation, and redressability are mandated by Article III of the Constitution. During that same time, however, the federal courts have consistently permitted Congress to relax or eliminate altogether the imminence, redressability, and even injury-in-fact requirements in most so-called “procedural rights cases”—cases in which there exists a statutory right to judicial review regardless of the plaintiff’s own personal interest in the matter. After asking whether the Necessary and Proper Clause could augment Article III to close up this gap, we conclude that the best solution is to reinterpret Article III itself. We argue that the Court should simply recognize that the words “cases” and “controversies” mean two different things in the two types of litigation—one in which Congress has bestowed “procedural rights” on those without personal interest, and one for traditional common-law review. We refer to this as a “two tier” interpretation of the “cases” and “controversies” language in Article III. This solution, which is consistent with previous historical analyses, eliminates the need to jettison the Court’s insistence that, as a general matter, “cases” and “controversies” requires a personal stake in the outcome of the dispute, while also eliminating the need to engage in wholesale overruling of standing cases in the procedural rights and agency review areas. This would finally make clear to Congress the actual rules it must follow to use the “private attorneys general” tool to help enforce statutes that benefit society as a whole—particularly in the environmental, climate change, and transparency-in-government areas.
INTRODUCTION

For the last forty years, probably no procedural doctrine has had more influence on the course of constitutional adjudication in federal courts than the set of often-mystifying rules known as “standing to sue.” Litigants must demonstrate they have suffered an injury-in-fact that is caused by the defendant’s conduct and likely redressable by a favorable determination of the case.1 Many a challenge to government action has been turned away because the plaintiff, though able to demonstrate a violation of legal rights, lacked sufficiently “imminent” or “concrete” injury, or failed to convince the court in pretrial proceedings that the prayed-for relief would be sufficiently likely to remedy such injury. As a result, dozens of critical questions of federal law have either gone unresolved or been resolved de facto by highly partial government actors.

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If this state of affairs seems suboptimal, the federal courts’ response has been that their hands are tied by Article III of the Constitution. Article III grants Congress the authority to confer the “judicial power of the United States” on federal courts to adjudicate “cases” or “controversies” that fall into certain enumerated categories. Although it is hardly obvious from analysis of the constitutional text, the Supreme Court has long held that most of the requirements of the standing doctrine are compelled by Article III. But what if it were shown that critical parts of the standing doctrine said to be compelled by Article III are, in fact, not so compelled; and furthermore, that the Court’s own decisions prove the point? That is exactly what we set out to do in this Article.

In Part I, we explain in more detail what we mean by the standing doctrine’s “dirty little secret”—that, although the elements of standing are supposedly required in all cases by Article III, there are certain contexts in which the Supreme Court has acknowledged they may be relaxed or even eliminated. Generally speaking, these dispensations are granted in the “procedural rights” context, usually involving review of federal regulatory agency decisions. In Part II, we review the black-letter law of the standing doctrine, making it clear that “standing to sue” is supposed to be governed by the “Case or Controversy” Clause of Article III, which requires the “constitutional minima” of injury-in-fact, causation, and redressability. Then, in Part III, we more fully unveil the standing doctrine’s “dirty little secret”: in multiple lines of precedent, the federal courts have tolerated congressional elimination of these supposedly constitutionally mandated requirements. In fact, the Supreme Court’s own jurisprudence involving Environmental Impact Statement cases, the Freedom of Information Act, and the important administrative law rule known as the “Chenery doctrine” demonstrate that the standing doctrine’s “dirty little secret” is in fact a thoroughgoing contravention of the Article III orthodoxy.

Having laid this groundwork, we move to Part IV, where we make a sincere attempt to reconcile the “constitutional mandate” with the cases permitting Congress to override that very mandate. We find the Necessary and Proper Clause to be the most promising source of reconciliation. This argument rests on the Necessary and Proper Clause as it carries out Congress’ powers to legislate to the full extent of its constitutional authority.

Still, we acknowledge that the Necessary and Proper Clause arguments are short of irresistible. Therefore, in Part V, we examine other possible directions the Court could take, from overruling its precedent holding the standing doctrine mandated by Article III, to overruling its precedents permitting Congress to relax the elements. Finally, we settle on a pragmatic course of action: reconceptualizing the standing doctrine so it fits somewhere in between these two extremes, more along the lines of Justice Kennedy’s vision for the doctrine expounded in his concurring opinion in *Lujan v. Defenders of

3 See infra section II-E.
4 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (explaining that “procedural rights’ are special”).
5 As we explain infra in section IV-C, there is support for this proposition in *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).
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Wildlife. Ultimately, we suggest that the most elegant and minimally disruptive solution is to recognize that the words “cases” and “controversies” have two meanings: one for traditional common-law suits, in which the orthodox elements of standing are required, and one for “procedural rights” review, in which Congress may relax or even eliminate the formal elements of “standing.” But whether one agrees or disagrees with our prescription, our main aim is diagnostic—to bring this dilemma to light and demonstrate that the standing doctrine, as currently enunciated by the Supreme Court, is at war with itself.

I. The “Dirty Little Secret” Explained

In its 2008 blockbuster decision Massachusetts v. EPA, the Supreme Court held that Massachusetts had standing to obtain review of the Environmental Protection Agency’s (EPA’s) decision not to regulate greenhouse gases. Although Justice Stevens’ opinion for the 5-4 majority rested in part on a state’s special standing to sue the federal government on behalf of its citizens, it also rested in large part on the proposition that Congress may relax the “redressability” and “imminence” standards in the law of standing where “procedural injury” is concerned. The problem with this proposition is that it appears to contradict an unbroken chain of precedents beginning in the early 1970s holding that the redressability and imminence rules in the law of standing are mandated by the so-called “Case or Controversy Clause” of Article III of the Constitution. Put bluntly, if these rules are constitutionally mandated, how can Congress have the power to relax them, no matter what kind of subject matter is at issue in the litigation?

Although one might be tempted to write this off as the four “liberal” justices plus Justice Kennedy simply overreaching the bounds of standing law, that is not the case. In support of his statement that Congress may sometimes relax redressability and imminence standards, Justice Stevens cited Justice Scalia’s 1992 majority opinion in Lujan v. Defenders of Wildlife. There Justice Scalia, one of the Court’s former administrative law professors, had acknowledged in a discursive footnote that Congress must have the power to relax redressability and imminence standards in some cases—for if that was not true, how could one explain a neighbor’s unquestionable standing to

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6 See Lujan, 504 U.S. at 580 (Kennedy, J., concurring).
8 Id. at 520 (“Given . . . Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”), citing Georgia v. Tennessee Copper, 206 U.S. 230 (1907).
9 Id. at 518 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94-95 (D.C. Cir. 2002)).
10 In point of fact, there is no such “Case or Controversy” Clause; the text of Article III, Section 2, uses the word “cases” several times and “controversies” several times, but never together in the same clause. We nevertheless use the term on occasion for sake of ease and convention.
11 Massachusetts v. EPA, 549 U.S. at 518 (citing Lujan, 504 U.S. at 560-61).
12 Justice Breyer is the other.
13 Lujan, 504 U.S. at 572 n.7.
sue to force a developer to file an Environmental Impact Statement (EIS)? As Justice Scalia explained, it is rarely clear that forcing a developer to file an EIS will actually stop the development; such orders are usually sought as a delaying tactic. Nor could the plaintiff very often show that the development—and therefore his aesthetic or property value injury—was “imminent,” as actual construction depends on many variables other than the approval of an EIS. Yet the redressability requirement of standing normally insists that a plaintiff demonstrate, as a threshold matter of litigation, that the remedy he seeks will likely cure the injury-in-fact of which he complains. Moreover, the plaintiff must normally demonstrate that his injury is just about to happen, lest the litigation be declared unripe.

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

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14 *Id.* Justice Scalia explained:

There is this much truth to the assertion that “procedural rights” are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government’s argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents’ “procedural rights” argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

*Id.*

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


18 See infra section III-B.

other contexts, such a case would be dismissed for lack of standing on grounds the plaintiff was asserting no more than a “generalized grievance.”

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

If Massachusetts v. EPA and the Lujan footnote acknowledged that the causation and redressability requirements of Article III standing are sometimes optional, the FOIA cases demonstrate that injury-in-fact is also not indispensable in procedural rights cases. And these are not the only examples. As we document infra, this relaxation of Article III requirements occurs in a variety of contexts involving judicial review of agency action. But why is it that Congress can relax, or even eliminate, the three cardinal elements of standing when the Court has repeatedly stated that Article III absolutely mandates injury-in-fact, causation, and redressability?

That is the nub of the problem we face in this Article. The black-letter law says that Article III requires certain minima of concrete and imminent injury-in-fact, causation, and redressability in every federal court case. But a spate of precedents

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20 See infra sections II-D (generalized grievances) & III-B (FOIA cases defying this requirement).

21 See, e.g., Allen v. Wright, 468 U.S. 737, 754 (1984) (holding that a litigant’s asserted right to have the government act in accordance with law is not sufficient, by itself, to confer standing and therefore federal jurisdiction). Cf. Lujan, 504 U.S. at 578 (“[T]he injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.”) (internal alterations and citations omitted; emphasis added).


23 See, e.g., United States v. Richardson, 418 U.S. 166 (1974) (holding a taxpayer lacked standing to challenge the reporting of government expenditures under the Central Intelligence Agency Act because his claim amounted to a generalized grievance).


25 See infra section III.
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establishes beyond any doubt that Congress may sometimes relax and virtually eliminate those requirements. What gives?

II. THE “ARTICLE III” STANDING REQUIREMENTS

To address this conundrum fully, we begin with the cases in which the Supreme Court has steadfastly held that the elements of standing are constitutionally mandated. In the 1970s, the Court handed down a series of decisions in which it elaborated on the constitutional dimensions of the standing doctrine. In such cases as Simon v. Eastern Kentucky Welfare Rights Organization,26 Warth v. Seldin,27 and Linda R.S. v. Richard D.,28 the Court made it crystal clear that Article III of the Constitution requires a plaintiff to demonstrate three things in order to maintain any action in federal court: injury-in-fact, causation, and redressability. In other words, the plaintiff must be able to show that she suffered some real-world harm; she must make a plausible case that it was the defendant’s conduct (and not some third party or exogenous factor) that caused the harm; and that the plaintiff’s prayed-for remedy would likely cure the harm (and not just make the plaintiff feel better about having been vindicated on the liability issue). The Court’s most recent decisions continue to recite that these requirements are constitutionally mandated.29

Granted, these requirements have an undeniable common law sensibility about them: “If you want help, show us you are hurt, make sure you have blamed the right person for it, and assure us there’s some way we can fix it.” However, it is not obvious why Article III freezes them into the fundamental charter, and it is even less obvious why a plaintiff must demonstrate these matters at the threshold of the litigation. These questions have been explored elsewhere in considerable detail, and we will not revisit them here.30 We must, however, take some time to explain what the Court means by “injury-in-fact,” “causation,” and “redressability,” for they are terms of art with technical denotations.

27 422 U.S. 490 (1975).
A. "Injury-in-fact"

The most important thing to understand about injury-in-fact is the “in-fact” part. For years, the Court based a plaintiff’s standing to challenge federal agency action on something called the “legal right” test: did the defendant violate a vested legal right held by the plaintiff?31 In more modern terms, this amounted to the question of whether the plaintiff had alleged a valid “cause of action,” which is to say, an entitlement to a judicial remedy based on the facts alleged in the complaint. But in 1970, that changed.

In Data Processing Association v. Camp,32 Justice William O. Douglas led the majority in discarding the “legal right” test and instead substituting an “injury-in-fact” test.33 If “injury-in-fact” sounds redundant to a layperson, it is only because the layperson does not appreciate that it replaced what amounted to an “injury-at-law” test. Whereas the federal courts had previously denied standing to scores of plaintiffs seeking review of federal agency action on the ground that they had not alleged what we would today call a valid “cause of action,” the Camp Court now made it clear that the plaintiff did not have to show a valid cause of action to have standing to sue. The plaintiff did not have to show a “legal harm,” only an injury “in fact.”

Camp illustrates the difference between the two ideas. An industry association representing data processing providers sought judicial review of the Comptroller of the Currency’s ruling that banks could provide data processing services as well.34 The plaintiff alleged that the ruling violated the Bank Service Corporation Act of 1962, which the plaintiff claimed prohibited banks from engaging in any activity other than banking.35 The data processors were not, of course, concerned about preserving the soundness of the banking industry or the welfare of bank customers, but rather that their de facto monopoly on data processing services was being broken up. The lower federal court, following longstanding precedent, held that the plaintiff industry association lacked standing to sue because it had no entitlement to a competitive market advantage over banks.36 Neither the 1962 Act nor any other positive law granted the data processing industry any such right to a monopoly on providing data processing services.

The Supreme Court reversed. Justice Douglas, nonchalantly overruling more than forty years of precedent without any acknowledgement, stated that the “legal right” test is irrelevant to standing—that whether a legal right was violated instead goes to the

31 E.g., Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137-138 (1939) (where private power companies sought to enjoin TVA from operating, claiming that the statutory plan under which it was created was unconstitutional, the Court denied the competitors standing, holding that they did not have that status “unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”).
33 The Court also instituted a “zone of interests” requirement that has turned out to be quite toothless. See Clarke v. Securities Industries, 479 U.S. 388 (1987).
34 Camp, 397 U.S. at 151.
35 Id. at 155.
36 Id. at 152-53.
merits. The correct test for standing was whether the Comptroller’s ruling caused the data processors “injury-in-fact,” and the answer to that was clearly affirmative. Banks would now cut in on the data processors’ monopoly, causing market share diminution.

Understanding what the Supreme Court means by the difference between “legal harm” and “injury-in-fact” is absolutely critical to this Article. Cass Sunstein put it best: “injury-in-fact” is “pre-legal” harm. It could be measured conventionally—that is, would most people would consider it “harm”? (This could easily be converted into a “common sense” locution of “injury,” even though there is no epistemology for ascertaining what “common sense” dictates in any given situation.) Or it could be measured in pre-modern terms—what would a certain religious doctrine find to constitute “harm”? Or it could be measured in market terms—does the defendant’s conduct diminish an economic interest held by the plaintiff? Or it could be measured in secular moral terms—would a philosophical idealist view such conduct as creating “harm”? But the one measure we could not use to define injury-in-fact is whether the law labels something a harm, according to Justice Douglas.

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

37 Id. at 153.
38 Id. at 152-53.
39 Id. at 152.
40 Sunstein, Privatization of Public Law, supra n. 21 at 1436 n.18.
41 This is otherwise known as damnum absque injuria—“damage without legal wrong.” See generally, e.g., Hessick, supra n. _ at 281 & n.22; Joseph William Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 WIS. L. REV. 975, 1025-35 (1982) (surveying jurisprudence on damnum absque injuria).
42 Michael C. Jensen, William H. Meckling & Clifford G. Holderness, Analysis of Alternative Standing Doctrines, 6 INT’L REV. OF LAW & ECON. 205, 209 (1986). We would like to emphasize that this is a description of the Court’s jurisprudence; we do not endorse this statement normatively. It would be perfectly coherent to have a regime under which the plaintiff is asked a single question: “What legal right of yours did the defendant violate?” It would be perfectly coherent not to have the court ever ask, “were you harmed in some social, moral, philosophical, or political sense,” which is what the “injury-in-fact” doctrine effectively asks. In other words, “harm” is an inevitably value-laden concept. This point is hammered home not only by Sunstein, but also by William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221 (1988).
injured. According to the Court, this means that the mere existence of a “legal harm” cannot automatically confer the injury-in-fact sufficient for standing.\(^\text{43}\)

Thus, current standing doctrine, as established by *Camp*, is based on a non-legal baseline of what constitutes “injury.” For example, the Court has said that “pocketbook” or “wallet” injury always qualifies, but that mere “ideological” or “psychic” harm never does.\(^\text{44}\) If the plaintiff alleges that her property value has been diminished in some non-trivial way, this allegation always satisfies the “injury-in-fact” test. But if the plaintiff alleges that she has been harmed simply because her government has acted illegally in the treatment of someone else, she has failed the “injury-in-fact” test, because the emotional harm associated with seeing non-family members suffer is not a “cognizable” harm. (The Court uses the word “concrete” as a synonym for “cognizable” when it comes to pre-legal harms.) There is no positive law that preordains the characterization of this kind of harm as “non-cognizable”; Sunstein’s point is that it is non-cognizable because the Supreme Court says so. “[T]here is no prepolitical or prelegal way to decide who is a [mere] bystander” for standing purposes, Sunstein wrote.\(^\text{45}\)

Still, even leftists must concede that the Court has gone a long way in finding harms “cognizable.” In addition to “wallet injury,” the Court has recognized that “stigmatic” harm can be cognizable so long as the stigma emanates from the defendant’s “personal treatment” of the plaintiff;\(^\text{46}\) “aesthetic” injury is cognizable, as in the despoiling of beautiful natural settings, so long as the plaintiff is among those who personally go to the lands in question to enjoy their beauty;\(^\text{47}\) and “informational” injury is cognizable, so long as the information is necessary or at least helpful in allowing the plaintiff to decide how to cast her vote in an election.\(^\text{48}\) But the Court remains adamant that “ideological” injury is not cognizable; one may not sue based on the alleged harm that is done her simply because her government has acted illegally and in a manner of which she disapproves.

In addition to being “concrete” or “judicially cognizable,” the injury must be “imminent.”\(^\text{49}\) It is not clear whether imminence in the standing doctrine refers to a temporal concept, a probabilistic concept, or both. At times the Court has found a lack of

\(^{43}\) Except as permitted by the court in the cases we identify as defying this orthodoxy—the very cases that give rise to the standing doctrine’s “dirty little secret.” See infra section III.

\(^{44}\) Compare, e.g., *Data Processing Association v. Camp*, 397 U.S. 150, 153 (1970) (wallet injury as well as certain noneconomic injuries, such as aesthetic, conservational, recreational, and spiritual injuries) (collecting cases); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (same), *with*, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere harm to an ideological interest will not suffice).

\(^{45}\) Sunstein, *Privatization of Public Law*, supra n. 21 at 1436 n.18.


\(^{47}\) See *Sierra Club*, 405 U.S. at 734.


imminence where the Court’s concern seemed to be that the alleged injury was not just about to happen, which would denote a temporal matter;\textsuperscript{50} at other times, the Court has found imminence lacking because the injury was “too conjectural,” which denotes an insufficient probability of the injury ever occurring.\textsuperscript{51}

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

B. Causation

By the 1970s the touchstone of standing had become the existence of a “personal stake in the outcome of the controversy.”\textsuperscript{52} Thus the Court not only required that the plaintiff suffer an injury-in-fact, but also that the injury be “fairly traceable” to the defendant’s conduct. This has become known as the “causation” prong of the standing doctrine.

In \textit{Simon v. Eastern Kentucky Welfare Rights Organization}, a group representing indigents sued the Internal Revenue Service (IRS) for issuing a revenue ruling that permitted hospitals to retain their non-profit (and therefore tax-advantaged) status even though they were providing only emergency room services, and not full services, to indigents.\textsuperscript{53} The theory of the plaintiff’s case was simple: hospitals had an incentive to provide indigents with as little care as they could, provided that it would not endanger the hospitals’ non-profit status.\textsuperscript{54} Many or most hospitals are critically dependent on private donations, and donors can give more money to non-profits than to for-profits because the donations are deductible. By issuing the revenue ruling in question, the IRS had “encouraged” the hospitals to drastically cut the range of their services to indigents without worrying that their donations would dry up.

The Supreme Court held that the plaintiff lacked standing because the indigents’ undoubted injury (inability to get full hospital services) was not fairly traceable to the revenue ruling.\textsuperscript{55} “It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners’ ‘encouragement’ or instead result from

\textsuperscript{50} See, e.g., \textit{id.} at 559-60.
\textsuperscript{53} 426 U.S. 26, 28-32 (1976).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} at 41-42.
decisions made by the hospitals without regard to the tax implications,” wrote Justice Lewis Powell for the majority.\(^5\) In other words, unlike an ordinary tort case for damages, the plaintiff in a federal court proceeding seeking injunctive relief is required to make a convincing case \textit{at the pleading stage} that the defendant’s conduct had “caused” the plaintiff’s injury.

\textit{Allen v. Wright}\(^5\) illustrates the same point on substantially similar facts. Plaintiffs were parents of black children enrolled in public schools that were then under federal court orders to desegregate.\(^6\) Large numbers of white parents then pulled their children out of those public schools and sent them to white-only private schools, leaving the public schools with too few white students to carry out desegregation effectively.\(^7\) The plaintiffs sued the IRS for failing to enforce anti-discrimination requirements on the private schools, which were not entitled to their non-profit status if they discriminated on the basis of race.\(^8\)

This time Justice Sandra Day O’Connor wrote for the majority, holding that plaintiffs lacked standing.\(^9\) They had alleged adequate injury, being that their children were denied the benefits of being educated in a desegregated public facility.\(^10\) But, as in \textit{Simon}, the Court found it too conjectural that the IRS’s lax enforcement of the non-profit rules against the private schools had led white parents to move their children to those private schools. “Is the line of causation between the illegal conduct and the injury too attenuated?” asked O’Connor.\(^11\) Pointing to the facts of \textit{Simon}, Justice O’Connor wrote, “The chain of causation is even weaker in this case. It involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents’ communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.”\(^12\) She concluded: “The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents’ standing.”\(^13\)

\textit{C. Redressability}

Both \textit{Simon} and \textit{Allen v. Wright} highlight the redressability prong as well. In both cases, the Court held that it was far too speculative whether forcing the IRS to deny non-profit status to the hospitals and discriminatory private schools would cure the plaintiffs’ respective injuries. Would private donations to the hospitals decrease sufficiently for the hospital to restore full services to indigents? Would donations to the discriminatory

\(^{56}\) \textit{Id.} at 42-43.
\(^{58}\) \textit{Id.} at 739-48.
\(^{59}\) \textit{Id.}
\(^{60}\) \textit{Id.} at 743-45.
\(^{61}\) \textit{Id.} at 753.
\(^{62}\) \textit{Id.} at 752.
\(^{63}\) \textit{Id.} at 759.
\(^{64}\) \textit{Id.}
\(^{65}\) \textit{Id.}
private schools decrease sufficiently for them to have to raise tuition to a level where white parents would relent and send their kids back to public school, or force closure of the discriminatory private schools for lack of funding? These scenarios involved certain empirical suppositions the Court was unwilling to entertain, and the Court was further unwilling to proceed on the basis of the sweeping economic theory that people will consume less of any commodity as its price increases. There was just not enough evidence (even at the pleading stage) that the price to hospitals and private schools of discriminating against indigents and black students, respectively, would actually increase. The redress of the plaintiffs’ injuries in these two cases would therefore not necessarily follow from the granting of the relief they requested.

Another case that crisply depicts the redressability doctrine is *Linda R.S. v. Richard D.* The plaintiff was the mother of an illegitimate child whose father refused to make support payments. The state had a statute authorizing punishment of such “deadbeat dads,” but uniformly refused to prosecute fathers of illegitimate children. The mother sued for injunctive relief that would have ordered the prosecutor to go after the father, on the theory that the threat of punishment would make him pay up.

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

**D. Generalized grievances**

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

The first case was *Fairchild v. Hughes.* In early 1920, state legislatures were in the process of ratifying the Suffrage Amendment, guaranteeing women the right to vote. Thirty-five states had passed resolutions purporting to ratify the amendment, and the Secretary of State had indicated that, upon receiving one more certification, he would declare the amendment adopted. On July 7, 1920, a man named Charles S. Fairchild filed a bill in equity in the Supreme Court of the District of Columbia, asking that the “so-

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67 Id. at 614-16.
68 Id.
69 Id. at 616.
70 Id. at 617-18.
71 Id. at 619.
72 Id. at 621.
73 258 U.S. 126 (1922).
called Suffrage Amendment be declared unconstitutional and void,” and that the Secretary of State be enjoined from declaring that it had been adopted. Mr. Fairchild declared himself to be a citizen and a taxpayer of the United States and a member of the American Constitutional League, a voluntary association dedicated to spreading knowledge about the fundamental principles of the Constitution, “especially that which gives to each State the right to determine for itself the question as to who should exercise the elective franchise therein.” The trial court refused to issue the requested relief, whereupon the Secretary of State announced that he had received a certificate of ratification from the 36th state and therefore that the amendment had been adopted.

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

In form [the action] is a bill in equity; but it is not a case within the meaning of Section 2 of Article III of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is ‘brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.

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

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

Writing for the Court, Justice George Sutherland found that Mrs. Frothingham

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74 Id. at 127.
75 Id.
76 Id. at 128.
77 Id. at 129.
78 Id.
79 262 U.S. 447, 479 (1923).
80 See id. at 479-80.
had an insufficient interest in the subject matter of the suit. She had failed to allege that she had suffered any legal injury as a result of the challenged program, or that she was about to suffer any such injury. “It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief,” Sutherland wrote for the Court.  

“We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.”  

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

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

**E. The standing doctrine’s relationship to Article III**

The standing doctrine is generally accepted in the academic community as being a judicial creation of relatively recent vintage, having emerged in the mid-twentieth century. Nevertheless, the doctrine has roots in *Marbury v. Madison* and the jurisprudence leading up to it. In *Marbury*, as well as in such instances as the

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81 Id. at 484.
82 Id. at 488.
85 See Correspondence of the Justices (1793) (found in 3 Johnston, Correspondence and Public Papers of John Jay 486-89 (1891)) (Justices of the Supreme Court refused to render an advisory opinion requested by the President and Secretary of State, holding that such an opinion would be “extrajudicial” and thus would violate the “lines of separation
Correspondence of the Justices and *Hayburn's Case*, the Supreme Court enunciated what are now basic principles of American judicial federalism: the need for separation of powers and the concomitant requirement that the judicial power extend only to cases and controversies—namely, that federal courts must not make pronouncements in the abstract, without any live issues before them. Later, the Supreme Court linked these considerations to the Case and Controversy Clause of Article III, and today the standing doctrine is considered constitutionally required and jurisdictional in nature.\(^\text{86}\)

However, the standing doctrine has many strands, and not all of them are compelled by Article III. The Supreme Court has also imposed other “prudential” standing requirements to limit the discretion of the judiciary.\(^\text{87}\) The so-called “zone of interests” requirement, which requires those who seek judicial review of federal agency action to demonstrate that they “arguably fall within the zone of interests” that Congress intended when it enacted the enabling statute, is confessedly prudential.\(^\text{88}\) While in theory the Article III requirements are irreducible, Congress may waive the prudential standing requirements.\(^\text{89}\) Congress clearly has the power to overrule the zone of interests requirement.\(^\text{90}\) The rule that generally prohibits litigants from asserting the legal rights of third persons not before the court is also prudential, and Congress could do away with that as well.\(^\text{91}\)

Since the early 1970s, however, the Court has insisted that the requirements of imminent injury-in-fact, causation, and redressability are mandated either by the “judicial power” clause of Article III, or the “case or controversy” clause of Article III, or the original intentions of the Framers, or some combination of these. In *Camreta v. Greene*,\(^\text{92}\) decided in 2011, Justice Elena Kagan reiterated what the Court has said consistently over the last forty years:

> Article III of the Constitution grants this Court authority to adjudicate legal disputes only in the context of “Cases” or “Controversies.” To enforce this limitation, we demand that

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\(^{87}\) Of the “prudential” standing requirements, most salient of which is the prohibition on adjudicating the rights or interests of non-litigants. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975).


\(^{89}\) *Id.; Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”); *id.* at 500-01 (the requirements for injury and causation are constitutionally required; the ban on third-party standing and the prohibition against federal courts deciding generalized grievances are merely prudential).

\(^{90}\) *Bennett*, 520 U.S. at 162 (citing *Warth*, 422 U.S. at 501).

\(^{91}\) See, e.g., *Warth*, 422 U.S. at 500-01 (1975).

litigants demonstrate a “personal stake” in the suit. The party invoking the Court’s authority has such a stake when three conditions are satisfied: The petitioner must show that he has “suffered an injury in fact” that is caused by “the conduct complained of” and that “will be redressed by a favorable decision.”

Justice Anthony Kennedy’s majority opinion in another 2011 case, Arizona Christian School Tuition Organization v. Winn,94 said almost the exact same thing:

The minimum constitutional requirements for standing were explained in Lujan v. Defenders of Wildlife: “First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical.’” “Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”95

Indeed, it is Justice Antonin Scalia’s majority opinion in Lujan v. Defenders of Wildlife96 that the Court now routinely cites for the proposition that Article III mandates the imminent injury-in-fact, causation, and redressability requirements. But a closer look at Justice Scalia’s Lujan opinion and Justice Kennedy’s concurrence in that same case strongly suggest that the Justices are well aware that the matter is more complicated than that: Congress clearly does have the power to alter some of these rules that are assertedly mandated by Article III.

III. THE “DIRTY LITTLE SECRET” EXPOSED: AREAS IN WHICH CONGRESS HAS BEEN PERMITTED TO RELAX OR ELIMINATE THE ARTICLE III REQUIREMENTS

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

A. Environmental Impact Statements: The Supreme Court’s confession in Lujan

The text of Justice Scalia’s majority opinion in Lujan did not break much, if any, new ground in terms of the relationship between Article III on the one hand and the injury, causation, and redressability strands of the standing doctrine on the other. The Endangered Species Act of 1973 requires every federal agency to consult with the Secretary of the Interior to help insure that no agency action jeopardize the continued existence of any endangered species or its habitat.97 In 1978, the departments of Interior

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93 Id. at 2028.
95 Id. at 1442.
and Commerce jointly issued a regulation that extended the consultation obligations of the ESA to actions taken abroad, not just those in the United States. By 1986, however, the White House had changed hands, and the Interior Department issued a new regulation that limited the consultation requirement to agency actions in the United States or on the high seas.

The Defenders of Wildlife brought an action in federal district court against the Secretary of the Interior, praying for a judicial declaration to the effect that the new regulation violated the ESA and for an injunction that would require the Secretary to promulgate a new regulation that was consistent with the Act. The district court found an absence of standing to sue, but the Court of Appeals for the Eighth Circuit reversed, and on remand, the district court granted the plaintiff’s motion for summary judgment and issued the prayed-for declaratory and injunctive relief.

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

In Lujan, the lawyers for Defenders of Wildlife assembled declarations in an effort to surmount this requirement. The Court of Appeals focused on two of them, executed by members Joyce Kelly and Amy Skilbred. Justice Scalia described their declarations in some detail:

Ms. Kelly stated that she traveled to Egypt in 1986 and ‘observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly,’ and that she ‘will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] developing . . . Egypt’s . . . Master Water Plan.’ Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and ‘observed the habitat’ of ‘endangered species such as the Asian elephant and the leopard’ at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she was unable to see any of the endangered species; ‘this development project,’ she continued,

98 Lujan, 504 U.S. at 558-59.
99 Id.
100 Id. at 559.
101 Id.
102 405 U.S. 727 (1972).
103 Id. at 734.
104 See id.
105 Id. at 734-35.
will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [which] may severely shorten the future of these species”; that threat, she concluded, harmed her because she ‘intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard. When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that ‘I intend to go back to Sri Lanka,’ but confessed that she had no current plans: ‘I don’t know [when]. There is a civil war going on right now. I don’t know. Not next year, I will say. In the future.’

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

Justice Scalia went on to find that the plaintiff also failed the redressability requirement. Even if the injunction were to take effect, how could one be sure that other agencies would actually consult with the Secretary of the Interior on projects abroad, particularly given that the Reagan Administration’s Justice Department had taken the position that the consultation requirement was not binding to begin with? Interestingly, however, Justice Kennedy did not join this portion of the opinion, leaving the redressability analysis with only a four-justice plurality.

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

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

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106 *Lujan*, 504 U.S. at 563.
107 *Id.* at 562-63.
108 *Id.* at 564.
109 *Id.*
110 *Id.* at 568.
111 *See id.* at 580 (Kennedy, J., concurring).
112 *Id.* at 580 (Kennedy, J., concurring) (emphases added). The two decisions alluded to are, of course, Chief Justice John Marshall’s magisterial opinions in *Marbury v. Madison*, 5 U.S. 137 (1803) and *Gibbons v. Ogden*, 22 U.S. 1 (1824).
Justice Kennedy later elaborated on his view:

The Court’s holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.\footnote{113}

The citizen-suit provision of the ESA did not, in Justice Kennedy’s view, surmount even this very low threshold. It came too close to allowing anyone to sue to stop the federal government from violating what amounted to internal housekeeping rules with respect to interagency consultations.

On its surface, Kennedy’s concurrence could be viewed as an admonition to those on the Court who believe in a strong version of original intention interpretation. It could be seen as a battle of “pragmatism” (Kennedy) versus “principle” (Scalia), with Justice Kennedy gently reminding his colleagues in the plurality that times have changed, and therefore the Court must be more flexible about letting Congress utilize the concept of “private attorneys general” to enforce the many, varied, and complex norms produced by the administrative state.

In fact, however, these passages represent a simple airing of Justice Kennedy’s views. He appears to have been entirely sincere when he said, “I do not read the Court’s opinion to suggest a contrary view.” We know this is true because Justice Scalia, the former administrative law professor, acknowledged as much in his majority opinion; he simply buried the acknowledgement in a footnote.

The note—footnote 7—is an eye-opener. Nominally, it is a response to the plaintiff’s argument that the limitation of the consulting requirement caused them a “procedural injury,” which entitled them to seek judicial review under circumstances where a plaintiff might not otherwise have such a right.\footnote{114} But instead of sweeping aside this embarrassingly shallow argument with a single dismissive sentence, Professor Scalia showed up and gave an intellectually honest mini-lecture on standing to seek judicial review of agency action:

There is this much truth to the assertion that ‘procedural rights’ are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.\footnote{115}

\footnote{113}{\textit{Lujan}}, 504 U.S. at 580 (Kennedy, J., concurring) (emphasis added).\footnote{114}{\textit{See id.}} at 572 n.7.\footnote{115}{\textit{Id.}} (emphasis added).
This passage is astonishingly candid and has equally astonishing consequences. Justice Scalia, the member of the Court probably most closely associated with strict adherence to the Article III standing doctrine, admits in this note that it is simply too late in the day to claim that Congress has no power to alter the Article III requirements of imminence (an integral element of the injury-in-fact requirement) and redressability.

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

The Court’s subsequent standing precedent confirms what Justice Scalia discussed in that *Lujan* footnote. It was the prospect of rising ocean waters that brought *Massachusetts v. Environmental Protection Agency* to the Supreme Court. A group of private organizations petitioned the EPA to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act. Four years later, the EPA denied the petition on two grounds: first, that the agency lacked authority to regulate greenhouse gases; and second, that in any event the agency would not choose to exercise such authority. A number of states including Massachusetts joined as plaintiffs and sued unsuccessfully for review of agency’s decision by the Court of Appeals for the D.C. Circuit.

The Supreme Court reversed, 5-4, with Justice John Paul Stevens writing for the majority. The Court found that Massachusetts had standing to seek judicial review of the agency’s denial of the petition to regulate greenhouse gases. The State’s injury-in-fact was the potential loss of its coastal lands to rising sea levels. In dissent, Chief Justice Roberts protested that Massachusetts had failed the redressability test. The State had not demonstrated that the regulation of new motor vehicle emissions in the United States would redress Massachusetts’ claimed injury, the loss of coastal lands. Eighty percent of greenhouse gas emissions already originate outside the United States, Justice Roberts

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117  Id. at 510.
118  Id. at 511-14.
119  Id. at 514.
120  Id. at 517.
121  Id. at 518-23.
122  Id. at 542-46 (Roberts, C.J., dissenting).
123  Id. (Roberts, C.J., dissenting).
argued, and that percentage would only increase as China and India continued to develop economically. Thus, the redressability of the state’s injury was too conjectural. It was contingent on the behavior of third parties not before the Court. If China and India were not to greatly reduce their emissions, wrote Chief Justice Roberts, the allegedly injurious climate changes would occur whether or not the EPA regulated new tailpipe emissions in the United States. Ocean levels would still rise. Massachusetts would still lose land.

That might be true, responded Justice Stevens, but the state would not lose as much land as it otherwise would. Justice Stevens’ key intellectual move was to view redressability as a matter of degree rather than as an all-or-nothing proposition. Rather than ask whether the regulation of new vehicle emissions in the United States was likely to reverse the process of climate change completely, Justice Stevens asked whether such regulation was likely to lead to some diminution or slowing of climate change. For redressability purposes, it did not matter that China and India were much larger producers of greenhouse gases, or that they were unlikely to make drastic reductions in emissions. “A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere,” Stevens wrote. Even if a reduction in domestic emissions only caused a modest slowing in the process of climate change, that presumably would also bring a small decrease or delay in the loss of coastal lands, or a small decrease in the risk that any coastal lands would be lost. That, in turn, would constitute redress—however partial.

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

[A] litigant to whom Congress has ‘accorded a procedural right to protect his concrete interests’—here, the right to challenge agency action unlawfully withheld—‘can assert that right without meeting all the normal standards for redressability and immediacy.’

When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.

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

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124 Id. at 545 (Roberts, C.J., dissenting).
125 Id. at 545-46 (Roberts, C.J., dissenting).
126 Id. at 525-26.
127 Id. at 526.
128 Id.
129 Id. at 517-18 (citations omitted) (emphasis added).
Court has openly admitted the standing requirements may be “relaxed.” But, as we explain in the following sections, federal courts have permitted this to occur in many “procedural rights” areas. These cases demonstrate that the *Lujan* and *Massachusetts v. EPA* cases are not flukes but rather reveal a thoroughgoing and systematic contradiction of the black-letter law of standing—the doctrine’s “dirty little secret.”

**B. The Freedom of Information Act**

Although *Lujan* and *Massachusetts v. EPA* establish beyond doubt that Congress has the power to relax the imminence and redressability requirements, there is another area in which Congress has arguably eliminated the injury requirement altogether: the Freedom of Information Act (FOIA). Indeed, a strong case could be made that FOIA violates even Justice Kennedy’s generous concession of power to Congress to grant standing except to “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.”

For, under well-established law, *anyone* has standing to request judicial review of an agency’s refusal to disclose documents under the FOIA, even if purely out of curiosity, or even if just to harass the agency.

Title 5 of the United States Code, §552(a)(3)(A) states:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

This provision literally grants “any person” a right to receive non-exempt records upon a proper request to a federal agency. It does not say any “injured person,” or any “aggrieved person,” as many administrative statutes say, but simply any person.

In *NLRB v. Robbins Tire & Rubber Co.*, the Supreme Court made it clear that “any person” really means “any person”:

> We have had several occasions recently to consider the history and purposes of the original FOIA of 1966. As we have repeatedly emphasized, ‘the Act is broadly conceived,’ and its ‘basic policy’ is in favor of disclosure. In 5 U.S.C. § 552(b), Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. But unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.

On this point, the Court in *EPA v. Mink* stated, “[the Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a

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133 *Id.* at 220-21 (emphasis added).
judicially enforceable public right to secure such information from possibly unwilling official hands.”134 The phrase “judicially enforceable public right” is striking; the Court has ruled out any such concept in most other places, including claims asserting violations of the Guaranty Clause (nonjusticiable)135 and claims asserting “generalized grievances” (quintessentially nonjusticiable).136 Outside of the FOIA, the Court has recognized very few instances that come close to anything like a “judicially enforceable public right.” One of them is the Establishment Clause, and the case recognizing the right to enforce that provision in the courts, Flast v. Cohen,137 has subsequently been whittled down to the slenderest possible reed.138 Lest there be any doubt that the FOIA was meant to create a judicially enforceable right to access, a quick read of § 552 dispels it:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.139

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

The “birther” cases are a prime example of the generalized grievances that federal courts are willing to entertain in the name of FOIA. In countless cases where an

137 392 U.S. 83 (1968).
138 See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982) (plaintiff lacked standing under Flast to challenge transfer of federally-owned land to the Northeast Bible College because it was accomplished under the Property Clause rather than under the Taxing and Spending Clause); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) (plaintiff lacked standing under Flast to challenge President’s appropriation of monies to faith-based community groups because Congress did not specifically allocate the funds to the Executive Branch for that purpose; the President exercised his discretion to use them in that manner).
interested citizen made a FOIA request for documents relating to President Obama’s citizenship, international travel, birth, and so on, courts did not reject the claim as a generalized grievance. For instance, in *Taitz v. Ruemmler*, Orly Taitz, an indefatigable leader of the “birther” movement, sought review of the Obama administration’s refusal to release his long-form birth certificate. The district court affirmed the decision of Kathy Ruemmler, White House Counsel, not to release the documents allegedly in her possession because “the Supreme Court has long held that the President’s personal staff and advisors are not ‘agencies’ subject to FOIA requests.” The court rejected Taitz’ claim, but not before remarking upon the nature of her request: “As part of her Sisyphean quest to prove that President Barack Obama is using a fake Social Security number and a forged birth certificate, plaintiff . . . seeks access under the Freedom of Information Act . . . to the two certified copies of the original long form birth certificate of Barack Obama[].” Notably, the court made no mention of the generalized nature of the grievance—if anything, the court’s rather snarky description only served to emphasize that, despite Taitz’s claim being a generalized grievance, she nonetheless possessed standing to sue. Indeed, other “birther” plaintiffs have gotten further in their review, notwithstanding the inescapable fact that their claims are generalized grievances.

This permissiveness is even more dramatically highlighted when compared to another “birther” case that arose in a different procedural context. In *Berg v. Obama*, Phillip J. Berg, an attorney and self-proclaimed lifelong member of the Democratic Party, challenged President Obama’s eligibility for the presidency directly under the Natural Born Citizen Clause. Berg sought orders compelling the production of Obama’s long-form birth certificate, enjoining Obama from running for President, and enjoining the Democratic National Convention from selecting Obama as the nominee on the grounds that Obama was not a “natural born citizen” within the meaning of Article II, section I, clause 4 of the Constitution. The district court dismissed Berg’s complaint because it asserted no more than a generalized grievance: “Plaintiff’s stake is no greater and his status no more differentiated than that of millions of other voters. . . . [H]e avers that he and ‘other Democratic Americans’ . . . will experience irreparable harm. . . . This harm is too vague and its effects too attenuated to confer standing on any and all voters.”

Thus, courts have held in one case that a “birther” request is a nonjusticiable

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141 *Id.* (citing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980)).
142 *Id.*
143 See, e.g., *Strunk v. U.S. Dep’t of State*, 770 F. Supp. 2d 10 (D.D.C. 2011) (in FOIA suit seeking access to documents regarding President Obama’s deceased mother, the court held, inter alia, that a genuine issue of material fact remained as to the sufficiency of the Department of Homeland Security’s search for the documents, precluding summary judgment).
145 *Id.*
146 *Id.* at 519.
generalized grievance and thereby incapable of constituting injury-in-fact, but permitted
the same basic claim to go forward in the context of a FOIA request. These cases
demonstrate that in FOIA cases, there is no “rock bottom” for injury-in-fact—that no
injury-in-fact is required at all. This situation goes beyond Congress “relaxing” the
imminence qualifier to the injury-in-fact requirement or relaxing the redressability
requirement. We think FOIA represents the flat-out elimination of the injury-in-fact
requirement. (If we are right about that, it wipes out the causation and redressability
requirements as well, since they are yoked to the injury prong.) It permits anyone
standing to sue for enforcement of a request to see documents based on any motivation,
including simple desire to see that government follow the law.

Some will argue that one can suffer a “concrete informational injury” from an
agency’s refusal to disclose non-exempt documents, even if the plaintiff has no
connection to the subject matter documents other than being an “interested citizen.”
There are at least three levels on which this argument could be engaged: (1) as a matter of
precedent; (2) as a matter of conventional agreement; and (3) as a conceptual matter of
what constitutes “concreteness” or “cognizability” of injury. As Sunstein has
demonstrated, the third form of discourse is intellectually incoherent. There can be no
such concept as “pre-political” and “pre-legal” injury, unless it is based on something like
morality or religious doctrine, which surely no one wants to control here. “Injury”
could be a cultural, political, or legal construct, or some combination of the three, but it is
not etched in any non-religious stone tablet. There simply is no Platonic form of “injury”
available to use as a metric. What one person considers “harm” another may regard as
“not harm,” or even as “benefit”—for example, the construction of a subway station a
block from one’s house, or the prohibition against taking distributions from one’s pension
plan until a certain age, or being awakened at 3 a.m. by the police because they heard
suspicious noises near one’s house and were concerned about the safety of the
inhabitants. Unless one has a universal metric that can tell us which of these three
hypotheticals causes “injury,” and which do not, then the conceptual approach is going
nowhere. (It is tempting to say the metric is historical, but that can’t be right: it seems
improbable, to say the least, that the Framers would have recognized “aesthetic” injury to
the countryside far away from one’s own property as sufficiently “concrete” to support
litigation.)

But precedent doesn’t have to pass any philosophical test to be law, and all of the
Court’s pronouncements about “concreteness” or “cognizability” would suggest that an
agency’s failure to satisfy one’s mere curiosity about the contents of government

147 “As Chief Justice Marshall explained in an early decision of the United States
Supreme Court, the existence of numerous decisions that have permitted a judicial
procedure without explicitly discussing the procedure’s validity are properly viewed to
‘have much weight, as they show that [the asserted flaw in the procedure] neither
occurred to the bar or the bench.’” Perry v. Brown, -- P.3d --, 52 Cal. 4th 1116, at p. *15
(Cal. 2011) (citing Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 88 (1809); Brown
Shoe Co. v. United States, 370 U.S. 294, 307 (1962)).

148 Sunstein, Privatization of Public Law, supra n. 21 at 1436 n.18.

149 Cf., e.g., Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (recognizing Article III
standing for “aesthetic” injury).
documents is not a concrete injury. It is true that the Court found “informational injury” to be sufficient in *Federal Election Commission v. Akins*, but only because some people desperately did not want to vote for candidates who had received money from the American Israel Public Affairs Committee, an organization whose lobbying activities some people find objectionable. Without the requested information disclosures, the voters could not know which candidates had received money from the organization and which had not.

One might argue that the Court’s recognition of aesthetic injury is no more concrete than injury to curiosity, but the argument strikes us as far-fetched. Judging by conventional standards, surely more people feel genuine anguish in the despoliation of beautiful natural settings than feel anguish from the gnawing awareness that random federal agencies are generating documents that they will never be able to see. One who loses sleep because what used to be sublime rolling green hills are now lined with tract houses may well find a sympathetic ear; one who complains that the Department of Transportation is generating documents that she may never get a chance to monitor may well get advice to see a psychiatrist.

But even if “concrete injury to curiosity” were a way to account for the FOIA cases, there is still no principled way to distinguish FOIA curiosity cases from non-FOIA curiosity cases, the latter of which are dismissed as generalized grievances. As the “birther” cases demonstrate, the only discernable difference is the procedural vehicle—whether the case was brought on FOIA review (a procedural rights case) or as a direct action under the Constitution. In a direct action under the Constitution, the plaintiff must prove injury-in-fact. With a FOIA case, the plaintiff need not even allege a personal interest in the matter, let alone “particularized, imminent, and concrete” injury-in-fact.

Nor do we find compelling the argument that because Congress created the procedural right to the enforcement of FOIA requests, that the plaintiff in such cases has injury-in-fact merely by virtue of the violation of that right. This argument misses the crucial distinction between an injury-in-fact and an injury-at-law drawn above. Ever since the *Camp* decision in 1970, the mere violation of a “legal right” is insufficient for standing—the plaintiff must also have “injury-in-fact,” and the former does not always qualify as the latter. The question of legal harm goes to the merits of the plaintiff’s case in both the FOIA and the common-law cases; there is no principled way to distinguish between them that would account for the different standing requirements. Just as courts do not recognize *damnum absque injuria* (harm without violation of law), federal courts do not recognize a cause of action without an injury-in-fact—except, it seems, in FOIA and other agency review cases.

We conclude that the FOIA cases simply cannot be squared with the precedents requiring “concrete” injury. Is FOIA simply an outlier? It is perhaps the most jarring example of how Congress has been permitted to alter what the Court describes as standing requirements mandated by Article III, but it is hardly an outlier. Indeed, in the administrative state, it is far closer to typical than exceptional.

C. *The Chenery doctrine*

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151 *See supra* section II-A, notes 39-42 and accompanying text.
FOIA and the environmental impact statement cases are but two examples of how Congress has been permitted to alter Article III standing requirements with respect to review of agency action. The reason for their relative typicality is something known in administrative law circles as the *Chenery* doctrine.\(^\text{152}\) The doctrine holds that reviewing courts may uphold agency decisions only on grounds specifically relied upon by the agency.\(^\text{153}\) One basic corollary of this rule is that the only remedy a reviewing court can usually provide is to vacate the agency’s decision and order the agency to reconsider it on other grounds.\(^\text{154}\) In fact, agencies that are ordered to reconsider their decisions rarely change their conclusions—only their reasoning. Thus, when a petitioner is afforded judicial review of agency action, she rarely meets the usual requirement of redressability, for she cannot demonstrate a likelihood that the prayed-for relief (vacatur for reconsideration) will redress her underlying injury-in-fact. As Justice Scalia pointed out in his *Lujan* footnote, the petitioner has a “procedural right” to review under circumstances where normal justiciability standards have not been met.\(^\text{155}\)

In *INS v. Ventura*,\(^\text{156}\) an immigration decision, the Court authoritatively restated this corollary to the *Chenery* doctrine:

> No one disputes the basic legal principles that govern remand. Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. In such circumstances a “judicial judgment cannot be made to do service for an administrative judgment.” *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 87 L. Ed. 626, 63 S. Ct. 454 (1943). Nor can an “appeal court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency.” *Ibid*. A court of appeals “is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.” Rather, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947) (describing the reasons for remand). . . . Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.\(^\text{157}\)

This rule has been reaffirmed by the Supreme Court\(^\text{158}\) and by the Court of Appeals for the District of Columbia Circuit.\(^\text{159}\) Indeed, it has been codified in the Administrative Procedures Act, which specifies that a reviewing court shall “set aside” an agency

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\(^{152}\) The *Chenery* litigation actually went to the Supreme Court twice; we currently refer to the holding of *Chenery I*. *See SEC v. Chenery*, 318 U.S. 80 (1943).

\(^{153}\) *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 353 (4th ed. 2007).

\(^{154}\) *See* id. at 354.

\(^{155}\) *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7.


\(^{157}\) *Id.* at 16 (some citations omitted).

\(^{158}\) *See* Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

\(^{159}\) *See* Graceba Total Commc’ns v. FCC, 115 F.3d 1038, 1041 (D.C. Cir. 1997) (“As the Supreme Court has made clear [in *Chenery*], we ‘may not accept appellate counsel’s post hoc rationalizations for agency action . . . and are ‘powerless to affirm’ agency action on ‘grounds [that] are inadequate or improper’”).
decision unsupportable on the grounds articulated.\textsuperscript{160} It emphatically does not say that the reviewing court can simply enter whatever judgment the agency should have reached, thereby providing the petitioner with redress of her grievance.

Although cases certainly exist where a petitioner does have a good chance of getting agency action reversed, whether by the agency on reconsideration or by the reviewing court itself on purely legal grounds, this doctrine explains why footnote 7 in \textit{Lujan} says what it says. Justice Scalia chose judicial review to compel the filing of an environmental impact statement as an example of where Congress has relaxed the redressability standard, but he had a veritable cornucopia of examples from which to draw. Many, if not most, petitions for judicial review of agency action would fail the normal redressability requirements as they are expressed in \textit{Linda R.S. v. Richard D.} and \textit{Allen v. Wright}, and it is because of the \textit{Chenery} doctrine and its corollary.

Likely no one would argue that \textit{Chenery} and its progeny were wrongly decided on the grounds that it permits plaintiffs to seek review of agency action without any guarantee that their injury would be redressed on remand. To the contrary, it is expected that litigants will be able to seek judicial review of administrative action—our whole administrative state functions in concert with the judiciary. Even if courts do not recognize a bona fide due process right to judicial review of agency action (as some commentators have argued they should),\textsuperscript{161} the Administrative Procedures Act’s explicit grant of judicial review rights\textsuperscript{162} is elemental to the structure of our administrative state. This, like the foregoing examples of procedural rights cases, tells us there may be a structural cause for the standing dilemma rather than a mere surface inconsistency.

\section*{IV. \textsc{Can the Article III Orthodoxy Be Reconciled With Reality?}}

Now that we have shown how the reality of much standing precedent does not line up with the orthodox rhetoric of Article III standing, we turn to possible resolutions. We will first make a sincere attempt to harmonize the conflicting lines of precedent—the Article III line and the various “procedural rights” lines. We turn to the Necessary and Proper Clause as it carries out Congress’ various constitutional powers as one source of Congress’ ability to override the Article III standing requirements. We attempt to propose a solution that is both elegant and minimally disruptive of existing doctrine, although we recognize this may be an impossible task.

Suppose that, under certain circumstances, Congress could use its constitutionally prescribed powers, as augmented by the Necessary and Proper Clause, to effectively expand federal court jurisdiction to include cases and controversies in which plaintiffs have not met the normal injury-in-fact, redressability, or imminence requirements. In most cases, federal courts would still be bound by the longstanding doctrine that the elements of standing are required by Article III. However, when federal courts hear “procedural rights” cases made possible by a statutory grant from Congress, courts would not be bound by the traditional Article III standing requirements. Federal courts would


\textsuperscript{161} \textit{E.g.}, Louis L. Jaffe, \textit{The Right to Judicial Review I}, 71 HARV. L. REV. 401, 401-06 (1958).

\textsuperscript{162} \textit{See APA, 5 U.S.C. §702 (2012) (judicial review).}
have the power to hear those cases as a necessary and proper corollary to the exercise of Congress’ constitutional legislative powers. This conclusion is grounded in two strains of Necessary and Proper Clause doctrine: first, the Court’s holding in the 1949 case National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co.\(^{163}\) that Congress may supplement Article III courts’ jurisdiction if it would be necessary and proper to do so to carry out its Article I powers; and second, the Supreme Court’s recent expansion of Congress’ power to act under the Necessary and Proper Clause in Comstock v. United States.\(^{164}\)

As a foundation for this thesis, we first provide an overview of the Necessary and Proper Clause,\(^{165}\) also known as the “Sweeping Clause.”\(^{166}\) We explore the extent to which the Clause has been used to expand federal court jurisdiction, with an eye toward analyzing whether, under the Necessary and Proper Clause, Congress may “relax” the heretofore irreducible Article III standing requirements imposed by the Supreme Court. While the Clause has seemingly widened the permissible exercise of federal court jurisdiction, the Supreme Court has cautioned that Congress may not alter the constitutional core of federal court jurisdiction. Nevertheless, the Court’s decision of National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co. provides some jurisprudential leads vis-à-vis Congress’ power to supplement federal courts’ jurisdiction via the Necessary and Proper Clause.\(^{167}\) We also address a few of the problems we perceive with this solution and what they may mean for the standing dilemma.

### A. The Necessary and Proper Clause Doctrine

The Necessary and Proper Clause states that Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”\(^{168}\) The Supreme Court’s Necessary and Proper jurisprudence could fairly be described as fickle. At the turn of the century, the Court described the Clause in sweeping terms:

> This clause is that which contains the germ of all the implication of powers under the constitution. It is that which has built up the congress of the United States into the most august and imposing legislative assembly in the world, and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its co-ordinate departments, as partitioned by that instrument.\(^{169}\)

\(^{163}\) 337 U.S. 582 (1949).

\(^{164}\) 130 S. Ct. 1949 (2010).

\(^{165}\) U.S. CONST. art. I, § 8, cl. 18.


\(^{167}\) 337 U.S. 582 (1949).

\(^{168}\) U.S. CONST. art. I, § 8, cl. 18.

\(^{169}\) Cunningham v. Neagle, 135 U.S. 1, 83 (1890).
But the Court has also limited Congress’ power under the Necessary and Proper Clause, requiring that congressional acts under the Clause be grounded in some other enumerated power of Congress. Thus, there is no freestanding Necessary and Proper Clause “power.” The question is, then, how closely linked must an act of Congress be to an enumerated Article I power? Historically, the Court has required a relatively close connection, but has recently relaxed the standard.

The first major case to apply the Necessary and Proper Clause was *McCullough v. Maryland*, where the Supreme Court considered a challenge to Congress’ establishment of the first Bank of the United States.\(^{170}\) In *McCullough* the Court was confronted with the problem of determining the scope of the Necessary and Proper Clause in a situation where no specific restraints on governmental power stood in the way. The Court rejected the plaintiffs’ invitation to declare the Bank unconstitutional under a literal reading of the Necessary and Proper Clause; namely, to limit the laws Congress could make to those strictly “necessary” to carrying out its constitutional duty. Rather, the Court construed the Sweeping Clause to require only a minimal “fit” between legislatively chosen means and a valid governmental end, denying that a federal law must be “absolutely necessary” to the exercise of an enumerated power. The Court stated: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”\(^{171}\) Under this standard, the Court upheld the creation of the Bank of the United States as legitimate and plainly adapted to the execution of Congress’ powers under the Taxing and Spending Clause.\(^{172}\)

Thus, what emerged was a two-part test: First, what enumerated power does the law carry into execution? And second, are the means “appropriate” and “plainly adapted” to the legitimate end? In addition, a preliminary inquiry can be added to the *McCullough* test\(^ {173}\)—namely, whether the exercise of Congress’ power violates some constitutional restriction, such as the Tenth Amendment.\(^{174}\)

\(^{170}\) 17 U.S. (4 Wheat.) 316 (1819), superseded on other grounds by U.S. Const. amend. XVI, as stated in Fla. Bar v. Behm, 41 So. 3d 136, 151 (Fla. 2010).

\(^{171}\) Id. at 421.

\(^{172}\) Id. at 325-26.

\(^{173}\) In *McCullough*, the only question was whether the act of Congress exceeded its Article I power even though it conceded did not violate any explicit constitutional prohibition. See *id.* at 421 (noting that an act of Congress must not be prohibited by the Constitution).

\(^{174}\) E.g., United States v. Darby Lumber Co., 312 U.S. 100 (1941); see also Printz v. United States, 521 U.S. 898, 923-24 (1997) (striking down Brady Act, holding that although the law carried into execution the Commerce Clause, it violated the principle of state sovereignty and was therefore not enforceable under Necessary and Proper Clause); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (holding that an exemption statute singling out institutions that served mostly state residents for beneficial tax treatment and penalized those institutions that did principally interstate business violated the dormant commerce clause; *id.* at 609 (Thomas, J., dissenting).
Over the next two centuries, the case law largely adhered to this formula. The majority of cases named a particular provision of the Constitution granting Congress the legislative power. A slim minority of the cases identified a general power of the federal government without closely tethering it to an explicit constitutional provision, such as the power to promulgate federal criminal laws (which are not among Congress’ enumerated powers to enact), an expansive view of the federal government’s war powers, and the need for the smooth operations of the federal government.

But in 2010, the Court dramatically changed course, shifting toward what had been the minority of cases. That year, the Supreme Court decided *United States v. Comstock*, which established a much more capacious test for the application of the (arguing that the majority impermissibly created a “dormant” Necessary and Proper Clause to supplement the Dormant Commerce Clause).

175 *E.g.*, Gonzales v. Raich, 545 U.S. 1, 5 (2005) (Commerce Clause); Wickard v. Filburn, 317 U.S. 111 (1942) (Commerce Clause); Houston, E. & W. Tex. Ry. Co. v. United States (*The Shreveport Case*), 234 U.S. 342, 353-54 (1914) (Commerce Clause); Stewart v. Kahn, 11 Wall. 493, 507 (1871) (upholding a federal tolling statute as to causes of action accrued during the Civil War on the basis of Congress’ war powers); *United States v. Coombs*, 37 U.S. 72, 78 (1838) (holding the Commerce Clause allowed Congress to pass federal law making it a felony to steal from stranded vessels); *see also*, *e.g.*, *United States v. Lopez*, 514 U.S. 549, 588 (1995) (Thomas, J., concurring) (“In addition to its powers under the Commerce Clause, Congress has the authority to enact such laws as are ‘necessary and proper’ to carry into execution its power to regulate commerce among the several States.”); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (holding that Congress’ war powers in Art. I, § 8, cl.14 did not extend to the trial by court-martial of a soldier’s family members for noncapital offenses).

176 *See, e.g.*, *Greenwood v. United States*, 350 U.S. 366, 375 (1956) (holding that statute authorizing commitment of an accused who is found temporarily mentally incompetent or mentally disabled to stand trial is within congressional power to prosecute federal offenses under the Necessary and Proper Clause).

177 *See United States v. Oregon*, 366 U.S. 643, 648 (1961) (federal statute providing that when veteran dies intestate in a veterans’ hospital his property vests in United States as trustee for use of the General Post Fund is valid under the Necessary and Proper Clause and the federal government’s war powers to pay pensions and to build hospitals and homes for veterans).

178 *See United States v. Barnow*, 239 U.S. 74, 78 (1915) (noting that the federal law prohibiting the fraudulent impersonation of a federal official was within the general power of Congress); *see also* *Sabri v. United States*, 541 U.S. 600, 605 (2004) (observing that “Congress has authority under the Spending Clause to appropriate federal moneys” and that it therefore “has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars” are not “siphoned off” by “corrupt public officers”); *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (“The general welfare clause is not a limitation on congressional power but rather is a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the necessary and proper clause.”).

179 130 S. Ct. 1949 (May 17, 2010).
Necessary and Proper Clause. In *Comstock*, the Court upheld a Necessary and Proper challenge to a federal civil commitment statute. The plaintiffs contended that Congress lacked Article I authority to enact the federal civil commitment program\(^{180}\) that allowed the government to detain sexually dangerous federal prisoners beyond the date the prisoner would otherwise be released.\(^{181}\) The Court stated that for the Necessary and Proper Clause to grant Congress the legislative authority to enact a particular federal statute, the statute must constitute a means that is “rationally related” or “reasonably adapted” to the implementation of a constitutionally enumerated power.\(^{182}\) Justice Breyer, writing for the Court, explained that the civil commitment statute was constitutional under the Necessary and Proper Clause due to five factors, which, “taken together,” militated in favor of the law.\(^{183}\) Justice Breyer’s opinion for the Court was joined by Chief Justice Roberts, Justice Stevens, Justice Ginsburg, and Justice Sotomayor; the opinion garnered two concurring opinions by Justices Kennedy and Alito and a spirited dissent from Justice Thomas, joined by Justice Scalia.

The majority agreed on Justice Breyer’s five-factor analysis. First, the Court stated that for the Necessary and Proper Clause to carry out an “enumerated power,” it need not be “explicitly mentioned in the Constitution”; rather, it can be implied from other explicitly mentioned powers.\(^{184}\) With respect to the civil commitment law, while the power to promulgate federal criminal laws is not among Congress’ Article I enumerated powers, federal criminal laws carry out Congress’ other powers, such as its powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, and to regulate citizenship and naturalization.\(^{185}\) Second, civil commitment supplemented the longstanding federal prison-related mental health statutes; the Court explained that “in that respect, it is a modest addition to a longstanding federal statutory framework, which has been in place since 1855.”\(^{186}\) Third, the law is “reasonably adapted” to “Congress’ power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority).”\(^{187}\) Fourth, the law did not violate the states’
sovereign interests or the Tenth Amendment.\textsuperscript{188} And fifth, the links between the federal law and an enumerated Article I power were “not too attenuated.”\textsuperscript{189}

On this last point, the Court indicated that there can be more than one inferential step between the law and an enumerated power of Congress, but the majority did not specify how many inferential steps would be too many. The Court, anticipating the objections of the concurring Justices, accompanied this last point with the proviso that the law did not constitute a “general police power” because the law is specifically defined and narrow in scope.\textsuperscript{190}

Most notable about \textit{Comstock} is that the Court eschewed the traditional two-step \textit{McCullough} analysis\textsuperscript{191} in favor of a more flexible test. What emerged was a five-factor test: (1) Whether the law carries out an express or implied Article I power; (2) Whether the law’s subject matter falls within a longstanding tradition of federal regulation; (3) Whether the law is “reasonably adapted” to an express or implied power of Congress; (4) Whether the law violates the states’ sovereign interests or the Tenth Amendment; and (5) Whether the links between the federal law and an enumerated Article I power are “not too attenuated.”

Justice Thomas, with whom Justice Scalia joined as to most points, criticized the majority’s novel five-factor test. Justice Thomas argued that it was a clear break from \textit{McCullough}’s two-factor test\textsuperscript{192} and that it was not clear from the majority opinion how this new test would be applied. Specifically, Justice Thomas said it was not clear whether the five factors form a true balancing test, a nonexclusive list of salient factors, or some hybrid. He also complained that it was impossible to know how the factors are to be weighed if some, but not all, are present in a given case.\textsuperscript{193} Next, Thomas objected that the civil commitment law was improper because the Necessary and Proper Clause only allows Congress to pass laws carrying out \textit{explicitly} enumerated Constitutional powers – leaving out the civil commitment law.\textsuperscript{194} The dissent argued that “a federal criminal defendant’s ‘sexually dangerous’ propensities are not ‘created by’ the fact of his incarceration or his relationship with the federal prison system. The fact that the Federal Government has the authority to imprison a person for the purpose of punishing him for a

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\textsuperscript{188} While this factor seemingly is a prerequisite to a Necessary and Proper analysis, the Majority appears to recycle the factor in its quasi-balancing test.

\textsuperscript{189} \textit{Id.} at 1963.

\textsuperscript{190} \textit{Id.} at 1965.

\textsuperscript{191} Namely, what enumerated power does the law carry into execution, and, second, are the means “appropriate” and “plainly adapted” to the legitimate end? \textit{See supra} notes [222-224] and accompanying text.

\textsuperscript{192} \textit{See supra} text accompanying notes 225-226.

\textsuperscript{193} \textit{See id.} at 1975 (Thomas, J., dissenting). Justice Scalia joined Justice Thomas in all but Part III-A-1-b (arguing that civil detention lacks any connection to an enumerated power); Justice Scalia did not write a separate dissenting opinion. \textit{Id.} at 1970, 1975-77.

\textsuperscript{194} \textit{Id.} at 1970 (Thomas, J., dissenting); \textit{see also id.} at 1973 (Thomas, J., dissenting) (“The Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable.”).
federal crime—sex-related or otherwise—does not provide the Government with the additional power to exercise indefinite civil control over that person.”

Concurring Justices Kennedy and Alito wrote separately to clarify the nuances in their differences with the majority position on a number of issues. Justice Kennedy departed on four main points. First, he disapproved of importing the phrase “rational basis” because that standard was designed to defer to states’ ability to legislate—which, unlike that of the federal government, is plenary. Second, he disagreed with the majority’s Tenth Amendment analysis, reminding us again that the federal government, unlike state governments, does not possess general police powers. As he explained,

The Constitution delegates limited powers to the National Government and then reserves the remainder for the States (or the People), not the other way around, as the Court’s analysis suggests. . . . The opinion of the Court should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution’s express prohibitions.

Third, Justice Kennedy clarified that the majority’s allowing a “chain of inferences” between an express Article I power and a federal law should not be read as a carte blanche; rather, “the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain. . . . The inferences must be controlled by some limitations lest [they] become completely unbounded by linking one power to another ad infinitum in a veritable game of ‘this is the house that Jack built.’” Finally, Justice Kennedy cautioned that the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances—if the federal government demands that the state implement federal commands, relieves the states of their primary responsibility of ensuring the safety and well-being of their citizens, or otherwise intrudes upon state functions. However, Justice Kennedy concurred rather than dissented because § 4248 only affects a “discrete class of persons [] already subject to [] federal power[,]” meaning that the federal government is not impermissibly intruding upon state sovereignty.

Justice Alito, like Justice Kennedy, disagreed with the breadth of the majority’s language but agreed that the civil commitment law was based on Congress’ enumerated powers, citing federal criminal laws enacted by the First Congress. Unlike the dissenters, Alito concluded that, given the federal government’s authority to enact federal criminal laws, “it is also necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems.” Thus, there was

195 Id. at 1979 (Thomas, J., dissenting).
196 Id. at 1966 (Kennedy, J., concurring).
197 Id. at 1967-68 (Kennedy, J., concurring).
198 Id. at 1966 (Kennedy, J., concurring).
199 Id. at 1968 (Kennedy, J., concurring) (internal citations omitted).
200 Id. (Kennedy, J., concurring).
201 Id. at 1969 (Alito, J., concurring).
202 Id. at 1970 (Alito, J., concurring). Note that, although he declined to write separately, Justice Scalia may have agreed with Justice Alito on this point because he declined to
standing’s “dirty little secret”

more than a “rational basis” for the law—there was a “substantial link to Congress’ constitutional powers.”

Although there was a clear majority in Comstock, its application in the future is unclear. For one thing, as is often the case, the makeup of the Court has changed since Justice Stevens retired and Justice Kagan joined the Court. In fact, then-Solicitor General Kagan argued the case for the United States before the Court; her argument for the petitioner seems to more closely track the two concurring opinions than the majority opinion, although of course that does not necessarily represent the way she would vote in a future Necessary and Proper case. Moreover, Justice Thomas’ dissent aptly identifies another source of uncertainty in Comstock’s application: How are the five factors to be applied in future cases?

Some commentators have claimed that, for better or worse, Comstock is the bellwether for an upswing in Necessary and Proper jurisprudence and an expansion of what may validly be passed under the Clause. The lower court cases following Comstock have sent mixed signals. Some cases have received Comstock’s new approach favorably, applying the factors or otherwise citing Comstock. For example, among the courts considering challenges to the Affordable Care Act, courts upholding the law, not surprisingly, have appeared more receptive to Comstock’s new rule than have courts

join Justice Thomas as to Part III-A-1-b of the opinion, in which Justice Thomas diverges from Justice Alito on this same point. See supra note 245.

203 Id. at 1970 (Alito, J., concurring).


205 See infra text accompanying note 245.

206 See, e.g., Geoffrey P. Miller, The Corporate Law Background of the Necessary and Proper Clause, 79 Geo. Wash. L. Rev. 1, 31 (2010) (noting that Comstock reflects the Court’s recognition that Congress may desire increased power over such “troubling matters” as, inter alia, the financial crisis, terrorism, healthcare, drug addiction, domestic abuse, energy policy, and environmental threats); Ilya Somin, Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power, 2010 Cato Sup. Ct. Rev. 239, 240-41 (contending that Comstock foreshadows the Court’s giving Congress a “virtual blank check to regulate almost any activity it wants[,]” and mentioning the Health Care litigation as one such example on the horizon).

207 E.g., United States v. Kebodeaux, 647 F.3d 137 (5th Cir. 2011) (upholding the Sex Offender Registration and Notification Act (SORNA) as necessary and proper under the five Comstock factors); see also United States v. DeCay, 620 F.3d 534, 542 & n.8 (5th Cir. 2010) (upholding the garnishment of pension funds under the federal Mandatory Victims Restitution Act (MVRA), citing Comstock as support); United States v. Belfast, 611 F.3d 783, 804-07 (11th Cir. 2010), cert. denied, -- U.S. --, 131 S. Ct. 1511 (Feb. 22, 2011) (upholding the Torture Act implementing the Convention Against Torture as connected to the foreign relations and treaty powers of the federal government, favorably citing Comstock).

striking down the law.\textsuperscript{209} As the health care litigation makes its way to the Supreme Court, it is likely that \textit{Comstock}'s application will come into greater focus.

\textbf{B. The Necessary and Proper Clause and federal court jurisdiction: Tidewater and its progeny}

As we have just discussed, the increasing liberalization of the scope of the Necessary and Proper Clause is on the horizon, if not already upon us. \textit{Comstock} suggests a more favorable environment for the argument that the Necessary and Proper Clause permits Congress to expand federal courts' jurisdiction to hear procedural rights cases with plaintiffs who do not meet the Article III minima of injury-in-fact, redressability, or imminence. While the courts have not addressed how the Court has approached expansions of the standing doctrine under the Necessary and Proper Clause specifically, the Necessary and Proper jurisdictional cases may provide insight into whether the Court would be willing to employ the Necessary and Proper Clause to allow Congress to relax the otherwise supposedly “irreducible” Article III minima of standing.\textsuperscript{210} For, as we have noted, the Article III standing requirements are considered jurisdictional.\textsuperscript{211}

Generally speaking, it is “fundamental that Congress [can] not expand the jurisdiction of the federal courts beyond the bounds of Article III.”\textsuperscript{212} However, a number of cases have arguably eroded this categorical pronouncement. The most recent case to


\textsuperscript{210} This jurisdictional body of law differs from the main corpus of Necessary and Proper cases in at least one important respect—rather than addressing the proper division of state and federal law, the procedural law cases tend to turn on the proper separation of powers within the federal government. To be sure, many of the cases carry on the theme of state sovereignty (see, e.g., Alden v. Maine, 527 U.S. 706 (1999) (holding that the powers delegated to Congress under Article I and the Necessary and Proper Clause do not include the power to subject nonconsenting states to private suits for damages in state courts)), but by and large the cases bear upon procedural issues internal to the federal government.

\textsuperscript{211} See supra n.84 and accompanying text.

do so was *Jinks v. Richland County* in 2003. In that case, the plaintiff, Susan Jinks, was the widow of a man who died of medical complications related to alcohol withdrawal while incarcerated for failure to pay child support. Within the applicable statutes of limitations, Ms. Jinks sued the County for civil rights violations under section 1983 and for supplemental state wrongful death and survival claims. The district court granted the County’s motion for summary judgment on the section 1983 claim, and subsequently issued an order declining to exercise jurisdiction over the remaining state-law claims, dismissing them without prejudice pursuant to 28 U.S.C. § 1367(c)(3). Ms. Jinks refiled her state law claims in state court, and the County asserted a statute of limitations defense. Under the applicable state law, Ms. Jinks’ claims would be time-barred; but because she filed first in federal court, her claim was timely pursuant to 28 U.S.C. § 1367(d), which requires a state statute of limitations to be tolled for the period during which a plaintiff’s cause of action is pending in federal court. The trial court permitted her claim to go forward, and a jury returned a verdict in her favor. The County appealed, and the Supreme Court of South Carolina reversed, holding that section 1367(d)’s tolling provision was unconstitutional because it exceeded the enumerated powers of Congress.

The United States Supreme Court unanimously reversed. It held section 1367(d) necessary and proper to execute Congress’s power to “constitute tribunals inferior to the Supreme Court, . . . and to assure that those tribunals may fairly and efficiently exercise the judicial power of the United States.” Applying the *McCullough v. Maryland* test, the Court found the law was not “absolutely necessary” since “[t]he federal courts can assuredly exist and function in the absence of § 1367(d)”; however, it sufficed that the law was “conducive to the due administration of justice in federal court and [was] plainly adapted to that end.” Therefore, section 1367(d) passed constitutional muster.

The Court applied similar reasoning in *Willy v. Coastal Corp.*, holding that a district court could, without running afoul of Article III, impose Rule 11 sanctions in a case in which it was later determined that the court lacked subject-matter jurisdiction.

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214 Id. at 460.
215 Id.
216 Id.
217 Id. at 458-60.
218 Id. at 460.
219 Id. at 458-60.
220 Id. at 462 (citing U.S. CONST. art. I, § 8, cl. 9, and U.S. CONST. art. III, § 1).
221 Id. (citing McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 414-15 (1819)) (internal quotation marks omitted). See also Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1871) (upholding as constitutional a federal statute that tolled limitations periods for state-law civil and criminal cases for the time during which actions could not be prosecuted because of the Civil War, reasoning that this law was both necessary and proper to carrying into effect the Federal Government’s war powers because it “remed[ied] the evils” that had arisen from the war).
and the means by which their judgments are enforced. Under the Necessary and Proper Clause, then, Congress may allow a federal court to sanction attorneys for their improper conduct before the court even though the court may later be determined to lack jurisdiction over the case.223 The Court duly noted that Article III power may not be extended by court rule but denied that any such thing was happening in Willy.224

Like Jinks, Willy represented a sort of “residual” jurisdiction on the part of federal courts for judicial housekeeping purposes, such as maintaining order in the court (Rule 11) and providing for a smooth transition between courts (section 1367(d)). Such incremental moves do not necessarily signify a greater power on the part of Congress to open up federal courts to new causes of action outside the scope of Article III. However, the Court arguably did just that in the 1949 case National Mutual Insurance Company of District of Columbia v. Tidewater Transfer Company,225 probably the boldest statement the Court has ever issued regarding Congress’ power under the Necessary and Proper Clause to expand federal courts’ jurisdiction beyond Article III.

In Tidewater, the Court addressed whether Congress could constitutionally expand diversity jurisdiction to open federal courts in the several states to actions by District of Columbia citizens against citizens of other states.226 The plaintiff was a District of Columbia corporation that sued the defendant, an out-of-state corporation, in Maryland federal district court for money damages arising out of an insurance contract.227 The plaintiff’s only cause of action was for the state breach of contract claim, so federal jurisdiction was predicated entirely on diversity of citizenship.228 The diversity set forth was that plaintiff was a corporation created by District of Columbia law, and that the defendant was a corporation chartered by Virginia and subject to suit in Maryland by virtue of a license to do business there.229

This pleading of diversity met the statutory requirements of 28 U.S.C. § 41(1) (1940), which at the time read in pertinent part: “The district courts shall have original jurisdiction as follows: Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and . . . (b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory[.]”230 However, section 41(1) conferred federal jurisdiction in excess of Article III, which provides only that the judicial power of the United States extends to controversies “between citizens of different States.”231 The Supreme Court had long held that the District of Columbia was not a “state” within the meaning of this provision.232 The defendant in Tidewater moved to dismiss for lack of subject-matter jurisdiction on the theory that section 41(1) was an

223 Id. at 136, 138.
224 Id. at 135.
225 337 U.S. 582 (1949).
226 Id. at 583.
227 Id.
228 Id.
229 Id.
230 Id. at 584 & n.10.
unconstitutional grant of federal jurisdiction in excess of Article III authority. The district court agreed and dismissed the case, contributing to a deep split of authority among federal courts. The Court of Appeal affirmed, and the Supreme Court granted certiorari.

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

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

Indeed, Justice Jackson did not expressly limit this holding to the context of diversity jurisdiction. He observed, “[m]any powers of Congress other than its power to govern Columbia require for their intelligent and discriminating exercise determination of controversies of a justiciable character. In no instance has this Court yet held that jurisdiction of such cases could not be placed in the regular federal courts that Congress has been authorized to ordain and establish.” Justice Jackson surveyed other instances in which the Court had upheld Congress’ power to do so in other contexts. As examples, he named Congress’ power to establish the federal Court of Claims, to permit suits

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233 Tidewater, 337 U.S. at 583.
234 Id. at 583-84 (citing cases).
235 Id. at 588.
236 Id. at 600 (Jackson, J.).
237 Id. at 588-89.
238 See U.S. CONST. Art. I, s 8, cl. 17.
239 Tidewater, 337 U.S. at 588.
240 Id. at 591-92 (citing O’Donoghue v. United States, 289 U.S. 516 (1933)).
241 Id. at 592 (emphasis added).
242 Id. at 588-89.
243 Id. at 592.
244 Id. at 592-94 (citing Williams v. United States, 289 U.S. 553 (1933), overruled on other grounds by Glidden Co. v. Zdanok, 370 U.S. 530 (1962), as recognized by Jan’s
under the Federal Tort Claims Act, and the power of federal courts to adjudicate bankruptcy suits. Thus, Justice Jackson concluded, there was ample reason to affirm Congress’ power to have federal courts hear matters not strictly within their Article III-enumerated powers.

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

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

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

Finally, Justice Vinson, joined by Justice Douglas, wrote a separate dissent. Vinson acknowledged that Congress should be able to establish inferior legislative courts (such as the federal Court of Claims and the bankruptcy courts) to address such matters

Helicopter Serv., Inc. v. F.A.A., 525 F.3d 1299, 1306 n.5 (Fed. Cir. 2008); United States v. Sherwood, 312 U.S. 584, 591 (1941); Pope v. United States, 323 U.S. 1, 14 (1944). 245 Id. (citing Brooks v. United States, 337 U.S. 49 (1949)). 246 Id. at 594-600 (citing, e.g., Cont’l Ill. Nat’l Bank & Trust Co. v. Chi. Rock Island & Pac. R. Co., 294 U.S. 648 (1935); Schumacher v. Beeler, 293 U.S. 367 (1934); Williams v. Austrian, 331 U.S. 642, 657 (1947)). 247 Id. at 604 (Rutledge, J., concurring). 248 Id. at 607 (Rutledge, J., concurring). 249 Id. at 609-11 (Rutledge, J., concurring) (citing, e.g., O’Donoghue v. United States, 289 U.S. 516 (1933); Williams v. United States, 289 U.S. 553 (1933); Schumacher v. Beeler, 293 U.S. 367 (1934)). 250 See id. at 625. 251 Id. at 626 (Frankfurter, J., dissenting). 252 Id. at 648 (Frankfurter, J., dissenting). 253 Id. at 626 (Vinson, J., dissenting).
as diversity suits involving District of Columbia citizens. However, Justice Vinson was concerned with the proper division of power between legislative (Article I) courts and Article III courts. According to Justice Vinson, Congress could not use its Article I power to imbue Article III courts with extra jurisdiction. He concluded,

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

Given that Tidewater generated so many opinions, it is questionable how much precedential weight the principal opinion carries. A true majority of five justices signed on to the narrow disposition of upholding section 41(1) against its constitutional challenge but only three found that Congress may imbue Article III courts with extra jurisdiction in support of Congress’ exercise of its Article I powers.

C. The viability of extending Tidewater

Where does that leave us in addressing the conundrum of Article III rhetoric and reality? Tidewater is attractive because it holds so much explanatory potential vis-à-vis the conundrum. Justice Jackson’s declaration is astonishing—it would have serious, and heretofore unexplored, implications for the intersection between the Necessary and Proper Clause and federal court jurisdiction. Among other things, it would provide support for the proposition that Congress may expand a different aspect of federal jurisdiction, the standing doctrine.

Under Tidewater, the Necessary and Proper Clause might well be a viable avenue for courts to hear cases that would otherwise be outside of their Article III jurisdiction, or which would otherwise fail to comply with the elements of Article III standing. If Congress creates a right to make a FOIA or EIS request, then there is a procedural right to the requested information. These procedural rights cases arise from Congress’ Article I power to promulgate federal law that then may be applied by federal officials and administrative agencies. It would not take much of an extension of Tidewater to include

254 Id. at 642-45 (Vinson, J., dissenting).
256 Id. at 644-45.
all of Congress’ constitutional powers, not merely its Article I powers, that it could use to imbue federal courts with extra jurisdiction. So long as Congress acts pursuant to its constitutionally prescribed powers, under *Tidewater*, it may endow Article III courts with the power to adjudicate disputes arising from federal law. In other words, implied in Congress’ power to promulgate federal law is the need for courts to adjudicate disputes that arise in the course of the administration of procedural rights—for instance, when a government agency wrongfully refuses to honor a valid FOIA request.

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

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

Moreover, in light of *Comstock*, the Court may be more amenable to upholding a law under the Necessary and Proper Clause than in previous years. Courts will only invoke the Necessary and Proper Clause to effectuate some existing power of Congress; but under the new rule in *Comstock*, the power need not be explicitly enumerated, so long as the act of Congress is “rationally related” to an enumerated power. Although it is not yet clear how the *Comstock* factors are to be applied, the Court may be more agreeable to upholding new federal powers under the Necessary and Proper Clause, which, with respect to *Tidewater*, may include an expanded notion of federal court jurisdiction.

We acknowledge that some will try to distinguish the principal opinion in *Tidewater* on the ground that it did not profoundly alter the balance of powers among the coordinate branches of the federal government. Justice Jackson did note that section 41(1) was a statute regarding the administration of judicial power. Much like the laws at issue in *Jinks* and *Willy*, section 41(1) had a ministerial aspect: it did not confer substantive rights or remedies, but rather concerned the procedural question of whether District of Columbia citizens, who admittedly could bring the same causes of action in state courts, could seek redress in federal court as well. As Justice Jackson explained, section 41(1) did not entail “congressional enactments which invade fundamental

257 *Tidewater*, 337 U.S. at 585-86.
freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states, are not present here."\(^{259}\)

We think Justice Jackson was being too modest—indeed, modest to an almost intellectually disingenuous degree. If one believes in a principled doctrine of separation of powers, then it should make no difference whether the violation is major or minor, fundamental or ancillary, marginal or central. A violation of separation of powers is a violation of separation of powers. Under Jackson’s reasoning, the statute involved in \textit{Tidewater} was not unconstitutional, despite the fact that it undeniably granted the federal courts powers beyond Article III. In our view, Jackson’s opinion was correct, and furthermore, its basic principle controls the standing doctrine as well. \textit{Tidewater} plus \textit{Comstock} should equal the power to relax or eliminate the injury, causation, and redressability requirements by proper congressional action.

On the other hand, Jackson’s opinion only attracted three votes, and we are legal realists enough to recognize that three is not five. It was not a majority opinion. Normatively attractive it may be, but \textit{Tidewater} is thin precedent indeed. Therefore, we turn to three other possibilities of reconciling the rhetoric of Article III with the precedential reality of it—and we decidedly favor one of them.

\textbf{A. Abandoning the Article III Orthodoxy}

Perhaps the most obvious—and least likely—solution is to simply overrule the cases holding that Article III of the Constitution specifically requires the three elements of imminent injury-in-fact, causation, and redressability. This would not be a new proposal by any means. Much, if not most, of the law professoriat regards the standing doctrine as intellectually bankrupt. In 1978, Professor Joseph Vining wrote that it is impossible to read the standing decisions “without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate.”\(^{260}\) The Supreme Court itself recognized as much in its \textit{Valley Forge} opinion, where Justice Rehnquist, writing for the Court, admitted, “we need not mince words when we say that the concept of Art[icle] III standing has not been defined with complete consistency in all of the various cases decided by this Court.”\(^{261}\) As Professor Gene Nichol later wrote, Justice Rehnquist’s wry comment was a “marvelous understatement.”\(^{262}\)

A series of full-blown (and, in our view) devastating critiques in the 1970s and 1980s by Professors Lee Albert,\(^{263}\) Gene Nichol,\(^{264}\) William Fletcher,\(^{265}\) Susan Bandes,\(^{266}\)

\(^{259}\) \textit{Id.} at 585.

\(^{260}\) \textbf{JOSEPH VINING}, \textit{LEGAL IDENTITY} 1 (1978).


\(^{264}\) \textit{Gene Nichol}, \textit{Abusing Standing: A Comment on Allen v. Wright}, 133 \textit{U. PA. L. REV.} 635 (1985); \textit{Nichol, Rethinking Standing, supra} n. [330].

Cass Sunstein, Steven Winter, and others demonstrated quite persuasively that the question of standing should be seen as nothing more than a question of whether the plaintiff in any given case has presented a good cause of action on the merits. Of course, if the Court were to take these critiques to heart, the problem we identify in this Article would disappear. For whatever reason, however, the Court has chosen to ignore these critiques. Because the topic has been so thoroughly and expertly briefed elsewhere, this Article does not attempt to revisit the issue of whether the standing doctrine ought to be seen as nothing more than actionability. However, we do note that one aspect of *Tidewater* would support overruling the Article III precedent.

The *Tidewater* principal opinion seems to leave open the possibility that Article I and Article III can be concurrent sources of federal court power without running afoul of the justiciability doctrines. Justice Jackson maintained that Article III courts must still be constrained by “traditional notions of the justiciable.” But the Supreme Court’s later jurisprudence on the standing doctrine—one of the essential justiciability doctrines—established that the core elements of standing are required by Article III. Federal courts may receive their judicial power from either Article I or Article III (or, as we noted earlier, from another power of Congress, such as section five of the Fourteenth Amendment). However, the courts must also limit their review to cases that are justiciable—but under the Article III orthodoxy, justiciability is supposedly circumscribed by Article III. If federal courts can receive their power from Article I, then when they entertain “Article I” cases, why must they adhere to the “Article III” rules of standing? While this conclusion is not logically inexorable, it would go a long way toward explaining why federal courts have not always adhered to the “Article III” standing requirements when they entertain procedural rights (non-Article III) cases.

If Article III courts need not observe the Article III standing rules, but nevertheless are constrained by the “traditional concept of the justiciable,” then courts should abandon the longstanding orthodoxy that standing, as a justiciability doctrine, is

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inseparable from Article III. Instead, courts could regard the standing doctrine as largely prudential. Pursuant to this analysis, the Case or Controversy Clause of Article III would still require that federal courts abstain from issuing, for example, truly advisory opinions. However, it would mean that the boundaries of what makes a “Case or Controversy” are much broader than the elements of injury-in-fact, causation, and redressability. This solution reflects the intuitive notion that if the standing elements can be eliminated, they simply cannot be said to be “mandated” by the Constitution.

In a slight variation, the Tidewater principal opinion could mean that courts’ jurisdiction in procedural rights cases falls within the “traditional notions of the justiciable” simply because courts have exercised that power for so long—in other words, because it is “grandfathered in.” However, we would still have to posit parallel “justiciability” rules for Article I and Article III cases—which would still require us to conceptually separate the standing doctrine from Article III. If cases can be permitted in federal court without meeting the justiciability requirements simply because they have been permitted for a long time, it makes the standing doctrine, as applied to non-procedural rights cases, look all the more prudential.

Yet another way of looking at this option would be to say that even if the elements of standing are more or less required by Article III, they may still be legislatively “overruled” (or “overridden”) by Congress when it enacts a law like FOIA, which lacks an injury-in-fact requirement. However, this way of looking at it has its own problems. Some academics have described judge-made doctrines like the standing doctrine “constitutional common law,” a sub-category of federal common law. Constitutional common law is described as “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions[].” Other doctrines that could fall within this category are Bivens, the Accardi doctrine, Miranda, Terry, and the exclusionary rule. Professor Henry Monaghan, who first enunciated the theory of constitutional common law, speculated that Congress could overrule doctrines developed in this manner.

This prediction has not fully been tested; however, later precedent indicated that Congress does not have this power for Supreme Court precedent that is “constitutional in nature,” and therefore cannot legislatively overrule cases. For instance, in Dickerson v.

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271 Henry P. Monaghan, Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 2-3 (1975). Professor Monaghan did not specifically identify the standing doctrine as falling within the category of constitutional common law.

272 Id. We note that under the prevailing orthodoxy, the standing doctrine would not fall under the definition, since it is supposed to be “required” by Article III of the constitution. However, because in this section we assume for the purpose of argument that is not the case, we consider the standing doctrine to be a candidate for constitutional common law.

273 Id. at 2 (giving Miranda as an example); Josephine K. Mason, Note, The Un-Creation of Rights: An Argument Against Administrative Disclaimers, 62 HASTINGS L.J. 559, 572-75 (2010) (providing other examples).

274 Professor Monaghan originally included another element in his definition of constitutional common law: “and subject to amendment, modification, or even reversal by Congress.” Monaghan, supra n. 334 at 2-3.
United States, the Supreme Court was faced with the question of whether Congress could legislatively overrule or modify Miranda.\(^\text{275}\) The Court held that Congress could not do so because Miranda was a “constitutional decision.”\(^\text{276}\) The same may be said of the standing doctrine—or perhaps not. An exhaustive discussion of whether Congress may legislatively overrule “constitutional common law” lies outside the scope of this Article; suffice to say that this may be another avenue by which the Court could resolve the standing dilemma. Still, this would still require the Court to reassess whether the standing doctrine truly is a “constitutional rule” or whether it may be altered by Congress\(^\text{277}\)—which does not get us much further in solving the problem.

As we have said, this Article does not attempt to reevaluate the existing standing doctrine’s pedigree. We have simply tried to show that existing precedent has two faces irreconcilable with one another on their own terms. There is the rhetoric (“Article III mandates injury, causation and redressability in all federal court cases”) and the reality (the FOIA cases, the EIS cases, the Chenery doctrine). Perhaps our highlighting of the standing doctrine’s Janus-faced quality will incline the Court toward reassessing whether standing is really nothing more than actionability analysis or a prudential doctrine, but probably not. As we have noted, more prominent academics have made fully reasoned arguments for such a reconceptualization and apparently gotten nowhere. Thus, pragmatism counsels us to search for a reconciliation of precedents that has the virtue of parsimony. That is to say, we feel impelled to offer the Court a recommendation that does the least violence to existing precedent while eradicating the basic contradiction that currently plagues it.

**B. Conforming the procedural rights cases to the Article III orthodoxy**

One such option would be to flat-out overrule the “procedural rights” cases permitting relaxation of the Article III standing elements. In other words, overrule Chenery, the EIS cases, and the FOIA cases. But we see a significant unattractive feature in this course of action: These cases are important to the structural functioning of federal law. If Congress cannot create enforceable rights via federal law, its ability to supplement agency enforcement (which is expensive and resource-intensive) with private attorneys-general (cheap and plentiful) would be severely hampered.

Aside from these policy concerns, the EIS, FOIA, and Chenery are pretty well entrenched in the Court’s jurisprudence. (Indeed, as earlier noted, Chenery has been codified into the APA. That portion of the APA would have to be declared unconstitutional!) In other words, how truly parsimonious is this solution? This course of action would require the overruling, or dramatic restructuring, of the instances in which Congress has heretofore been permitted to relax or eliminate the standing requirements. The Court would have to overrule Massachusetts v. EPA,\(^\text{278}\) reconfigure FOIA such that,

\(^{275}\) 530 U.S. 428 (2000). The statute at issue was 18 U.S.C. § 3501(a) (2000), which sought to change the requirements and consequences of the Miranda warnings. \textit{Id.} at 432.

\(^{276}\) \textit{Id.} at 437-38.

\(^{277}\) See \textit{id.}.

\(^{278}\) 549 U.S. 497 (2007)
contrary to its text, a litigant must show an injury-in-fact, \textsuperscript{279} and overrule such cases as \textit{NLRB v. Robbins Tire & Rubber Co.}, \textsuperscript{280} \textit{EPA v. Mink}, \textsuperscript{281} and the “birther” cases;\textsuperscript{282} and reconsider the application of the \textit{Chenery} doctrine as codified by the APA.\textsuperscript{283} The impact on the future of judicial review would be unpredictable and extraordinarily wide-reaching.

Perhaps the result would not have to be so extreme. Maybe all Congress would have to do would be to establish legislative courts to deal with these issues, as suggested by Justice Vinson in his \textit{Tidewater} dissent. Recall that Justice Vinson suggested Congress should be able to establish inferior legislative courts, much like the federal Court of Claims and the bankruptcy courts, to address these “Article I” matters.\textsuperscript{284} However, we would be concerned, as Justice Vinson was, with the proper division of power between legislative (Article I) courts and traditional (Article III) courts. Surely, Justice Vinson cautioned, Congress cannot constitutionally divert a significant number of cases and controversies over which Article III courts had jurisdiction to be heard instead by legislative courts.\textsuperscript{285}

To this end, one risk would be that Congress would be overstepping its bounds by delegating too much of the Article III function to Article I courts—the inverse problem as Congress delegating Article I power to Article III courts. Moreover, decades after Justice Vinson made this suggestion, the Court actually struck down Congress’ attempt to confer near-plenary jurisdiction on bankruptcy courts for this very reason—namely, that Congress has imbued those legislative courts with too much Article III power to pass constitutional muster.\textsuperscript{286} On the other hand, just a few years later, the Court upheld a

\begin{footnotes}
\item 410 U.S. 73, 80 (1973) (FOIA “create[s] a judicially enforceable public right to secure such information from possibly unwilling official hands”). \textit{See also, e.g., Dep’t of the Air Force v. Rose}, 425 U.S. 352, 361 (1976) (same).
\item \textit{See id. See generally Fallon, Of Legislative Courts, Administrative Agencies, and Article III, supra n. _}.
\end{footnotes}
similar delegation of power to the Commodity Futures Trading Commission.\textsuperscript{287} As a result, Congress may now delegate judicial authority so long as it does not delegate the “essential attributes of judicial power” reserved to Article III courts, the origins and importance of the right to be adjudicated make them conducive to adjudication by a non-Article III court, the concerns that drove Congress to depart from requirements of Article III are significant, and the parties have had a chance to consent to a non-Article III decision-maker.\textsuperscript{288}

If Congress were to create legislative courts for all of the statutes in which litigants would not meet the Article III standing requirements, to say that there would be a feasibility problem would be an understatement. And as we have noted, there would also be the problem of Congress’ delegating too much judicial power to nonjudicial entities in controversies arising under the “Laws of the United States”\textsuperscript{289}—to say nothing of the availability of Article III judicial review of such cases.

In sum, even if Justice Vinson’s legislative courts suggestion could form part of the solution, it would be an administrative nightmare—as would be overruling the procedural rights cases. Thus, we turn finally to a potential solution that lies somewhere in between flat-out overruling the Article III orthodoxy cases and overruling the procedural rights cases.

\textbf{C. A two-tiered “cases” and “controversies” interpretation}\textsuperscript{290}

We think the most parsimonious solution lies in a combination of Justice Scalia’s “zone of interests” idea as expressed in his 2011 majority decision in \textit{Thompson v. North American Stainless, LP}\textsuperscript{291} and Justice Kennedy’s \textit{Lujan} concurrence. But the fit between these two ideas is hardly seamless; some custom tailoring will be required. The result, as we envision it, looks remarkably like a two-tiered interpretation of the words “cases” and “controversies”—one meaning for traditional “Article III” cases, and a different meaning for the review of “procedural rights” cases.

First, we observe that Justice Kennedy’s \textit{Lujan} concurrence already embodies the intellectual heart of the zone of interest requirement. It states that Congress is entitled to articulate new injuries and chains of causation, so long as it takes care to identify the

\textsuperscript{287} See CFTC v. Schor, 478 U.S. 833 (1986) (upholding a substantial grant of authority to the CFTC against a challenge that it violated Article III).

\textsuperscript{288} See id. at 847-59. \textit{But see} Stern v. Marshall, supra note 287.

\textsuperscript{289} U.S. \textbf{CONST}. Art. III, \textsection 2, cl.1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[].”).

\textsuperscript{290} We use the phrase “two-tiered” with apologies to Akhil Amar, who meant something entirely different when he wrote \textit{A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction}, 65 B. U. L. REV. 205 (1985) (arguing “cases” should be viewed as different from “controversies” and Congress is only required to vest subject matter jurisdiction in federal courts over “cases” at any given time). Our “two-tier” argument has nothing to do with his, other than borrowing his phraseology and the fact that both arguments have something to do with Article III.

\textsuperscript{291} ___ U.S. __ (Jan. 24, 2011).
nexus between those given standing and the underlying subject matter of the litigation.\textsuperscript{292} This is conceptually similar to the zone of interests rule, which requires that the plaintiff be within the group of persons “arguably meant to be protected” by the enabling statute.\textsuperscript{293} The resemblance lies in the insistence of some kind of a connection between the underlying purpose of the legislation and the group of people permitted to sue under it.

Of course, the “injury-causation-redressability” requirements of Article III do the same thing, only with much more complex and demanding thresholds. The Article III standing rules ensure that there is a very tight relationship between injury and causation on the one hand, and between remedy and injury on the other. Crucially, however, existing Article III doctrine does more. It also ensures that the plaintiff’s injury is both “imminent” and “particularized”—concepts left unaddressed by the “zone of interests” rule. Thus, the Article III “injury-causation-redressability” doctrine and the “zone of interests” doctrine differ not only in terms of the degrees of their strictness. They have differences at the conceptual level. Their concepts overlap, but they are not coterminous.

Let us move this from the 30,000-foot level to the ground. Suppose the Court were to adopt the Kennedy \textit{Lujan} concurrence word-for-word, with no modifications. It is extremely difficult to see how many of the doctrines we have highlighted in this Article would survive that test. In FOIA, Congress has made absolutely no attempt to draw a nexus between who can make a document request and the underlying purpose of the statute. Congress’ theory was that every American has an interest in the transparency of his or her government’s operations, and therefore that every American should be capable of making a document request for any reason whatsoever. Unless Justice Kennedy’s prose is considerably more subtle than it appears, FOIA fails his test.

The same thing applies to the EIS cases. If a person in Fort Lauderdale, Florida, can file a demand that a developer file an Environmental Impact Statement for a proposed shopping mall in Whitefish, Montana, how can it be said that Congress has drawn any kind of nexus between those eligible to sue and the underlying purpose of the statute? Presumably Justice Kennedy does not think that the ideological interests of environmentalists in Florida would qualify them to delay the construction of projects in the Pacific Northwest—particularly if they never travel to Montana. Yet under existing law, the ideological Floridian is entitled to file precisely such a demand and receive

\textsuperscript{292} Recall Justice Kennedy’s particular wording in \textit{Lujan}: “In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555, 580 (Kennedy, J., concurring).

\textsuperscript{293} \textit{See, e.g.}, \textit{Ass’n of Data Processing Serv. Orgs., Inc. v. Camp}, 397 U.S. 150, 153 (1970) (“The question of standing . . . concerns, apart from the ‘case’ or ‘controversy’ test, the question 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.”).
federal judicial enforcement of it. The EIS cases, too, would flunk the test of Justice Kennedy’s *Lujan* concurrence.

One might respond that Justice Kennedy’s concurrence in *Lujan* is sufficiently commodious to accommodate these cases, but we cannot see how. Recall that Justice Kennedy *concurred* in the disposition in *Lujan*. He thought that Congress, in enacting the citizen-suit provision of the Endangered Species Act, had failed his nexus test. But if the citizen-suit provision of the ESA did not draw a sufficient nexus, how can it be said that the FOIA or EIS cases do? These statutes are almost certainly premised on a congressional theory that some harms are so widely-shared and pervasive that all citizens are sufficiently affected to have standing to sue. Thus, if we take Justice Kennedy’s *Lujan* concurrence at face value, it would not provide a way to draw a principled distinction between procedural rights cases where the plaintiffs lacked standing and where they had standing. We reluctantly conclude that an “off-the-rack” adoption of Justice Kennedy’s *Lujan* concurrence would not solve the conundrum highlighted in this Article—at least not without a lot of precedents having their heads lopped off.

Therefore, we now look to a solution that involves an adjustment to Justice Kennedy’s vision for the standing doctrine—one that accounts for both the Article III and procedural rights strands of the standing doctrine in a descriptively complete way. We think this is best achieved by simply recognizing that there are two different “tiers” of the case or controversy requirement of Article III that apply depending on the type of case presented to the court.

In cases where the plaintiff sues under common law or directly under the Constitution, “cases” and “controversies” means injury-causation-redressability as expressed in *Allen v. Wright* and in the text of *Lujan*. However, where the plaintiff sues under a statute that purports to grant standing to “any person,” “any citizen,” or “any aggrieved person,” then “cases” and “controversies” takes on a different meaning. It means anyone who falls within the “zone of interests.” That is to say, those who seek judicial review of federal agency action must demonstrate that they “arguably fall within the zone of interests” that Congress intended when it enacted the enabling statute. In the context of procedural rights review, the “zone of interest” may be broader than the cases delimited by the traditional injury-in-fact, causation, and redressability requirements.

The Court has recently favored expanding the zone of interests test to other areas. In Justice Scalia’s majority opinion in *Thompson v. North American Stainless, LP*, the Court held that, in using the words “any aggrieved person” in Titles VII and VIII, Congress did not mean to create standing all the way out to the limits of Article III. Instead, the *Thompson* Court unanimously held that the “any aggrieved person” language in Titles VII and VIII extend standing only as far as the “zone of interests” requirement first adopted by the Court in *Camp*. The Court noted that Congress could conceivably widen the “zone of interest” out to the constitutional limits—but the Court held, as a

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294 See, e.g., *Lujan*, 504 U.S. at 572 n.7.
297 See id.
matter of statutory construction, that Congress simply had not chosen to do so in the context of Title VII and Title VIII litigation. As the Court recognizes the increasing utility of the zone of interest test, we believe Thompson presents an opportunity to resolve the conundrum that has been the subject of this Article. The Court could adopt the zone of interest test as the principal justiciability requirement in procedural rights cases, where Congress has expressed its specific intent to widen the class of persons who can enforce the law. But in other cases, where Congress has not been so explicit, the usual standing requirements will still apply.

This is not a radical proposition. There is no canon of interpretation dictating that words must always have the same meaning in the same legal document without respect to context, for any such rule would be ridiculous. The words “due process” mean one thing in certain contexts and something completely different in others. Because of “tiered review,” the words “equal protection of the laws” mean one thing in certain contexts and something entirely different in others. There is no a priori reason why “cases” and “controversies” could not have different meanings depending on whether Congress has specifically authorized judicial review or not.

Justice Harlan said it best. In any area where it is doubtful whether a broad class of people ought to be able to sue about subject matter to which they have only an indirect connection, the Court should not permit such actions on its own initiative. The Court should wait for Congress to authorize such actions with specificity. But if the politically accountable branches want to authorize “private attorneys general” to help enforce a regulatory statute, then the federal courts should permit it. Congress has employed such private attorneys general since at least the end of the Civil War, when it enacted the False Claims Act, which offers private individuals a bounty for “snitching” on those who lodge false claims against the government. Our point here is not necessarily that the False Claims Act is yet another outlier that disproves the mandatory character of the “injury” requirement. Our point is that the Court should defer to Congress regarding whether

298 Id. at 869-70.
299 Compare, e.g., Parratt v. Taylor, 451 U.S. 527 (1981) (due process requires only notice and opportunity to be heard) with Rochin v. California, 342 U.S. 165 (1952) (due process prohibits police conduct that “shocks the conscience”).
300 Compare, e.g., Adarand v. Pen a, 515 U.S. 200 (1995) (applying strict scrutiny, meaning the government must show its actions are necessary to achieve a compelling government interest) with San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (applying rational basis review, meaning the government need only show its actions are rationally related to a legitimate government purpose).
303 Although this has been argued elsewhere. See Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 772-73 (2000) (explaining the standing doctrine quandary posed by qui tam actions and resolving it by noting that it functions like an assignment of the government’s claim in which the government meets the Article III
third parties who have little or no particularized connection to the subject matter ought to be permitted to sue because the statute is aimed at remedying a problem that affects us all—just as false claims against the government affect us all, however minutely. Far from the courts arrogating power to themselves in such cases, they are accepting the political judgment of the elected branches that the judicial power should be deployed to achieve such broad societal objectives, just as they do in all federal criminal cases.

We are fully aware of the well-mooted debate over the historical origins and original meaning of the “cases” and “controversies” language in Article III. There is no point in our rehashing them here. We think Raoul Berger and Louis Jaffe sufficiently demonstrated a history of “public actions” to support our proposed secondary meaning of “cases” and “controversies in agency review cases.\textsuperscript{304} There is at least one dissenter to this view,\textsuperscript{305} but we are not persuaded by his rather tendentious analysis. In light of the litigation that the federal courts have actually handled since the beginning of the administrative state, if one thinks “cases” and “controversies” are truly limited to the business of the courts at Westminster in 1792, then, to paraphrase Ricky Ricardo, “You got a lotta ‘splaining to do.”\textsuperscript{306}

Therefore, we propose that, in cases where plaintiffs sue for judicial review of federal agency action under a provision in which Congress has made it clear who is permitted to seek such review, “cases” and “controversies” simply means “the plaintiff must arguably fall within the zone of interests that Congress meant to protect.” If Congress really wants to authorize anyone to sue for disclosure of government documents having absolutely nothing to do with their private interests, and the plaintiff follows the proper court procedures for judicial compulsion of disclosure, then that is a “case” within the meaning of Article III. On the other hand, if someone wants to sue for an injunction stopping the war in Afghanistan directly under the Constitution and no congressional statute specifically authorizes such a suit, it is not a “case” for purposes of Article III because the plaintiff lacks a “particularized” injury-in-fact. That he followed proper court procedures in filing the complaint would not be enough to sustain justiciability.

Under our proposal, the Court does not have to retract its long-held rhetoric that the Article III “case or controversy” requirement applies to all cases. Nor does the Court have to overrule its precedents in the FOIA cases, the EIS cases, or the Chenery doctrine.


\textsuperscript{306} Catchphrase associated with the television show \textit{I Love Lucy} (1951-1957).
All FOIA applicants fall within the “zone of interests” of FOIA because Congress meant for anyone to be able to obtain non-exempt government documents. Anyone who sues to require that an EIS be filed falls within the “zone of interests” because Congress meant for anyone to force such statements to be produced. The statutes in these cases are sufficiently broad to conclude that, under our two-tiered “case or controversy” doctrine, the litigation falls within Article III. We do confess that the narrow holding of *Lujan* itself would have to be reconsidered, given that the Defenders of Wildlife may well have fallen within the zone of interests meant to be protected by the citizen-suit provision of the ESA. But it is important to remember that the holding of *Lujan* would simply be giving way to its own footnote 7 and to Justice Kennedy’s concurrence. A more recent case that purports to follow *Lujan*, *Summers v. Earth Island*,307 would not be affected because there the plaintiffs did not sue under a specific congressional mandate but under the general judicial review provisions of the Administrative Procedure Act and so the zone-of-interests test would presumably not be met.308

A fuller account of what cases may have to be reconsidered under our proposal is beyond the scope of this Article. So, too, do we defer further discussion of the extent of Congress’ control over what cases belong in what standing “tier.” For example, could Congress relax the “case” and “controversy” requirements (pursuant to Section 5 of the Fourteenth Amendment or otherwise) in cases like *City of Los Angeles v. Lyons* to grant plaintiffs like Adolph Lyons standing to enjoin the Los Angeles Police Department from using that fatal chokehold?309 Suffice to say that the standing dilemma we identify in this Article is not susceptible to easy resolution; it will not go gentle into that good night.310 But we hope we have begun the process of showing it the door.

**Conclusion**

Standing is about separation of powers. The standing doctrine ensures that the federal courts do not take on matters that are beyond their competence or role in the constitutional scheme. While the Court has long insisted that the best—and only—way to ensure that federal courts do not exceed their constitutional powers is to insist on a strict régime of injury-in-fact, causation, and redressability, it is time for the Court to acknowledge this is generally not the path the Court itself has followed when Congress has affirmatively conferred a right of judicial review to large segments of the public, or to the public at large.

Our chief aim in this Article has not so much been to recommend a particular solution as it has been to highlight the disconnect between the Court’s Article III rhetoric and the reality of its procedural rights precedents. We have tried to hold dear Ralph

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309 *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). We do note, however, that our analysis of Congress’ power to do so may be of future use on this point. *See supra* section IV-E & text accompanying n.332.
310 *See* Dylan Thomas, *Do not go gentle into that good night* (1951).
Waldo Emerson’s aphorism that “a foolish consistency is the hobgoblin of little minds,” but not all insistence on consistency is foolish, and particularly not when it comes to Supreme Court precedents. If the Court cares that its asserted justifications actually support its decisions—which it ought to and apparently does—then this is a problem that must be addressed, whether in the way we have suggested or in some other way. That will not happen unless the Court faces the problem head-on and considers a structural revision to the doctrine.

As we have explained, the Necessary and Proper Clause could conceivably allow the Court to retain both its Article III orthodoxy and its procedural rights cases. Under an extension of the plurality’s position in *Tidewater*, the federal courts may entertain cases that do not satisfy the usual Article III requirements if doing so would aid Congress in the exercise of its constitutionally prescribed powers. Still, we recognize this solution is predicated on flimsy authority and might not pass muster even under the more lenient *Comstock* test.

We have also explained why we think it is unlikely that the Court would simply overrule either the line of cases holding the “Article III minima” are constitutionally compelled or the motley group of procedural rights cases that flout this orthodoxy. It is difficult to imagine what far-ranging and devastating implications either course of action would have on the orderly administration of government and on judicial review as we know it.

We therefore recommend a two-tiered “cases” and “controversies” solution because it resolves the apparent disconnect and does so with a relative parsimony in terms of overruling existing cases. The two-tiered solution would, admittedly, require the Court to retract its insistence that injury-in-fact, causation, and redressability are required in *every* federal case—but if it is not true, why should the Court continue to say it? Our solution is not excessively disruptive of the Article III orthodoxy and it is descriptively accurate.

Nor would a two-tiered solution disrupt the *raison d’être* of the standing doctrine. As we have said, standing is about separation of powers. Of course, the Constitution is the ultimate authority on what matters the federal courts may entertain, and we know that they are limited to “cases” and “controversies.” But we also know that Congress has considerable say into what cases or controversies may actually come before the federal courts. And we have demonstrated that when Congress passes a law it wants to see enforced by the public, courts have generally honored Congress’ intent to create such rights, “the invasion of which creates standing.” In other words, when Congress has spoken with specificity, the floor for what makes a “case” or “controversy” drops much lower than the threshold of injury-in-fact, causation, and redressability. We think it drops as far as the “traditional notions of justiciability” the Court has recognized as distinct from the standing doctrine.311

Thus, the baseline for justiciability in procedural rights cases—i.e., when Congress has spoken with specificity about who may sue, even if that means anyone—is simply different from the baseline for justiciability in traditional common-law cases. That

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is why we think that recognition of these two tiers of standing is the best way to do away with the standing doctrine’s “dirty little secret.”