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# Standing Without Injury

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INTRODUCTION

It is "all but gospel" that bringing suit in federal court requires the plaintiff to allege an "injury in fact."[1] But what if this gospel is wrong?

For over thirty years, *Lujan v. Defenders of Wildlife*[2] has defined the contours of Article III standing. Justice Antonin Scalia's opinion for the Court articulated a clear (if not always clearly applied[3]) test to determine whether litigants could invoke the jurisdiction of the federal courts.[4] Under this test, the "irreducible constitutional minimum of standing contains three elements,[5] the "first and foremost" being that the plaintiff must have suffered an "injury in fact."[6] This requirement of Article III is said to be "essential and unchanging."[7] Yet some in ther clerisy are expressing doubts.

The justices spar over *Lujan*'s boundaries, and routinely disagree on its precise application.[8] *Lujan* itself was not unanimous and has not

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[1] Sierra v. City of Hallandale Beach, 996 F. 3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) ("It is now all but gospel that any plaintiff bringing suit in federal court must satisfy what the Supreme Court has called the 'irreducible minimum' of Article III standing" which includes "an injury in fact."); *see also* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1132 (2009) ("Today's treatises tell us that in order to have standing to challenge government action in federal court, a challenger must establish 'injury in fact'").

[2] 504 U.S. 555 (1992).

[3] *See* Magill, *supra* note __, at 1132 ("the doctrine is widely regarded to be a mess").

[4] *See* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199 (2016) (noting the "requirements of standing doctrine have grown relatively settled despite the debates"); Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1068 (2009) (observing that most standing opinions in the Roberts Court were unanimous to that point).

[5] 504 U.S. at 560.

[6] *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103 (1998) ("First and foremost, there must be alleged (and ultimately proved) an 'injury in fact'"). Under current doctrine, the injury must also be "fairly traceable" to the challenged conduct and redressable by a favorable court judgment. *Lujan*, 504 U.S. at 560.

[7] *Id.*

[8] Cases in just the past ten years in which the justices have split on the application of *Lujan* include Biden *v* Nebraska, 143 S.Ct. 477 (2023) (standing of states to challenge immigration enforcement policy); Haaland v. Brackeen, 143 S.Ct. 1609 (2023) (standing to challenge Indian Child Welfare Act); TransUnion LLC v. Ramirez, 141 S.Ct. 2190 (2021) (standing to challenge Fair Credit Reporting Act violations); California v. Texas, 141 S.Ct. 2104 (2021) (standing to challenge aspects of Affordable Care Act); June Medical Service LLC v. Russo, 140 S.Ct. 2103 (2020) (standing to challenge Louisiana abortion law); Thole v. U.S. Bank, N.A., 140 S.Ct. 1615 (2020) (standing to sue for alleged Employee Retirement Income Security Act violations); Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (standing to sue under Fair Credit Reporting Act); Clapper v.

produced anything remotely approaching a consensus within the academy.[9] Building on prior scholarship skeptical of the evolving requirements for standing, many academics were harshly critical of what they saw as an ahistorical and ungrounded attempt to restrict public interest litigation in the name of constitutional fidelity.[10]

The academic critique of *Lujan* has been recently joined within the judiciary, as judges find the test difficult to apply in a clear and consistent fashion.[11] Some jurists are even challenging *Lujan*'s canonical foundations.

Judge Kevin Newsom of the U.S. Court of Appeals for the Eleventh Circuit, in particular, has challenged *Lujan*'s threshold requirement of an "injury in fact."[12] This requirement, he has come to conclude, is not "properly grounded in the Constitution's text and history, coherent in theory, or workable in practice."[13] Accordingly, Judge Newsom suggests abandoning the injury requirement altogether. Instead, standing to sue in federal court should exist whenever a plaintiff "has a legally cognizable cause of action, regardless of whether he can show a separate and stand-alone factual injury."[14] Whatever limits exist on plaintiffs pursuing statutory rights in federal court, Judge Newsom elaborated, come not from Article III, but from Article II, and the latter's "vesting of the 'executive power' in the President" in particular.[15]

Judge Newsom's critique of *Lujan* is particularly noteworthy not only because he is a prominent and well-respected federal appellate judge.

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Amnesty International USA, 586 U.S. 398 (2013) (standing to challenge national security surveillance program).

[9] *See* Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1888 (2022)(noting the injury requirement "while commanding the apparent assent of all recent justices on the Supreme Court, has long been under siege by academics, and, occasionally, lower court jurists").

[10] *See. e.g.*, Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155 (2001); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

[11] *See, e.g.*, Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 957 (11th Cir. 2020)(Jordan, J., dissenting).

[12] *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring); Laufer v. Arpan, LLC, 29 F.4th 1268, 1283 (11th Cir. 2022) (Newsom, J., concurring).

[13] *Sierra*, 996 F.3d at 1115.

[14] *Id.* at 1115.

[15] *Id.*; *see also id.* at 1132 ("the relevant limits on congressional power are … found ... in Article II of the Constitution, not Article III").

His critique is particularly noteworthy in that his jurisprudence generally aligns with that of *Lujan*'s author.[16] Despite his affinity for Justice Scalia's formalist and originalist jurisprudence, Judge Newsom rejects a core element of one of Justice Scalia's most important and most influential opinions. His critique has not only begun to attract interest from scholars,[17] it has also received attention on the Supreme Court.[18]

*Lujan*'s injury-in-fact requirement is often the most significant standing hurdle litigants must overcome, and likely does more than any other part of the opinion to limit access to Article III courts. Abandoning an injury-in-fact requirement is tantamount to rejecting *Lujan* wholesale. Yet in embracing an Article II limitation on the legislature's ability to create statutory causes of action, Judge Newsom's approach embraces another core element of Justice Scalia's jurisprudence: Concern for the unitary executive and suspicion of efforts to delegate enforcement authority to private litigants or the courts.[19]

Standing without injury, as suggested by Judge Newsom, might align standing doctrine more closely with the original public meaning of Article III and the historical understanding of the judicial power. It would also represent a dramatic departure from the standing doctrine that emerged in the twentieth century.

While possibly more grounded in text and history than the approach championed by Justice Scalia and embraced in some recent Supreme Court decisions, it is not clear that it would produce a more coherent doctrine or prove more readily applied by lower courts. As Judge Newsom readily admits, his approach is "not a panacea" and "raises its own set of hard questions."[20] Discarding the current approach would unquestionably upend settled expectations and produce a period of judicial

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[16] Before becoming a judge, like Justice Scalia, Judge Newsom also authored some important originalist scholarship. *See, e.g.*, Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000).

[17] *See, e.g.*, Elizabeth Earle Beske, *Litigating the Separation of Powers*, 73 ALA. L. REV. 823, 837 n100 (2022); Ernie Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1888 n21 (2022); Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON. L. REV. 729, 734 nn33&34 (2022); Jacob Phillips, TransUnion, Article III, and Expanding the Judicial Role, 23 FED. SOC. REV. 186, 199 (2022); Jeffrey G. Casurella, *Why Standing Matters*, 74 MERCER L. REV. 557, 562 n29 (2023).

[18] *See* TransUnion LLC v. Ramirez, 141 S.C. 2190, 2219 (2021) (Thomas, J., dissenting) (citing *Sierra v. Hallendale Beach*, 996 F. 3d 1110 (11th Cir. 2021).

[19] See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983). *See also* Morrison v Olson, 487 U.S. 654, 697 (1998) (Scalia, J., dissenting).

[20] *Sierra*, 996 F.3d at 1139 ("I readily confess that reconceptualizing 'standing in Article II terms is not a panacea, and it raises its own set of hard questions.").

uncertainty, even if it would also reify the legislature's power to regulate the jurisdiction of federal courts and authorize causes of action in federal court.

This Article seeks to assess Judge Newsom's proposed injury-less approach to standing in federal court. Part I of this article provides a brief overview of current standing doctrine, the requirements of standing consolidated in *Lujan*, and how these requirements have been interpreted and applied by the Supreme Court. Part II describes Judge Newsom's critique of contemporary standing doctrine, and outlines the two primary components of his proposed alternative: 1) elimination of the standing requirement in favor of a simple cause-of-action requirement, and 2) recognition of an external constraint on standing derived from Article II, rather than Article III.

Part III considers the potential implications of this alternative approach for justiciability across a range of contexts, with a particular emphasis on ways in which the Newsom approach of standing without injury would deviate from current law. It then evaluates the extent to which Judge Newsom's proposed reformulation of standing would adequately account for the failings of existing doctrine. Eliminating injury, and focusing exclusively on whether a given plaintiff has a cause of action to bring their claim, would likely simplify the standing inquiry. The theoretical justification for such a requirement may even be more coherent than the contours of the existing Article III inquiry. Imposing Article II limitations on the ability of private litigants to enforce federal law where authorized by Congress, however, could invite the same sort of policy-influenced assessments as does existing law and may turn out to be no more workable than the test left by *Lujan.* After considering such concerns, the Article concludes.

## I. LUJAN AND STANDING IN THE SUPREME COURT

The *Lujan* formulation should be quite familiar.[21] Indeed, *Lujan*'s canonical account of Article III standing is routinely quoted by federal courts and the case is one of the most-cited Supreme Court decisions of all time. [22] Under *Lujan*, the "irreducible constitutional minimum of

[21] Judge William Fletcher wrote that the requirements of Article III standing were "numbingly familiar," but this comment was made before *Lujan*. *See* William A. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 222 (1988).

[22] *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 392 (2016). Of potential interest to administrative law scholars in particular, this study found more federal court references to *Lujan* than to *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), even though *Lujan* was

standing" has three parts.[23] First, the "plaintiff must have suffered an 'injury in fact,'" that is both "actual or imminent" and "concrete and particularized."[24] Second, there must be a "causal connection between the injury and the conduct complained of."[25] Third, there must be a sufficient likelihood that the "the injury will be 'redressed' by a favorable decision."[26] These requirements, *Lujan* instructed, constitute the "core component of standing" which is "an essential an unchanging part of the case-or-controversy requirement of Article III."[27]

*Lujan* itself described this test as "an essential and unchanging part of the case-or-controversy requirement of Article III."[28] Demonstrating the existence of standing by showing each of these elements is more than "mere pleading requirement," but is "an indispensable part of the plaintiff's case."[29] The existence of standing is jurisdictional, and thus cannot be waived.[30] Courts must assure themselves of standing in each case.

The purpose of the standing inquiry is to determine whether an individual litigant has a sufficient stake in the outcome of a particular legal dispute so as to justify the exercise of federal jurisdiction.[31] As colorfully explained by then-Judge Antonin Scalia, the standing inquiry asks of the party seeking to invoke the jurisdiction of a federal court "What's it to you?"[32] This requirement, in turn, is often understood as serving the purpose of ensuring that there is sufficient adversity among the parties, or

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decided eight years later. *Id.* (reporting 13,123 federal court citing references to *Lujan* and 12,829 references to *Chevron*). *But see* Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, Notice & Comment (Oct. 09, 2014) https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/ (finding more citations to *Chevron* than *Lujan*).

[23] *Lujan*, 504 U.S. at 560.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 561 (quoting Simon v. E. Ky. Welfare Rights Org., 426 US. 26, 38 (1976)).

[27] *Id.* at 560.

[28] *Id.* at 560.

[29] *Id.* at 561.

[30] As some advocates discover to their chagrin, federal judges often raise questions about standing even when the subject has not been raised, let alone briefed, by the parties.

[31] *See* William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) ("The essence of a true standing question is . . . [does] the plaintiff have a legal right to judicial enforcement of an asserted legal duty"?). In Fletcher's view, however, this question necessarily implicates the underlying merits and "should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked." *Id.*

[32] *See* Scalia, *supra* note __, at 882. *See also* TransUnion LLC v. Ramirez, 141 S.Ct. 2190 (2021) (citing Justice Scalia's quip).

ensuring that courts confine their jurisdiction to cases in which the rights of parties are at issue and avoid issuing advisory opinions.[33]

More broadly, standing is understood, and often defended, as "a crucial and inseparable element" of the separation of powers.[34] As Chief Justice John Roberts suggested before he joined the federal bench, the doctrine of standing was "designed to implement the Framers' concept of 'the proper—and properly limited—role of the courts in a democratic society.'"[35] In *Raines v. Byrd* the Court went so far as to proclaim that "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[36]

To Chief Justice Roberts, *Lujan* was a "sound and straightforward decision" that reaffirmed traditional (and, in his view, unremarkable) separation-of-powers principles.[37] By contrast, academic commentary, has long been divided on whether separation of powers concerns dictate the Court's approach to Article III.[38] *Lujan* itself provoked substantial

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[33] *See, e.g.*, Scalia, *supra* note __, at 882 ("There is no case or controversy, the reasoning has gone, when there are no adverse parties with personal interest in the matter."); Lea Brillmayer, *The Jurisprudence of Article III: Perspectives on the Case or Controversy Requirement*, 93 HARV. L. REV. 297 (1979) (among the purposes of standing is the proper representation of individuals and self-determination); Eugene Kontorovich, *What Standing Is Good* For, 93 VA. L. REV. 1663 (2007) (standing "prevents inefficient dispositions of constitutional entitlements" and enables individuals to determine the best use of their own rights); Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006) (Article III's case or controversy requirement ensures adequate adversity between the parties). *But see* Richard A. Epstein, *Standing and Spending – The Role of Legal and Equitable Principles*, 4 CHAPMAN L. REV. 1, 46-47 (2001 (arguing ideological plaintiffs are likely to be sufficiently adverse to satisfy this concern); JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES (2021)(arguing that Article III "cases" need not feature adversity).

[34] Scalia, *supra* note __, at 881; *see also* Allen v. Wright, 468 U.S. 737, 752 (1984)("the law of Art. III standing is built on a single basic idea—the idea of separation of powers").

[35] John G. Roberts, Jr., *Article III Limits on Standing*, 42 DUKE L.J. 1219, 1220 (1993) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984) (internal quotation omitted)).

[36] Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

[37] *See* Roberts, *supra* note __, at 1219; *see also id.* at 1226 (*Lujan* "can hardly be regarded as remarkable").

[38] *See, e.g.*, John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (arguing standing doctrine was fabricated by the Supreme Court in the twentieth century); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (suggesting elements of *Lujan*'s approach are grounded in historical understandings of the judicial role. This debate precedes *Lujan*. *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816

criticism, as have some of its successors.[39] Nonetheless, most of the debate over standing within the judiciary focuses on its boundaries and particulars, not the underlying principle.

Whether or not the *Lujan* formulation can be characterized as originalist in any meaningful sense, the principles motivating contemporary-standing doctrine can be traced to the founding era, and in particular the distinction between public and private rights.[40] As Chief Justice John Marshall noted in *Marbury v. Madison*, "[t]he province of the court is, solely, to decide on the rights of individuals . . . ."[41] Such cases stand in contrast to those that are "political" in that "[t]hey respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."[42] Where the rights of individuals are at stake, the judiciary is within its element, and properly exercises the authority of judicial review, even if that means second-guessing or overruling the actions of a coordinate branch. Yet when individual rights are not at stake, constitutional questions are properly left to the political branches, each of which has an independent obligation to uphold and enforce the Constitution.[43]

By most scholarly accounts, what we now call the doctrine of standing took root in the first part of the twentieth century.[44] In *Tyler v. Judges of Court of Registration*, for instance, the Court concluded the plaintiff lacked "the requisite interest to draw in question" the constitutionality of the law he sought to challenge.[45] In order to sustain a

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(1969); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

[39] *See, e.g.*, Erwin Chemerinsky, *What's Standing After* Transunion LLC v. Ramirez, 96, N.Y.U. L. REV. ONLINE 269 (2021); Sunstein, *Transformed*, *supra* note __; Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* Transunion v Ramirez, 101 B.U. L. Rev. Online 62 (2021); Beske, *Charting*, *supra* note __.

[40] *See* F. Andrew Hessick, *Standing, Injury in Facts, and Private Rights*, 93 CORNELL L. REV. 275, 289 (2008) ("Standing grew out of the distinction between public and private rights"); Woolhandler & Nelson, *supra* note __, at 691 ("eighteenth- and nineteenth-century courts were well aware of the need for proper parties, and they linked that issue to the distinction between public and private rights").

[41] 5 U.S. (1 Cranch) 137, 170 (1803).

[42] *Id.* at 166.

[43] *See* Roberts, *supra* note __, at 1229 ("By properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution.").

[44] *See, e.g.*, Hessick, *supra* note __ at 290 ("Standing first flourished as an independent doctrine in the early 1900s"); Sunstein, *What's Standing*, *supra* note __, at 179 (in the early twentieth century "'standing' began to make a modest initial emergence as a discrete body of doctrine"). Justice Scalia, for his part, rooted

[45] 179 U.S. 405, 410 (1900).

suit, the Court explained, the plaintiff must "show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens."[46] Similarly, in *Frothingham v. Mellon*, the Court held that generalized grievances, such as a federal taxpayer's complaint that federal funds were being spent in an illegal or unconstitutional fashion, were insufficient to confer standing on a litigant.[47] During this period, by many accounts, standing was deployed to protect progressive governmental interventions from legal attack.[48]

While these early decisions suggested federal courts lacked the authority to hear generalized grievances or claims in which the plaintiff lacked the requisite personal interest, jurisdiction could be had if Congress expressly authorized the suit in question.[49] Thus, in *Tennessee Electric Power Co v. Tennessee Valley Authority*, the Court concluded competitors lacked standing to challenge TVA policies that threatened them with economic loss, as no right of theirs had been violated.[50] Yet in *Federal Communications Commission v. Sanders Brothers Radio Station*, the Court allowed an economic competitor to sue, despite the lack of a legal right, because Congress had authorized such suit, thereby giving them "standing to appeal."[51] If Congress believed that the public interest would be served by allowing those with an economic stake in the FCC's decisions to sue when the agency failed to comply with the law, the Court

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[46] *Id.* at 406.

[47] 262 U.S. 447 (1923). As the Court explained, a taxpayer could not sustain a suit challenging the lawfulness of a government expenditure because "interest in the moneys of the Treasury is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Id.* at 487.

[48] *See* Hessick, *supra* note __, at 291; Robert J Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458-59 (1996); Sunstein, *What's Standing*, *supra* note __, at 179; MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 218 (2000).

[49] *See* Magill, *supra* note __, at 1139-40. Among the earliest cases in which the Supreme Court rejected a legislatively enacted cause of action was *Muskrat v. United States*, 219 U.S 346 (1911), in which the Court held an act of Congress purporting to "authorize[] and empower[]"specific suits by specifically names parties exceeded the scope of Article III. The basis for the Court's conclusion is "famously obscure." Baude, *supra* note __, at 207. In later opinions, the Court cited *Muskrat* for the proposition that "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions." *See* Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).

[50] 306 U.S. 118 (1939).

[51] 309 U.S. 470, 477 (1940).

would respect that choice.[52] Where a common law cause of action was absent, Congress could create a cause of action by enacting a statute. It was only later that the Court concluded that Congress's ability to authorize such suits was constrained by the Constitution.

The "injury in fact" formulation was a relative late addition to the Court's Article III jurisprudence. The phrase's first appearance in a standing case was not until 1970 when it featured prominently in Justice Douglas' opinion for the Court in *Association of Data Processing Service Organizations, Inc. v. Camp* (*ADPSO*).[53] Seeking to expand the opportunity for citizen suits against federal agencies while observing the limits of Article III, Justice Douglas declared that "the first question" in determining whether a litigant has standing is "whether the plaintiff alleged that the challenged action has caused him injury in fact, economic or otherwise."[54] If such an injury is alleged, Justice Douglas wrote, the next 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."[55] The former, as presented by Justice Douglas, was a requirement of Article III, while the latter was grounded in the Administrative Procedure Act.[56]

The *ADPSO* formulation was "startling because the Supreme Court had never used the term 'injury in fact' in connection with standing law" before then.[57] Justice Douglas intended for this formulation to make it easier for litigants, and public interest groups in particular, to bring claims in federal court.[58] He said as much in his *ADPSO* opinion,[59] and made his approach perfectly clear in the Mineral King case just two years later.[60]

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[52] *Id. See also*, Magill, *supra* note __, at 1140-41.

[53] 397 U.S. 150 (1970). As Elizabeth Magill notes, the phrase "injury in fact" had previously appeared in three Supreme Court opinions, but not with reference to standing or Article III. *See also*, Magill, *supra* note __, at 1161.

[54] *ADPSO*, 397 U.S. at 152.

[55] *Id.* at 154.

[56] Magill, *supra* note __, at 1162 ("The Court presented this test as an interpretation of the APA's permission to those 'aggrieved by agency action within the meaning of a relevant statute' to challenge agency action in court.").

[57] Magill, *supra* note __, at 1161. As Magill puts it, Douglas "completely butchered the prior law." *Id.* at 1163. According to Cass Sunstein, *ADPSO* was a "shockingly sloppy opinion" and Douglas's formulation "was made up out of whole cloth." Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 356, 349 (2021).

[58] Magill, supra note __, at 1161-62. See also Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations and a Solution to the Problem of Environmental Standing*, 30 FORDHAM ENVTL. L. REV. 21 (2018).

[59] *Id.* at 154 (noting approvingly "the trend toward enlargement of the class of people who may protest administrative action").

[60] *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

*ADPSO* had the desired effect, at least initially.[61] Prior to *ADPSO*, a private litigant seeking to challenge a governmental action that advantaged a competitor would have to identify some statutory basis for alleging that the governmental action constituted a "legal wrong." Under *ADPSO*, however, demonstration of an injury from the governmental action was sufficient for jurisdiction, and consideration of whether the litigant suffered a "legal wrong" would await consideration of the suit's merits.[62]

While *ADPSO* introduced injury in fact as a way to "expand, rather than contract, the category of parties who could bring suit in federal court to challenge governmental action," the Court's standing jurisprudence quickly changed course.[63] In *Warth v. Seldin*[64] and *Eastern Kentucky Welfare Rights Organization*[65] the Court declared that "injury in fact" was a meaningful constitutional hurdle after all, suggesting that such an injury was necessary, in addition to the violation of a legal right, in order to satisfy the jurisdictional requirements of Article III. This approach was reified in subsequent cases, such as *Allen v. Wright*,[66] and ultimately concretized in *Lujan*, in which the Court squarely held that a federal statute authorizing "any person" to sue to force the federal government to comply with federal law[67] did not, in fact, authorize suit by "any person," but only those persons who could also demonstrate they had suffered an "injury in fact," and could meet the other requirements of Article III standing.[68]

In *Lujan*, environmental organizations filed suit to challenge a regulation promulgated by the Department of the Interior that, in the plaintiffs' view, abandoned the federal government's statutory obligation to ensure that federally funded projects do not place listed endangered species at risk.[69] The plaintiffs identified specific listed species they believed would be threatened by specific U.S.-funded projects and submitted affidavits from organization members who could plausibly

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[61] As Chief Justice Roberts quipped, the "high-water mark of diluted standing requirements" would occur just three years later in Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, (1973). *See* Mass. v. EPA, 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting).

[62] *ADPSO* also established the requirement that a plaintiff suing under a federal statute establish that they are within the "zone of interests" of the statute, but this is a prudential standing requirement, not a jurisdictional requirement of Article III.

[63] *Sierra*, 996 F.3d at 1118.

[64] 422 U.S. 490 (1975).

[65] 426 U.S. 26 (1976).

[66] *Allen v. Wright*, 468 U.S. 737 (1984)

[67] *See* 16 U.S. C. §1540(g)(1).

[68] *See Lujan*, 504 U.S. at 561-62.

[69] *See* 16 U.S.C. § 1536(a)(2).

attest to concern about those species.[70] Six justices of the Court concluded this was insufficient, concluding they had not shown the government's actions produced an injury-in-fact.[71] Despite the existence of a citizen suit provision expressly authorizing suit,[72] which created a procedural right to federal government compliance with the ESA, the Court concluded there was no Article III standing unless the plaintiffs could demonstrate that they suffered an injury in fact that was both actual or imminent and concrete and particularized, that the injury was fairly traceable to the government's allegedly unlawful action, and that the injury would be redressed by a favorable court judgment.[73]

Although a majority of justices rejected the plaintiffs' standing claim, they did not all sing from the same hymnal. Justices Kennedy and Souter concurred to soften the edges of Justice Scalia's majority opinion, and refused to join his conclusion that the plaintiffs could not show redressability.[74] In an oft-cited passage, Justice Kennedy suggested the plaintiffs could have prevailed had only purchased plane tickets.[75] Justice Stevens concurred in the judgment on other grounds,[76] and Justice Blackmun (joined by Justice O'Connor) disparaged Justice Scalia's opinion as a "slash-and-burn expedition through the law of environmental standing."[77]

The *Lujan* formulation is repeated by rote in case after case, but lower court judges and even the justices themselves have at time struggled to apply the *Lujan* framework to specific cases.[78] What constitutes an "actual or imminent" or "concrete and particularized" injury is not always clear, and jurists sometimes disagree on the extent to which *Lujan* allows Congress to broaden the range of injuries that may support standing.[79] The justices themselves have divided on the extent to which informational

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[70] *See Lujan*, 504 U.S. at 563.

[71] *Id.*at 571. Four of the justices also argued that the plaintiffs could not show that any alleged injury was redressable. *See Lujan*, 504 U.S. at 582.

[72] 16 U.S.C. § 1540(g)(1)(A).

[73] *See Lujan*, 504 U.S. at 560.

[74] *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment).

[75] *Id.* ("While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, … this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis").

[76] *Id.* at 581 (Stevens, J., concurring in the judgement).

[77] *Id.* at 606 (Blackmun, J., dissenting).

[78] *See infra* note __ and cases cited therein.

[79] *See Sierra*, 996 F.3d at 1116 (Newsom, J., concurring) ("Despite nearly universal consensus about standing doctrine's elements and sub-elements, applying the rules has proven far more difficult than reciting them.").

injuries,[80] concerns about government surveillance,[81] mishandling or misrepresentation of personal data,[82] and unenforceable provisions within larger statutory schemes[83] may serve as the basis for Article III standing. Lower courts have likewise sometimes disagreed on how the *Lujan* analysis should cash out in particular contexts.[84] Yet these disagreements have concerned how to apply *Lujan* in particular circumstances, not whether the *Lujan* test should govern standing claims or whether Article III requires an injury-in-fact for a case to be heard in federal court.

While *Lujan* constrained citizen-suit standing, particularly in environmental cases,[85] subsequent opinions may have softened some of *Lujan*'s harder edges. Post-*Lujan* Justice Scalia often found himself in dissent as his colleagues made it easier for litigants to demonstrate in cases alleging informational or environmental harms. In *Friends of the Earth v. Laidlaw Environmental Services*, for instance, the Court accepted that a statutory violation could provide the basis for an injury in fact even without demonstrable harm to the environment.[86] Also, in *Federal Elections Commission v. Akins*, the Court found a litigant's "failure to obtain information" also constituted an injury in fact.[87] In both cases, Justice Scalia dissented.[88] Although the Roberts Court was often accused

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[80] *See* Federal Election Comm'n v. Akins 524 U.S. 11 (1998)

[81] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013)

[82] *See* TransUnion LLC v. Ramirez, 141 S.Ct. 2190, (2021).

[83] *See* California v. Texas, 141 S.Ct. 2104 (2021).

[84] *Compare* Cohen v. Rosicki, Rosicki & Assocs., P.C., 897 F.3d 75, 81–82 (2d Cir. 2018) (receipt of objectively misleading debt-collection letter in violation of Federal Debt Collection Practices Act constitutes concrete injury); Macy v. GC Servs. Ltd. P'ship, 897 F.3d 747, 756–58 (6th Cir. 2018) Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1001–02 (11th Cir. 2020)( receipt of misleading debt-collection letter in violation of FDCPA does not constitute concrete injury unless recipient was actually misled); Frank v. Autovest, LLC, 961 F.3d 1185, 1188 (D.C. Cir. 2020) (same); *see also Sierra*, 996 F.3d at 1116 (summarizing "inter- and intra-circuit tensions and conflicts" over what constitutes a sufficient injury under *Lujan*).

[85] Lujan v Defenders of Wildlife, 504 U.S. 555, 606 (1992) (Blackmun, J., dissenting)("I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing").

[86] Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000). For a discussion of how *Friends of the Earth* tempered *Lujan*, see Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 51-57 (2001) (suggesting *Friends of the Earth* replaced "injury in fact" with "injury in fiction").

[87] Federal Election Comm'n v. Akins, 524 U.S. 11 (1998).

[88] *See Friends of the Earth*, 528 U.S. at 215 (Scalia, J., dissenting) ("The undesirable and unconstitutional consequence of today's decision is to place the immense power of suing to enforce the public laws in private hands"); *Akins*, 524 U.S. at 37 (Scalia, J. dissenting) ("Because this statute should not be interpreted to confer upon the entire

of closing the courthouse doors, standing doctrine did not become more demanding after Chief Justice Roberts joined the Court – at least not until quite recently.[89]

In the past few years, however, the Supreme Court has shown signs of tightening the requirements of Article III standing, even where Congress had authorized suit.[90] In *Spokeo v. Robins*, the Supreme Court held that a statutory violation of the Fair Credit Reporting Act (FCRA)[91] was not enough, by itself, to provide for standing.[92] Rather, an individual seeking to sue a credit reporting agency for violating the FCRA must still show an injury-in-fact that is "both concrete *and* particularized."[93] That Robins could claim Spokeo had collected and disseminated information about him without observing the FCRA's requirements satisfied the requirement of that his injury was particularized. The Court nonetheless concluded the U.S. Court of Appeals for the Ninth Circuit had not sufficiently considered whether this alleged injury was sufficiently concrete. While the Court acknowledged that the "judgment of Congress" is relevant for determining whether the intangible harm caused by a statutory violation meets this requirement,[94] it also concluded that a "bare procedural violation" of the FCRA's requirements "cannot satisfy the demands of Article III."[95]

The Court reaffirmed *Spokeo*'s holding that a statutory violation is insufficient, by itself, to demonstrate a concrete injury in *Thole v. U.S Bank, N.A.*[96] The context in *Thole* was different: an allegation that U.S. Bank had mismanaged a defined-benefit retirement plan in violation of the Employee Retirement Income Security Act of 1974.[97] Yet as in *Spokeo*, there was a question of whether the plaintiff could allege a sufficient injury

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electorate the power to invoke judicial direction of and prosecutions, and because if it is so interpreted the statute unconstitutionally transfers from the Executive to the courts the responsibility to 'take Care that the Laws be faithfully executed,' Art. II, § 3, I respectfully dissent.")

[89] *See* Adler, *Standing Still*, *supra* note __, at 1068.

[90] Insofar as Justice Kennedy sometimes parted company with Justice Scalia in standing cases, as he did in *Lujan*, his retirement and the subsequent confirmation of Justice Kavanaugh could be a contributing factor to this development. *See* Adler, *Standing Still*, *supra* note __, at 1070 (noting Justice Kennedy's role determining the outcome in standing cases); *see also* Lee Epstein & Tonya Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 67 (2008)(explaining how Justice Kennedy was a "super median" justice).

[91] 15 U.S.C. § 1681.

[92] 578 U.S. 330 (2016).

[93] *Id.* at 339.

[94] *Id.* at 340.

[95] *Id.* at 342.

[96] 140 S.Ct. 1615 (2020).

[97] 29 U.S.C. 18 § 1001.

because there was no allegation that the plaintiff had suffered a tangible harm from the allegedly wrongful conduct. Despite the alleged mismanagement, the plaintiffs' retirement benefits would not be reduced from what they otherwise would have been. Writing for a five-justice majority, Justice Kavanaugh explained that the alleged statutory violation, even when combined with the prospect of sizable attorney's fees, was insufficient to satisfy the requirement of a "concrete" injury.[98] That U.S. Bank had fiduciary obligations to the plaintiffs made no difference.[99]

The Court revisited standing to bring suit for FCRA violations in *TransUnion LLC v. Ramirez*.[100] Here the Court reiterated the principle of "no concrete harm, no standing" in the context of the FCRA.[101] It further clarified the test for determining whether intangible harms are sufficiently concrete suggested in *Spokeo*.[102] It reiterated that courts must "afford due respect" for Congress's judgment that a cause of action to sue over an alleged statutory violation is justified, but cautioned that Congress's conclusion is not dispositive.[103] Courts "cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so."[104] Rather, any harm for which Congress would authorize a cause of action must be one that is concrete in light of "history and tradition."[105] Specifically, the plaintiff's alleged injury must be one that has a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[106] For this showing it is not necessary to trace a history of suits all the way back to the founding era, however, as the

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[98] *Thole*, 140 S.Ct. at 1619.

[99] *Id.* at

[100] 141 S.Ct. 2190 (2021).

[101] 141 S.Ct. at 2200.

[102] It also arguably mangled the test, in that much of Justice Kavanaugh's discussion of what makes an injury concrete seems more focused on those factors that make an injury particularized to a given individual. Yet as the Court's precedents explain, concreteness and particularization are separate considerations. The latter concerns whether the alleged injury is in some way distinct to the particular plaintiff, while the former seems to be focused more on whether the allegedly illegal act had a measurable or identifiable effect on the plaintiff's interests, apart from his or her legal rights.

[103] *Id.*at 2204-05.

[104] *Id.* at 2205 (quoting Trichell v. Midland Credit Mgmt. Inc., 964 F.3d 990 999 n.2 (CA11 2020).

[105] *Id.*at 2204.

[106] *Id.* at 2204 (internal quotation omitted). Note that while *Transunion* cites *Spokeo* for this formulation, Judge Newsom notes that *Transunion* also modified the test in potentially significant ways. *See* Laufer, 29 F. 4th at 1287 (Newsom, J., concurring). So, for instance, in *Spokeo* the Court said courts should consider whether intangible harms are nonetheless concrete by considering whether the harm is one that has "traditionally been regarded as providing a basis for a lawsuit in English or American courts," 136 S.Ct. at 1549, in *Transunion* the Court dropped the reference to "English" courts, leaving the focus exclusively on "American courts." 141 S.Ct. at 2204.

*TransUnion* majority expressly embraced allowing Congress to confer standing on those who had suffered harms akin to various privacy-related suits not recognized until the late nineteenth century.[107]

On this basis, the Court concluded that some members of the plaintiff class seeking to sue for violations of the FCRA could sue, but others could not. Specifically, those who alleged that TransUnion illegally distributed false or misleading credit reports to third parties could sue, because the statutory harm was a sort of "concrete reputational harm," akin to that long recognized in common law defamation suits. Those merely claiming that false or misleading information about them was collected, or that TransUnion otherwise failed to abide by all of FCRA's procedural requirements with regard to collecting and disclosing information and communicating with consumers, could not. The company's mere failure to abide by statutorily mandated procedures, without more, did not produce a harm sufficiently like any "traditionally recognized as providing the basis for a lawsuit," and so was insufficiently concrete.

The Court's decision in *TransUnion*, in particular, prompted controversy and dissent. Even conservative jurists generally thought sympathetic to Justice Scalia's constitutional project raised concerns about how *Lujan* has been applied in recent cases. Justice Clarence Thomas, in particular, has raised concerns about the Court's unforgiving and unduly stringent application of the "injury in fact" requirement to preclude individuals from vindicating statutory rights in federal court.[108] This concern caused Justice Thomas to write separately in *Spokeo*[109] and *Thole*,[110] and to dissent in *TransUnion*.[111] Yet as sharp as the disagreement between Justice Thomas and the *TransUnion* majority, there was no dispute that *Lujan* should govern. Judge Kevin Newsom, on the other hand, has begun to contest that premise.

## II. THE NEWSOM CRITIQUE

Judges and commentators have long complained that it is difficult to apply the Supreme Court's standing jurisprudence in a consistent and

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[107] *See Laufer* 29 F.4th at 1287.
[108] *See TransUnion*, 141 S. Ct. at 2214 (Thomas, J., dissenting).
[109] *See* 578 U.S. at 343 (Thomas, J., concurring).
[110] *See* 140 S.Ct. at 1622 (Thomas, J., concurring).
[111] *See* 141 S. Ct. at 2214 (Thomas, J., dissenting).

principled manner.[112] Some have also charged that the standing requirements detailed in *Lujan* lack sufficient constitutional pedigree, as they are neither compelled by legal history nor required by the Constitution's text.[113] These criticisms are no longer confined to academic commentary, however.

In a recent concurring opinion in *Sierra v. City of Hallendale Beach*, Judge Newsom went beyond complaining about the difficulty of applying *Lujan* in particular types of cases to questioning the wisdom and provenance of *Lujan* itself.[114] Current standing doctrine—especially the injury-in-fact requirement, Judge Newsom suggested, is neither "properly grounded in the Constitution's text and history," "coherent in theory," nor "workable in practice."[115] Federal standing jurisprudence, he concluded, "has jumped the tracks."[116]

*Sierra* concerned whether a deaf individual, Eddie Sierra, had Article III standing to sue a Florida city under Title II of the Americans for Disabilities Act and Rehabilitation Act for failing to include closed captions on videos it posted on its website.[117] Under existing precedent, there was little doubt Sierra had Article III standing to sue, even if only due to the "stigmatic injury" caused by the city's failure to make the videos on its website accessible to him.[118] A long line of cases supported Article III standing for equivalent claims, even in cases involving "testers," who (unlike Sierra) are monitoring compliance with civil rights statutes and are never denied access to a service or accommodation they ever intended to use.[119] Indeed, the substance of the standing claim was so straightforward, the court dispatched with it in a single paragraph.[120]

Judge Newsom concurred with the result, finding it compelled by existing precedent.[121] At the same time, Judge Newsom expressed doubt

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[112] Such complaints long predate *Lujan. See, e.g.,* Gene Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U.PA. L. REV. 635 (1980); Mark Tushnet, *The New Law of Standing, A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

[113] *See infra* note __ and sources cited therein.

[114] *See* 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring). Judge Newsom expanded on his critique in Laufer v. Arpan LLC, 29 F.4th 1268, 1283 (2022) (Newsom, J., concurring).

[115] *See Sierra*, 996 F.3d at 1116 (Newsom, J., concurring) (""I've come to doubt that current standing doctrine—and especially the injury-in-fact requirement—is properly grounded in the Constitution's text and history, coherent in theory, or workable in practice.").

[116] *See Id.* at 1117.

[117] *Sierra*, 996 F.3d at 1112.

[118] *Id*. at 1114.

[119] *Id*. at 1114 n.3.

[120] *Id*. at 1115.

[121] *See id.* at 1115 (Newsom, J., concurring)("I agree that Eddie Sierra has suffered 'injury in fact' as that phrase has come to be understood in Article III standing doctrine.").

this conclusion cohered with the test the Supreme Court purports to follow in *Lujan*'s name. "[I]f it weren't for Supreme Court precedent specifically recognizing 'stigmatic injury," he warned, Eddie Sierra's claim might raise "difficult questions."[122] Such an injury, however painful to the plaintiff, is not self-evidently the sort of "concrete" harm contemporary precedents such as *Spokeo*, would seem to demand.[123] Rather they seem "a lot like the kinds of harms that courts have historically *rejected* for Article III standing purposes,"[124] as well as the sorts of harms *Spokeo* (and later *Transunion*) would seem to suggest are insufficient to satisfy Article III because they lack the requisite concreteness.

This doctrinal inconsistency prompted Judge Newsom to revisit standing from its foundations, and suggest a new approach equally rooted in separation of powers concerns as is the architecture of *Lujan*, but one he hopes is both more judicially administrable and more faithful to the Constitution's text and history. This alternative, he hopes, would be more coherent, and perhaps easier for judges to administer and apply in apply in a consistent fashion.

### *A. Standing without Injury*

Echoing arguments raised by academics over the years,[125] Judge Newsom posited that Article III's "Case or controversy" requirement does not necessitate that a plaintiff demonstrate an "injury-in-fact" at all, let alone one that is "concrete and particularized."[126] Rather, in order for there to be a "Case" for purposes of Article III, it is sufficient that a plaintiff "has a legally cognizable cause of action."[127] This alone should be sufficient for "what we have come to call 'standing,'" whether or not the plaintiff can also "show a separate, stand-alone factual injury."[128] Lest this throw open the courthouse doors too broadly, and give Congress unfettered discretion to authorize private suits in federal court, Judge Newsom added a qualification: Congress's authority to "empower[] private plaintiffs to sue for wrongs done to society in general, or to seek remedies that accrue to the public at large" is constrained by Article II, and the "vesting of the 'executive Power' in the President and his

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[122] *Id.* at 1117.

[123] Spokeo, Inc. v. Robins, 587 U.S. 330 (2016)

[124] *Id.*

[125] Among the academic works cited by Judge Newsom in support of this point are Elizabeth Magill, *Standing for the Public Law: A Lost History*, 95 VA. L. REV. 1131 (2009); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

[126] *Sierra*, 996 F.3d at 1115.

[127] *Id.*

[128] *Id.*

subordinates" in particular.[129] In this fashion, Judge Newsom proposes to reorient the standing inquiry while retaining the doctrine's grounding in separation of powers.

As Judge Newsom notes, it is not clear how current standing doctrine is rooted in the Constitution's text.[130] Article III of the Constitution speaks of "cases" and "controversies,"[131] but says nothing explicitly about standing.[132] There is no reference to a required "injury," let alone an "injury-in-fact" that is "actual or imminent" and "concrete" and "particularized."[133] These requirements have been derived from—or perhaps just conveniently anchored in—Article III's conferral of jurisdiction to federal courts to consider "Cases" and "Controversies."[134]

*Lujan*'s holding rests more on structural concerns than any particular constitutional text. As *Lujan*'s author would note in a famous lecture, it was never "linguistically inevitable" that the constitutional requirement of standing would be lodged in Article III.[135] It was set there, and made a fundamental part of constitutional law "for want of a better vehicle."[136] Judge Newsom is sympathetic to the separation-of-powers

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[129] *Id*.

[130] *Id.* at 1121-22.

[131] The text of Article III, section 2 begins:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. Const., Art. III, s.2.

[132] *See* Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 101 (7th ed. 2015) ("Despite the clarity with which the Court articulates the elements of standing, the Constitution contains no Standing Clause.").

[133] *Sierra*, 996 F.3d at 1122 ("despite the oft-repeated invocations of it, nothing in Article III's language compels our current standing doctrine, with all its attendant rules about the kinds of injuries—'concrete,' 'particularized,' 'actual or imminent'—that suffice to make a 'Case.'").

[134] While this article is focused on the injury requirement, there are other aspects of contemporary standing jurisprudence that may also lack much grounding in the original meaning of the Constitution's text or founding-era practice. *See, e.g.*, JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994).

[135] *Sierra*, 996 F.3d at 1122 (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK. L. REV. 881, 882 (1983)).

[136] Scalia, *Doctrine of Standing, supra* note__, at 882.

concerns that drove the evolution of contemporary standing doctrine, but believes it has reached the wrong conclusions because it started in the wrong place. However useful or valuable a doctrine of Article III standing could be, "judges shouldn't be surveying the constitutional landscape in search of 'vehicle[s]'through which to implement rules that the document's provisions, plainly read, don't establish."[137]

In Judge Newsom's view there is a "far more natural and straight-forward reading of 'Case'" in the context of Article III:

> An Article III "Case" exists so long as—and whenever—a plaintiff has a cause of action, whether arising from the common law, emanating from the Constitution, or conferred by statute. And a plaintiff has a cause of action, as I use the term here, whenever he can show (1) that his legal rights have been violated and (2) that the law authorizes him to seek judicial relief.[138]

This interpretation, unlike the conventional formulation which requires an "injury in fact," "follows directly from both its ordinary meaning and its traditional usage in the courts."[139]

In support of his interpretation, Judge Newsom cites dictionaries and prior court decisions that defined or understood "Case" as the equivalent of "cause of action."[140] In the 1871 case of *Blyew v. United States*, for example, the Supreme Court explained that "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action."[141]

Newsom also cites the historical practice of English and American courts in suits seeking nominal damages, *qui tam* actions, and criminal prosecutions to buttress the claim that "the original understanding of the term 'Case' included no stand-alone requirement of a factual injury, separate and apart from a legally cognizable cause of action."[142] There is a long tradition of courts awarding nominal damages in cases where legal

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[137] *Sierra*, 996 F.3d at 1122.

[138] *Id*.

[139] *Id*.

[140] *Id.* at 1823 ("One early American dictionary defined "case" to mean "[a] cause or suit in court; as, the case was tried at the last term." Case, *Webster's American Dictionary of the English Language* (1828). It continued: "In this sense, case is nearly synonymous with cause, whose primary sense is nearly the same." *Id.*).

[141] 80 U.S. (13 Wall.) 581, 595 (1871).

[142] *Sierra*, 996 F.3d, at 1123. For a somewhat different take on this history, see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?* 102 MICH. L. REV. 689 (2004). Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997).

injuries were alleged but compensatory damages were not sought or could not be proven.[143] In English courts, Newsom notes, "it was well understood that for many torts, no showing of actual harm was required to obtain judicial relief."[144] The mere fact of violation of a private right has been presumed to cause an injury.[145] As many first-year law students learn, driving a mobile home across an snow-covered field constitutes a trespass, even if the only tangible harm from the incursion is tire tracks that will melt away without a trace.[146]

What was true of common-law actions was also true of legislatively created rights, such as intellectual property rights for which Congress imposed statutory damages even where monetary loss could not be proven.[147] At the same time, damage or harm, absent the violation of a legal right, did not by itself constitute the sort of injury that would create a cause of action.[148] In other words, the existence of a factual injury was insufficient to establish a legal injury, and such an injury—what courts today call an "injury in fact"—"was neither necessary nor a sufficient condition for an Article III."[149] A legal injury, on the other hand, including the violation of a statutory right, "was *both* a necessary *and* a sufficient condition."[150]

The development of public nuisance and, in particular, the requirement that those seeking to bring private suits for public nuisance demonstrate a "special injury" is the one historical element of English and American law that would seem to support "something that approximates

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[143] *Sierra*, 996 F.3d, at 1123. *see also* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 798 (2021). On this point, Judge Newsom suggests the Court's recognition of standing to seek nominal damages is difficult to square with its insistence on concrete injury. *See Sierra*, 996 F.3d at 1124 n.6.

[144] *Sierra*, 996 F.3d at 1123

[145] *See* Spokeo, Inc. v. Robins, 587 U.S. 330, 344 (2016) (Thomas, J., concurring) ("In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded.").

[146] *See* Jacque v. Steenberg Homes, Inc., 209 Wis. 2d 605 (1997). This case is the first case in a popular Property casebook. *See* THOMAS W. MERRILL, HENRY E. SMITH, & MAUREEN E. BRADY, PROPERTY: PRINCIPLES AND POLICIES 4th ed. 1-7 (2022).

[147] *Sierra*, 996 F.3d at 1124. *See also* Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting) (collecting sources supporting existence of cause of action to pursue statutory damages even where no injury is shown).

[148] *Id.* ("Just as actions for nominal damages showed that factual harm wasn't necessary to create a 'Case,' the common law principle *damnum absque injuria* demonstrated that the existence of a factual injury wasn't sufficient.").

[149] *Id.*

[150] *Id*.

an injury-in-fact requirement."[151] Yet, Judge Newsom notes, this requirement has never been understood to be a requirement of Article III jurisdiction, so much as it is an element of the cause of action.[152] That is, in order for a private plaintiff to have a cause of action for public nuisance, they must be able to show that they have suffered a "special injury" from the alleged nuisance.[153] Where such a special, individualized harm can be shown, the individual whose rights were harmed has what amounts to a private claim even though such suits are against public nuisances.[154]

Thus, Judge Newsom's conclusion:

> If the Supreme Court means it when it says that "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process," . . . then there's little defense for the current standing doctrine's injury-in-fact requirement. Rather, both the ordinary meaning and traditional usage of the word "Case," as well as the sorts of actions that courts have historically entertained, indicate that an Article III "Case" exists whenever the plaintiff has a cause of action.[155]

If the need for an "injury-in-fact" did not come from the Article III's text or history, then from where did it come? As noted earlier, *Association of Data Processing Service Organizations v. Camp* in 1970[156]

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[151] *Id.* at 1126. *See also* Thomas W. Merrill, *Public Nuisance as Risk Regulation*, 17 J.L. ECON. & POL'Y 347, 357 (2022) (noting private civil actions seeking damages for public nuisance required showing plaintiffs suffered a "special injury"). On the origins of the "special injury" rule, see Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOL. L.Q. 755, 790-813 (2001). It is worth noting that the application of the "special injury" rule in the context of public nuisance was evolving at the same time that the Supreme Court began asserting that an injury-in-fact was sufficient for standing. *Id.* at 828-57.

[152] *Id.*

[153] *See, e.g.*, Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship, 245 Ariz. 397, 430 P.3d 362, 365–66 (2018) ("Rather than equating special injury with standing to sue, it is more apt to say that if that element is not sufficiently alleged or proven, a private plaintiff's public nuisance claim fails as a matter of law.")

[154] *See Spokeo*,578 U.S., at 345 (Thomas, J., concurring)("The existence of special, individualized damage had the effect of creating a private action for compensatory relief to an otherwise public-rights claim." (citing Blackstone).

[155] *Sierra*, 996 F.3d at 1126 (citations omitted).

[156] 397 U.S. 150 (1970).

was the first Supreme Court opinion to use the phrase.[157] In *ADPSO,* the question was not whether a plaintiff who had suffered a legal wrong also had the requisite factual injury to justify federal jurisdiction, but whether an "injury-in-fact" was sufficient to confer standing under the Administrative Procedure Act on someone who could not otherwise claim a violation of legal right.[158] Thus, a trade association upset that a federal agency would open their market up to competition from other firms could use this factual injury—economic losses from competition—even though this harm was not due to the violation of any previously recognized legal right.[159] Such an injury, the Court concluded in a "shockingly sloppy opinion,"[160] satisfied the APA's requirement that a person seeking to sue had been "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[161]

As Judge Newsom recounts the tale (in accord with the accounts offered by various scholars[162]), *ADPSO*'s recognition of "injury-in-fact" as a basis for standing served to expand standing to sue administrative agencies, not to constrain it; "[*ADPSO*] didn't repudiate the legal-right rule, but rather supplemented it, explaining that a plaintiff who had suffered an 'injury in fact' also had standing to sue—at least under the APA."[163] As explained by the Court at the time, this shift was justified because "[w]here statutes are concerned, the trend is toward enlargement

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[157] *Sierra*, 996 F.3d at 1117. *See also id.* at n.1, noting that the modern formulations of causation and redressability arose soon thereafter. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1373 N.9 (1988) ("The causation/redressability requirement first appeared in *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-18 (1973), and was constitutionalized in *Warth v. Seldin*, 422 U.S. 490, 504 (1975).").

[158] *Sierra*, 996 F.3d at 1117.

[159] Prior to this, a plaintiff would typically have to assert the violation of a legal right such as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Tenn. Elec. Power co. v. Tenn .Valley. Auth., 306 U.S. 118, 137-38 (1939). The statute at issue in *ADPSO* constrained the regulatory decisions of the Comptroller of the Currency, but did not purport to confer any privileges or rights on regulated entities, such as the data-processing service companies represented by the plaintiffs.

[160] Cass R. Sunstein, *Injury In Fact, Transformed*, 2021 SUP. CT. REV. 349 (2021).

[161] 5 U.S.C. §702.

[162] *See* Sunstein, *What's Standing*, *supra* note __; Magill, *supra* note __; Hessick, *supra* note __. Note that Sunstein credits this development to the work of Kenneth Culp Davis. *See* Kenneth C. Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 365 (1955). *See also*, Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591 (1910).

[163] *Sierra* ,996 F.3d at 1118. *See also* Scalia, *supra* note __, at 889 (*ADPSO* "converted the requirement of a statutory review provisions into merely a requirement that the plaintiff be within the 'zone of interests' that the statute seeks to protect.").

of the class of people who may protest administrative action."[164] Justice Douglas wanted to make it easier for litigants to sue (environmental litigants in particular), and for a time that is what *ADPSO* did.[165]

*Lujan*'s innovation was not declaring that an injury in fact was necessary for standing. Rather it was declaring that such a requirement was part of Article III's "irreducible minimum" that not even Congress could overcome.[166] While Congress could still create legal rights, the violation of which would constitute Article III injury, the claimed injury would still need to be "concrete."[167] And subsequent decisions, most notably *Spokeo v. Robins*[168] and *TransUnion v. Ramirez,*[169] have only accentuated this point, arguably expanding *Lujan*'s requirement of a separate concrete injury in cases seeking to vindicate statutory rights against the government to cases in which plaintiffs seek to vindicate such rights as against other parties. Just because "a statute grants an individual a statutory right and purports to authorize that person to sue to vindicate that right" does not mean that person has Article III standing.[170] Standing in such cases still requires that the "statutorily defined injury . . . independently satisfy Article III's requirement of 'concreteness.'"[171]

Judge Newsom's concern is not merely that this conception of Article III lacks textual or historical grounding. He is also concerned that the resulting doctrine is incoherent and difficult for lower court judges to apply in a remotely consistent or neutral fashion. In his view, "because the current standing doctrine lacks any solid anchor in text and history, it has devolved into 'essentially a policy question.'"[172] In this regard, Judge Newsom believes modern standing jurisprudence is not all that different from the doctrine of Substantive Due Process, of which he is also not a

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[164] 397 U.S. at 154. This "sea-change . . . in the judicial attitude towards the doctrine of standing" was also part of what inspired then-Judge Scalia's famous standing lecture that foreshadowed his *Lujan* opinion. Scalia, *supra* note __, at 881-882.

[165] *See* Magill, *supra* note __, at 1163. Of note, at the same time that Justice Douglas was seeking to use the concept of injury-in-fact to expand the opportunity for citizens to sue to enforce federal law, others were seeking to expand the opportunities for private citizens to file public nuisance suits through the "special injury" rule. *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOL. L.Q. 755 (2001).

[166] *Lujan*, 504 U.S. at 560.

[167] *See id.*

[168] Spokeo, Inc. v. Robins, 578 U.S. 330 (2016)

[169] TransUnion LLC v. Ramirez, 141 S.Ct. 2190 (2021)

[170] *Spokeo*, 578 U.S. at 341.

[171] *Sierra*, 996 F.3d at 1120.

[172] *Sierra*, 996 F.3d at 1126 (quoting *Muransky*, 979 F.3d at 957 (Jordan, J., dissenting)).

fan.[173] Standing doctrine, he warns "mirrors substantive due process both in its (d)evolution and in its on-the-ground application."[174]

Judge Newsom is concerned that determining which sorts of injuries should count, and which should not, is "inescapably value-laden."[175] "The very notion of a non-normative injury 'in fact' is conceptually incoherent', whether someone has been injured is necessarily a normative question—injured, that is, by reference to what?"[176] Common law rights embody a particular normative baseline as to the sorts of rights people may have that has evolved over time. Statutory enactments may recognize or create other rights, as has occurred with the recognition of intellectual property rights and other sorts of interests. In any case in which a court asks "Whether a plaintiff has been injured, we necessarily—even if only implicitly—refer to some framework that establishes such rights."[177] This is why harms, such as economic losses from competition, did not create causes of action by themselves. The ability to sue was tied to a violation of positive law.[178] Framed this way, Judge Newsom contends, the standing inquiry is coherent and administrable. Claiming that only some rights violations count, on the other hand, does not. Further, he argues, it has led to confusion and inconsistency on lower courts as they struggle to determine whether various statutory violations by credit agencies, telemarketers, and others cause sufficiently "concrete" injuries to allow individuals to sue.[179]

As noted, Judge Newsom's claim is that whether a plaintiff has standing "really just boils down to the question of whether he has a cause of action—whether his legal rights have been infringed and whether the positive law authorizes him to sue for that infringement."[180] More precisely, "there is no *separate*, jurisdictional 'standing' doctrine that limits a plaintiff's ability to sue," beyond the need for the plaintiff to have a valid cause of action.[181] Were this all there was to his proposed

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[173] *Id*. at 1127-28.

[174] *Id*. at 1128.

[175] *Id*. at 1129.

[176] *Id*.

[177] *Id.* Although Judge Newsom does not make the point, this is a variation of the fundamental Coasean insight that all harms are reciprocal and that one can only identify who caused harm to whom once one has specified who holds the underlying rights. *See* Ronald. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Even then, Coase would counsel, normative considerations are unavoidable. *Id.* at 43 ("As Frank H. Knight has so often emphasized, problems of welfare economics must ultimately dissolve into a study of aesthetics and morals.").

[178] *Sierra*, 996 F.3d. at 1128-29.

[180] *Sierra*, 996 F.3d. at 1131.

[181] *Id*.

alternative to current doctrine, it would be quite simple and straightforward for courts to apply. Requiring nothing more than for Congress to enact a cause of action would seem to grant Congress carte blanche to create procedural rights, authorize citizen suits, and deputize "private attorneys general" to enforce federal law or pursue other legislatively approved interests.[182] But that is not all there is to Judge Newsom's proposal. He also suggests a limit on Congress's ability to authorize suits—a limit that may take back much of what his willingness to dispense with injury in fact would have given.

### *B. Article II Constraints*

Dispensing with the injury requirement and recognizing Congress's authority to create statutory rights and authorize causes of action does not mean Congress can "just enact any statute it wants empowering private citizens to sue on any issue and for any remedy."[183] The text and historical understanding of Article III may not constrain the ability of Congress to create causes of action that may be heard in federal court. Such limits may, however, be found in Article II.[184] The limit is not a consequence of Article III's conferral of jurisdiction over "Cases" and "Controversies," but rather of Article II's vesting of the executive power in the President.[185] Thus, the constitutional constraint is not that the judiciary may not hear certain sorts of claims, but that Congress may not authorize certain types of suits, specifically those that would interfere with the Executive Branch's power and obligation to enforce federal law.[186]

Judge Newsom starts here with the "uncontroversial premise that certain kinds of lawsuits inherently involve the exercise of executive power," whereas others do not.[187] Criminal prosecutions are the most obvious example of the former, whereas common law tort actions filed by

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[182] This approach would, however, leave open questions about what Congress might have to do to make its intent to create a cause of action clear. This approach need not accept the recognition of implied causes of action. Indeed, under recent doctrine, perhaps creating a cause of action would be deemed a "major question."

[183] *Sierra*, 996 F. 3d at 1131.

[184] Others have made this suggestion. *See, e.g.*, Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993). *Cf.* Scalia, *supra* note __.

[185] U.S. CONST., Art. II, s.1 ("the executive power shall be vested in a President of the United States"); *id.*, s.3 ("he shall take care that the laws be faithfully executed"),

[186] *Sierra*, 996 F.3d. at 1133 (*Lujan* "was wrong that [separation of powers] concerns limited the *judiciary's* power, rather than *Congress's* power to cover on private plaintiffs the ability to perform what is, in effect, an executive function.").

[187] *Id.* at 1133. ("a violation of the law can give rise to two different kinds of legal actions.").

one individual against another are the archetypal example of the latter. A single wrongful act could give rise to both kinds of suits, but they are distinct.[188] When one individual commits a wrong against another, the wronged individual may be able to seek a legal remedy "that will accrue to him personally, such as a monetary award in his name."[189] At the same time, if the wrongful act is the sort prohibited by legislation, it may also be the subject of suit by a representative of the public—a prosecutor—"seeking a remedy that accrues to the public, such as imprisonment or a fine to be paid into the treasury."[190] As Newsom explains, the fundamental distinction is one between the rights of individual to pursue justice, on the one hand, and (quoting Blackstone) that of the power to "put [the laws] into execution," which entails "the right of punishing crimes."[191] The latter entails an exercise of the executive power, whereas the former does not.

As understood by Judge Newsom, Congress may expand the ability of private individuals to pursue private claims, such as by creating private rights and authorizing private causes of action, but it may not divest the executive branch of its core authority "to bring legal actions on behalf of the community for remedies that accrued to the public generally."[192] As he explains, "few deny that the Vesting Clause grants the President and his subordinates the exclusive authority to bring criminal prosecutions as a means of executing the laws."[193] Under current doctrine, "case-by-case enforcement discretion is a core nondelegable component of the executive power" and, as Judge Newsom sees it, this conclusion "is firmly rooted in Founding era history and practice."[194] This is in accord with *Lujan*'s admonition that Congress may not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" because this would "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[195]

This is not merely a matter of constitutional formalism. It is also due to the nature of a suit. A property owner who brings suit to defend her own property rights is the master of her suit, with the complete discretion

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[188] *Id.*; *see also id.*at 1135 (nothing "conceptual dichotomy between actions of personal nature and those of an executive nature.").

[189] *Id.*

[190] *Id.*

[191] *Id.* at 1134 (quoting 4 BLACKSTONE, COMMENTARIES *7-8 (emphasis added)).

[192] *Id.*

[193] *Id.* at 1137. Some academics do, however, contest the premise that "only the President vindicates the public' s shared interest in the enforcement of federal law." *See, e.g.*, Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1291 (2015).

[194] *Laufer*, 29 F. 4th at 1292.

[195] *Lujan*, 504 U.S. at 577.

of whether and how to pursue any rights she may have. Just because someone trespasses upon your land does not mean you need to take them to court. A private rightsholder may exercise discretion in choosing whether and when to seek to enforce her rights against others. Likewise the executive branch has the discretion to decide which specific crimes to prosecute and when.[196] As the Supreme Court put it "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[197]

Just as the executive may not direct the private rightsholder how to pursue or defend her claims, it would be inappropriate for Congress to give a private individual the authority to direct what are necessarily public claims.[198] To give such power to individual private citizens is to allow private prejudices and priorities to control the exercise of public power, and override the exercise of prosecutorial discretion by those entrusted with the authority and obligation to ensure faithful execution of the laws. This is permissible when a private individual is seeking to vindicate her own right and seek direct recompense, but not when the suit aims to vindicate the broader public interest in compliance with the law and seeks remedies that accrue to the public.[199] As Newsom summarizes the point:

> Congress has broad authority to grant a private plaintiff a cause of action, so long as it empowers him only to vindicate his own rights and to seek remedies that will accrue to him personally. But Congress may not give to anyone but the President and his subordinates a right to sue on behalf of the community and seek a remedy that accrues to the public—paradigmatically (but by no means exclusively) criminal punishment or a fine. Were Congress to confer on a private plaintiff the power to bring that kind of action, it would

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[196] *See generally*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014). It is important to note that this discretion does not necessarily extend to deciding not to enforce certain laws at all. Such abdication arguably violates the Take Care clause. *See id.*

[197] United States v. Nixon, 418 U.S. 683, 693 (1974). Yet just as this principle did not deprive the federal courts of jurisdiction in *Nixon*, this principle need not mean that courts lack the jurisdiction to hear claims by other parties, whether private individuals or states, to seek enforcement of federal law. *See* Litman, *supra* note __.

[198] *Sierra*, 996 F.3d. at 1136 ("What Congress can't do is create a cause of action authorizing an individual plaintiff to sue for harm done to society generally."). It is worth noting that Judge Newsom recognizes that the history of *qui tam* actions may complicate this account. *See id.* at 1134-35 n.14. Some scholars would also dispute Newsom's claim. *See, e.g.*,

[199] *Sierra*, 996 F. 3d at 1196.

> unlawfully authorize him to exercise Article II "executive Power."[200]

As a consequence, it is permissible for Congress to authorize a private individual to pursue redress for harms they have suffered, including nominal or statutory damages, but it is problematic for Congress to authorize a private individual to file suit seeking fines or other financial recompense payable to the public fisc or to force the executive branch to enforce the law in specific instances.[201]

In his *Sierra* and *Laufer* concurrences, Judge Newsom suggested *Lujan* was "the quintessential example of a suit that ran afoul of Article II's vesting of executive authority," even if that was not the basis upon which the case was decided.[202] This was because "the plaintiffs' action sought to compel executive agencies to enforce the environment al laws in a particular manner," thus impinging on the executive branch's duty to "take Care that the Laws be faithfully executed."[203] Thus, Justice Newsom concludes, Justice Scalia was correct in *Lujan* "to recognize that a statute empowering any person to sue over the executive branch's alleged failure to carry out its lawful duties would raise serious separation-of-powers concerns."[204] The problem is that *Lujan* situated such limits in Article III as opposed to Article II.[205]

Note, however, that the suit in *Lujan* did not seek to enforce federal law in a particular way against a particular private individual, let alone to enforce a criminal prohibition. Rather, it was a challenge to a legislative rulemaking that embodied the executive branch's (allegedly unlawful) interpretation of its obligations under a federal statute.[206] The suit sought to ensure the federal government complied with the federal government's own obligations under the Endangered Species Act (as interpreted by the

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[200] *Id.* at 1136.

[201] Whereas Judge Newsom focuses on the need to preserve discretion as an aspect of the executive power, Professor Grove argues that preserving executive branch discretion over enforcement decisions helps safeguard individual liberty, as it prevents private interests from overriding the executive branch's decision to forebear enforcement. *See* Grove, *supra* note __.

[202] *Laufer*, 29 F. 4th at 1289; *see also Sierra* 996 F. 3d at 1132.

[203] *Laufer*, 29 F. 4th at 1289.

[204] *Sierra*, F.3d at 1132-33.

[205] *Id.* at 1133 ("the constraint imposed by Article II's Vesting Clause provides a sounder basis than Article III's case-or-controversy requirement for keeping improper legal actions out of the courts.").

[206] Because the Court in *Lujan* concluded the plaintiffs lacked Article III standing, the Court never considered whether the regulation in question violated the Endangered Species Act. Justice Stevens, however, wrote separately to indicate that while he believed the plaintiffs had standing, the regulation represented a "sound" interpretation of the ESA. *See Lujan*, 504 U.S. at 581 (Stevens, J., concurring in the judgment).

plaintiffs), not to force federal enforcement or other action against private parties. So while the plaintiffs in *Lujan* did not seek to vindicate their own rights or to obtain remedies that would accrue to them personally, their suit did not entail overriding an exercise of enforcement discretion, nor did it seek to direct the exercise of federal power over private activity directly.

Although a suit by a tester to enforce a federal law against a private business is quite different from the scenario in *Lujan*, Judge Newsom suggested *Laufer* represented "one of the (perhaps rare) circumstances in which a plaintiff's suit may satisfy all Article III requirements but nonetheless constitute an impermissible exercise of 'executive Power' in violation of Article II."[207] While Laufer did not "seek[] to commandeer an Executive Branch agency and compel it to regulate in a particular manner" it presented similar problems" under Article II, Newsom concluded it was the sort of suit that unconstitutionally infringed upon the Executive Branch's Article II power and obligation to faithfully execute the laws.[208]

Unlike *Lujan*, *Laufer* arguably did involve an effort by a private individual to second-guess the executive branch's exercise of enforcement discretion. The plaintiff, Kelly Laufer, was in the practice of suing hotels that she had no intention or interest in ever patronizing.[209] While not a suit against the federal government seeking to force an agency's hand, a tester suit of this suit arguably represents an effort by the plaintiff to act as a "private attorney general," filling the gap left by the executive branch's reluctance to enforce federal law more aggressively.[210] The problem is not that a private suit would produce a public benefit, so much as it was that the suit would not produce any benefit to the plaintiff.[211]

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[207] *Laufer*, 29 F. 4th at 1284.

[208] At the time of this writing, the Supreme Court is slated to consider this question in *Acheson Hotel v. Laufer*. This case involves another ADA suit filed by the same plaintiff. In August 2023, Laufer asked the Supreme Court to dismiss the grant of certiorari as moot.

[209] *See Laufer*, 29 F. 4th at 1271 (noting Laufer "admits that she has no intention to visit the Value Inn or the area in which it's located."). This suit was part of a larger effort by the plaintiff to induce ADA compliance. According to the court, Laufer filed over 50 ADA lawsuits against hotels in the Northern District of Florida alone in one year. *Id.* at 1270.

[210] *See id.* at 1290 ("Without apology, Laufer considers herself a 'private attorney general.'").

[211] *See Laufer*, 29 F. 4th at 1290 ("Laufer has expressly disclaimed any interest in benefiting from the very provision that she seeks to enforce."). Laufer's alleged injury was "frustration and humiliation" due to the "discriminatory conditions present" at non-compliant hotels, and that such conditions exacerbated her "sense of isolation and segregation." *See id.* at 1271. According to Judge Newsom, this was sufficient to satisfy

The problem, as Newsom conceives of it, is that testers, such as Lauer seek to "Exercise the sort of proactive enforcement discretion properly reserve to the Executive Branch."[212] Unlike Executive Branch officials, private testers are "not accountable to the people and are not charged with pursuant the public interest in enforcing a defendant's general compliance with regulatory law."[213] While such concerns generally arise in the context of criminal prosecutions, Judge Newsom concluded the same concerns arise in the context of civil-enforcement actions.[214]

This approach, jettisoning "injury in fact" while policing the bounds of exclusive executive authority under Article II "isn't as radical as at first it may appear," Judge Newsom insists.[215] Barring Congress from authorizing private individuals to vindicate the public's interest in enforcing federal law will often produce the same results as *Lujan* does.[216] In other cases, however, it would not.

As outlined by Judge Newsom, Article II prevents Congress from authorizing private individuals to bring suit for the sole purpose of enforcing federal law. Enforcing this limit requires that an individual seek to enforce a right of their own, even if it is a right created by federal statute, and that the remedy sought accrue to the plaintiff. Many citizen suit provisions that raise questions under current Article III jurisprudence could likely be revised to satisfy these requirements, such as by expressly according private rights to affected individuals and authorizing statutory damages or bounties for successful suit. Article II prerogative can be further protected by ensuring the executive branch can intervene where necessary to protect federal interests. Yet if this is all that Article II requires, circumventing these limits may require little more than more careful and intentional drafting.

At times Judge Newsom suggests more is required, such as when he suggests suits to force federal agencies to follow Congress's instructions about how specific programs are to be implemented, transgress the limits of Article II, but it is not clear why such suits implicate the same Article II interests as does criminal law enforcement.

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the injury requirement under current doctrine, but the amelioration of such harms would not be sufficient to insulate her suit from an Article II challenge.

[212] *See Laufer*, 29 F. 4th at 1291.

[213] *Id.* at 1291 (quoting *TransUnion*, 141 S.Ct. at 2207 (citing *Lujan*, 504 U.S. at 577)).

[214] *Id.* at 1291 (citing *In re Aiken County*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013)(opinion of Kavanaugh, J.) ("Because they are to some extent analogous to criminal prosecution decisions and stem from similar Article II roots . . . civil enforcement decisions brought by the Federal Government are also presumptively an exclusive Executive power.")).

[215] *Sierra*, 996 F. 3d at 1137.

[216] *Id.*

Identifying the relevant boundary between permissible and impermissible authorization for suit would be facilitated by a more robust theory of what Article II requires than Judge Newsom provides in his opinions.[217] To pursue this further, this paper now turns to considering some of the potential implications of Judge Newsom's framework for a variety of types of cases, and whether it provides a greater degree of clarity, coherence, and workability than the *Lujan* formulation it would displace.

## III. IMPLICATIONS OF STANDING WITHOUT INJURY

Eliminating the "injury-in-fact" requirement, so that Congress can create causes of action authorizing private individuals to bring cases in federal court, subject only to Article II constraints, would transform the standing inquiry.[218] It would simultaneously expand federal court jurisdiction to hear cases raising statutory claims, while also limiting the ability of Congress to authorize citizen suits and deputize "private attorneys general" for the purpose of enforcing federal law. Whether the net result would be an overall expansion of federal court jurisdiction, or a beneficial change to standing doctrine, is unclear.

### *A. Stigmatic Harms under Antidiscrimination Statutes*

Judge Newsom was prompted to publish his misgivings about current standing doctrine in two cases concerning efforts to enforce nondiscrimination laws, the Americans with Disabilities Act in particular. In both *Sierra v. City of Hallandale Beach*[219] and *Laufer v. Arpan LLC*,[220] Judge Newsom readily concluded that existing precedent recognizing the

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[217] For one example of what such a theory might look like, see Grove, *supra* note __. While similar to Judge Newsom's argument in some respects, Professor Grove's theory departs from his analysis in crucial respects, particularly insofar as it focuses on the liberty-protecting aspects of preserving executive branch enforcement discretion, and not on the need to insulate Article II power as such. For another approach to identifying Article II limits on standing, see Krent & Shenkman, *supra* note __.

[218] Presumably Congress's authority to create causes of action would also be limited by the enumeration of powers in Article I, section 8 and other portions of the Constitution, such as Section 5 of the 14th Amendment. *See, e.g.*, U.S. v. Morrison, 529 U.S. 598 (2000)(civil cause-of-action for gender-motivated violence exceeded the scope of Congress's enumerated powers); Board of Trustees of University of Alabama v Garrett 531 U.S. 356 (2001) (Congress authority to authorize civil action against state entities limited by state sovereign immunity under the Eleventh Amendment). Nothing in Judge Newsom's writing seems to suggest such constraints on Congress's lawmaking powers should not be maintained.

[219] Sierra v City of Hallendale Beach, 996 F.3d 1110 (2021)

[220] Laufer v. Arpan LLC, 29 F.4th 1268 (2022)

stigmatic injury caused by discrimination as sufficiently concrete to provide for standing even in the absence of other damages.[221] In *Sierra*, the plaintiff was an area resident who sued when a local government failed to make material on its website suitably accessible to those with disabilities (in this case, because videos on the city's website did not have closed captioning). In *Laufer*, the plaintiff was a so-called "tester" who regularly visited hotel websites to monitor ADA compliance. In both cases, the plaintiffs' suits were expressly authorized by the ADA provision allowing any person "aggrieved" by a violation of the statute to file suit.

Because the ADA provides an express cause of action, both suits would satisfy the first part of Judge Newsom's proposed standing test.[222] Indeed, one might conclude that these suits would have an easier time satisfying a "cause of action" requirement than an "injury in fact" requirement, as it is not immediately clear why the sort of intangible stigmatic injury suffered by the plaintiffs in this case, without more, would constitute a "concrete" injury in fact, particularly as the Supreme Court has interpreted that element in recent cases.[223] It is one thing for victims of discrimination to allege lost opportunities or other tangible harms.[224] It is another to claim that the "emotional disquiet" produced by the knowledge of discriminatory—or merely insufficiently accommodating–conduct satisfies the requirement that injuries are "concrete," particularly if (as the Court held in *Spokeo* and *TransUnion*) Article III requires that any such injuries bear a "close relationship" to traditional common-law causes of action.[225] Nonetheless, the Supreme Court has long held that prohibited discrimination imposes "serious non-economic injuries" to the victims of such conduct by stigmatizing them.[226]

The existence of a statutory cause of action would be sufficient to allow the victims of prohibited discrimination to file suit under Judge Newsom's framework, but what about Article II? In *Sierra*, Judge Newsom was silent on the point, noting that the City of Hallendale never

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[221] Both of these cases involved suits for the failure to provide for or provide information about disability accommodations on public websites. Thus these cases would be potentially distinguishable from suits alleging employment discrimination and the like, in which it would be much easier to identify monetary or other tangible damages which are indisputably "concrete."

[222] *See Sierra*, 996 F.3d at 1139-40.

[223] *See Sierra*, 996 F.3d at 1117.

[225] *Laufer*, 29 F.4th at 1272. As Judge Newsom noted in *Laufer*, there was no claim that the plaintiff "was subject to the kind of 'extreme and outrageous' intentional or reckless conduct" of the sort necessary of an intentional infliction of emotional distress claim. *Id.*at 1273.

[226] *See, e.g.*, Heckler v. Mathews, 465 U.S. 728, 739-40 (1984). *See also* Havens Realty Corp. v. Coleman 455 U.S. 363 (1982); Allen v. Wright, 468 U.S. 737 (1984).

raised Article II in its defense.[227] That said, it is not clear why this should matter. Eddie Sierra sought compensatory damages and the ADA would not seem to infringe upon Article II more than would any other statute identifying and defining tortious conduct and providing for a legal remedy.[228] A suit for compensatory damages authorized by statute would not seem to be any greater a threat to executive power than a common law tort suit against conduct that is also prohibited (and perhaps even criminal) under a statute.

In *Laufer*, however, Judge Newsom raised the Article II concern (albeit only in a concurrence to his own opinion for the court).[229] Whereas Eddie Sierra filed suit after he was unable to obtain information about local government activities in his own community, Deborah Laufer was a "tester" who surfed the internet in search of noncompliant firms.[230] Whereas Sierra was in a position much like a common-law tort plaintiff, Laufer had taken it upon herself to identify and pursue those violating federal law, targeting hotels she had no intention of ever even attempting to visit.[231] "Whereas the typical plaintiff suffers an injury, and then chooses to sue, a tester plaintiff like Laufer chooses to sue and then—of her own free will—suffers an injury."[232] In the latter context, the "tester" is not merely (or not exclusively) seeking to vindicate their own rights, so much as they are seeking to "exercise the sort of proactive enforcement discretion reserved to the Executive Branch."[233]

Thus Laufer's claim would seem to raise Article II concerns, even if Sierra's might not. One wrinkle, however, is that both suits are filed under the same statutory provisions. The ADA does not provide separately for suits by the victims of discrimination and those who merely seek to

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[227] *Sierra*, 996 F.3d at 1140.. Because Article III constrains a court's jurisdiction, Article III limits are not waivable. Limits on the ability to sue imposed by Article II, however, do not raise the same jurisdictional concern, and thus would be waivable in federal court. By the same token, however, Article II limitations on the ability of private individuals to maintain suits seeking to enforce federal law would apply in both federal and state court.

[228] *See Sierra*, 996 F.3d at 1112 (noting Sierra initially sought injunctive and monetary relief, but narrowed his requested relief to compensatory damages after the city removed noncompliant videos from its website).

[229] Laufer v. Arpan LLC, 29 F.4th 1268 (2022)

[230] Laufer v. Acheson Hotels, LLC, 50 F.4th 259, (1st Cir, 2022), *cert. granted* (No. 22-429); Laufer v. Arpan LLC, 29 F.4th 1268 (2022); Laufer v. Looper, 22 F.4th 871 (10th Cir. 2022); Laufer v Mann Hosp. LLC, 996 F.3d 269 (5th Cir. 2021); Laufer v Naranda Hotels, LLC , 60 F.4th 156 (4th Cir. 2023)

[231] *See Laufer*, 29 F. 4th at 1271 (noting Laufer "admits that she has no intention to visit the Value Inn or the area in which it's located.")

[232] *Laufer*, 29 F.4th at 1291 (Newsom, J., concurring).

[233] *Laufer*, 29 F.4th at 1290. "Without apology," Newsom noted, "Laufer considers herself a 'private attorney general.'" *Id.* at 1291.

enforce the statute's accommodation requirements. The cause of action in each case is the same. One implication of this would seem to be that Judge Newsom's framework would not relieve courts of considering the particulars of a given plaintiff's suit, so as to distinguish between suits filed by those merely seeking to take advantage of a statutory cause of action, and those seeking to intrude upon the executive branch's discretion over the enforcement of federal law. And insofar as such an inquiry is required (as discussed below), this might require courts to recreate an inquiry not-all-that-distinct from that required by the need to show an "injury in fact." Otherwise, what would stop Congress from creating a statutory right not to be offended or stigmatized by the experience of visiting a non-compliant website? It is not immediately clear why such a cause of action would be any less private and permissible than other stigmatic injuries, nor is it clear why Article II is the source of a constitutional barrier to the recognition of such rights and the authorization of their vindication in federal court.

Another potential wrinkle could arise were Congress to authorize such suits on the grounds that all individuals are entitled to "truthful information" about the extent of accommodations offered at places of public accommodation.[234] As discussed below, Congress often creates causes of action authorizing individuals to obtain information.[235] Civil rights statutes such as the Fair Housing Act or ADA can also be viewed in these terms. So, for instance, the tester plaintiffs in *Havens Realty* alleged, among other things, that the defendants had violated their "statutorily created right to truthful housing information."[236] In particular, Sylvia Coleman alleged that Havens Realty had repeatedly told her that no apartments were available for rent and that this was untrue.[237] This produced a judicially cognizable injury: "the denial of the tester's own statutory right to truthful housing information cause by misrepresentation to the tester."[238] Although the primary purpose of civil rights statutes such as the ADA is not to generate information, that is one purpose that they serve, and Congress could certainly revise such statutes to make the recognition of such a right and accompanying cause of action more explicit.[239] If so, and if the authorization of suits seeking to vindicate rights

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[234] *See Laufer*, 29 F.4th at 1276 (Jordan, J., concurring) ("I also believe that Ms. Laufer has standing as an ADA tester under an 'informational injury' rationale pursuant to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

[235] *See infra*.

[236] Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982).

[237] *Id*. at 368.

[238] *Id*. at 375.

[239] *See Laufer*, 29 F.4th, at 1280 (Jordan, J., concurring) ("in cases after *Havens Realty* the Supreme Court has held that the deprivation of information to which one is legally entitled constitutes cognizable injury under Article III.").

to information is within Congress's power,[240] then this would be a way around the potential Article II concerns about such suits.

### *B. Disclosure of Consumer Credit Information*

As noted above, the Supreme Court has revisited and constricted the injury-in-fact requirement in recent cases concerning the Fair Credit Reporting Act (FCRA), *TransUnion v. Ramirez* in particular.[241] Judge Newsom is quite critical of the *TransUnion* decision for representing an unprincipled and indefensible historical approach to Article III standing.[242] In his view, "there are two defensible historical approaches to Article III's case-or-controversy requirement—but *TransUnion*'s isn't one of them."[243] As noted, Judge Newsom would recognize standing "whenever the plaintiff has a cause of action."[244] This approach is historically grounded because, as Judge Newsom argued in his *Sierra* opinion, "the constitutional term 'Case' . . . simply meant (and means) a cause of suit in court."[245] A second approach Judge Newsom thinks would be defensible would be to focus on "the particular common-law causes of action that existed at the time of the Founding," and only allow Congress to authorize suits that are a close analogues to such suits.[246] This would be even more restrictive than current law, as it would prevent the identification of new causes of action in federal court. *TransUnion* did neither, however, as it would allow Congress to create causes of action addressing the sorts of intangible harms recognized in late nineteenth century tort law, but not others. "If anything," he wrote, this approach "seems to get things exactly backwards," as it would seem to grant state courts more power to identify harms sufficient for Article III jurisdiction than it would grant to Congress.[247]

As this suggests, it seems Judge Newsom's approach would have allowed all of the plaintiffs in *TransUnion* to pursue their claims. The FCRA created private rights in individuals' personal credit data, both in terms of how that data is disclosed, but also how it is processed and handled. FCRA further created an express cause of action for individuals to bring suit for statutory damages where these legislatively created rights were violated. Some of the rights at issue here are procedural, to be sure.

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[240] *See infra*
[241] *See infra* notes __ and accompanying text.
[242] *Laufer* 29 F.4th at 1287.
[243] *Id.*
[244] *Id.* (quoting *Sierra*, 996 F.3d. at 1126).
[245] *Id.* (cleaned up).
[246] *Id.* at 1288.
[247] *Id.*

Yet as Justice Thomas noted in his *TransUnion* dissent, the duties created by the statute are not owed to the public at large, but to private individuals,[248] and "each class member established a violation of his or her private rights" with regard to information about them.[249] Thus it would seem that suits to enforce these requirements would not implicate Judge Newsom's concerns about Article II. Allowing such suits to go forward would not infringe upon the Executive Branch's authority to enforce federal law any more than a private tort suit seeking damages for the consequences of criminal activity. Thus, it would appear that under Judge Newsom's approach, every member of the plaintiff class would have standing in *TransUnion*.

### *C. Information Disclosure Requirements*

Various federal statutes purport to give individuals a right to obtain information from the government or from private parties. The Freedom of Information Act (FOIA) is a clear example of the former, under which private individuals may sue to force the disclosure of information withheld by the government. Statutes that require private parties to disclose information, such as campaign-related expenditures or details about industrial operations, to regulatory agencies or to the public are examples of the latter. As noted above, some anti-discrimination statutes might be conceived as requiring information disclosure as well.

Of the various information-disclosure requirements that exist under federal law, those embodied in FOIA might be the least vulnerable to Article II constraints. Under FOIA, Congress has given private individuals the right to seek information from the federal government, and provides a cause of action when the government withholds covered information. This has generally been recognized as sufficient for standing.[250] Where federal statutes require that private parties disclose information to the government or the public, however, the challenge may be greater, as it might be when, as in *Federal Election Commission v. Akins*, the plaintiff sues the government seeking enforcement action against a private party.

The Emergency Planning and Community Right-to-Know Act requires covered facilities to report information about the use and storage of potentially hazardous materials and to disclose such information to

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[248] 141 S.Ct. at 2217 (Thomas, J., dissenting).

[249] *Id.* at 2218.

[250] *See* Public Citizen v. U.S. Dept. of Justice, 491 U.S. 438, 449 (1989)("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.").

local authorities.[251] EPCRA is primarily enforced by the Environmental Protection Agency, which is authorized to seek criminal, civil and administrative penalties.[252] Like many other environmental statutes, EPCRA also contains a citizen suit provision, which allows private parties to file suit seeking civil penalties and injunctive relief.[253]

Citizen suits under EPCRA against firms that have failed to comply with the information disclosure requirements can be understood as suits to vindicate a statutorily created right to information about local environmental hazards. The problem with such suits, under Judge Newsom's suggested framework, is that EPCRA authorizes fines payable to the federal treasury, rather than compensation to those who were denied information from covered facilities.[254] But this deficiency would seem to be the sort that could be readily solved by amending the statute to provide for a bounty or even nominal damages to those denied covered information.

More difficult to reconcile with Judge Newsom's framework might be a statute that authorizes private individuals to sue a government agency for its failure to require private entities to disclose information. Such a suit begins to look more like a suit to induce government action—a suit to direct the exercise of the executive branch's enforcement discretion—and less like a suit to vindicate a private right to information.

The Supreme Court wrestled with this scenario in *Federal Election Commission v. Akins*.[255] Splitting 6-3, the Court concluded that private litigants' inability to obtain information about a political organization's donors and campaign-related expenditures constituted an injury in fact, as the inability to obtain such information inhibited their ability to evaluate candidate for public office and organize their own political activities. In effect, the Court concluded that Congress had created a private right to the relevant information, and private litigants could sue to force an agency to enforce the relevant disclosure requirements on another private entity. As Justice Breyer put it for the Court, the statute sought "to protect individuals . . . from the kind of harm they say they have suffered, i.e. failing to receive particular information about campaign-related activities."[256] While the dissenters and the government thought the plaintiffs were merely raising a "generalized grievance," the Court's majority found the asserted injury to be sufficiently concrete to constitute an injury in fact.

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[251] 42 U.S.C. §11001 *et seq.*

[252] 42 U.S.C. §11045.

[253] 42 U.S.C. §11046 (a)(1) EPCRA also expressly provides for enforcement by state and local governments. *See id.* at (a)(2), (c).

[254] *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

[255] Federal Election Comm'n v. Akins, 524 U.S. 11 (1998).

[256] *Akins*, 524 U.S. at 21.

Shorn of an injury requirement, the question in these sorts of suits would be whether private litigation to force information disclosure is the sort of private right Congress could recognize through a statutory cause of action, or whether it would, in effect, be allowing private litigants to force executive branch enforcement. In this regard, suits to enforce information disclosure from the government directly, as under FOIA, would seem best conceived as private efforts to enforce claims that private individuals have against the government: A claim to information of which private individuals want to make use. Indeed, insofar as FOIA suits will typically arise only after a litigant has requested, and been denied, information to which they are entitled, it could be seen as vindicating a private right.[257]

Cases like *FEC v. Akins* on the other hand, would seem to create more Article II concerns, particularly insofar as vindicating the claimed right to information requires more rigorous enforcement of existing regulatory requirements on third parties. Suits inducing the federal government to take enforcement action against other private individuals or firms implicate executive branch enforcement discretion and private liberty interests in ways that direct requests for information do not.

### *D. Qui Tam Statutes*

If Article II constrains Congress's ability to authorize private enforcement of federal law, an obvious question is what this would mean for *qui tam* suits. Such suits have a long history in the United States (and in England before that),[258] but there have also been persistent questions about whether such suits are consistent with more formalist conceptions of separation of powers, including robust conceptions of the limits imposed by Articles II and III.[259]

*Qui tam* actions are a "unique private-public scheme" for enforcing federal law.[260] *Qui tam* provisions authorize private individuals—called "relators"—to file suit "in the name of the Government" to enforce federal

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[257] *Cf.* Prisology v. Federal Bureau of Prisons, 852 F.3d 1114, 1117 (D.C. Cir. 2017) (concluding that a plaintiff that failed to request the desired information before bringing suit lacked standing).

[258] *See* Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 764, 774 (2000) (noting "the long tradition of *qui tam* actions in England and the American colonies"). *See also* Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AMER. U. L. REV. 275 (1989) (surveying the history).

[259] *See, e.g.*, Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. Off. Legal Counsel 207 (1989) (authored by William P. Barr, Assistant Attorney General, Office of Legal Counsel (OLC); Woolhandler & Nelson, *supra* note __, at 731 (noting the "dangers" of allowing "self-appointed" individuals to exercise prosecutorial discretion).

[260] U.S. ex rel Polansky v. Exec. Health Res., 143 S.Ct. 1720, 1727 (2023).

law.[261] There are several *qui tam* provisions in the U.S. Code, the most prominent being that in the False Claims Act.[262] The way these provisions typically work is that, in order to file a *qui tam* suit, the prospective plaintiff must first provide a copy of the complaint to the federal government so as to provide it with the opportunity to intervene in the litigation to execute its own enforcement action. The government also retains the right to dismiss the suit, even if the government does not initially intervene.[263] If the suit is successful, the relator receives a substantial share of the penalties assessed or eventual settlement, in addition to their costs and attorneys fees.[264] *Qui tam* suits are thus distinct from ordinary citizen suits in that the suit is brought in the name of the federal government and that the plaintiff receives a share of the suit's proceeds.[265]

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens* the Supreme Court concluded that *qui tam* relators have Article III standing as an assignee seeking to vindicate the injury-in-fact suffered by the assignor, in this case the federal government.[266] The Court left open, however, whether such suits might violate Article II.[267] Previously, in *Friends of the Earth v. Laidlaw*, Justice Kennedy had expressed concern that "exactions of public fines by private litigants" in *qui tam* litigation raised "difficult and fundamental questions" under Article II and might compromise the President's obligation to take care that the laws are faithfully executed.[268]

The challenge for those who would argue that *qui tam* suits are unconstitutional is the long history of such suits. Early in the nation's history "Congress enacted a web of civil qui tam provisions that authorized victims and non-victims alike to help enforce criminal laws."[269] Such mechanisms were but one example of how early Congresses

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[261] 31 U.S.C. § 3730 (a).

[262] 31 U.S.C. §§ 3729-3733; *see also* Craig, *supra* note __, at 142 ("the most commonly used *qui tam* provision is that in the FCA").

[263] See *Polansky*, 143 S.Ct..

[264] *Id.*

[265] *See* Craig, *supra* note __, at 145 ("What distinguishes *qui tam* from other citizen suit provisions, such as those found in environmental laws, is that *qui tam* relators share in the civil penalties assesses and bring suit in the name of the government, instead of on their own behalf.").

[266] *See Vt. Agy*., 529 U.S. Indeed, the Court was unanimous on this point.

[267] *See Vt. Agy*., 529 U.S. at 778 n.8

[268] *Friends of the Earth, Inc., v. Laidlaw Envtl Srvcs.* 528 U.S. 167, 197 (Kennedy, J., concurring).

[269] *See* Krent, *supra* note __, at 293; *see also id.* at 296 ("Within the first decade after the Constitution was ratified, Congress enacted approximately ten qui tam provisions authorizing individuals to sue under criminal statutes to help enforce the law.").

"assigned some criminal law enforcement responsibility outside of the Executive's control altogether."[270]

In his *Sierra* concurrence, Judge Newsom acknowledges that "the existence of *qui tam* actions offers some counterevidence against a strict demarcation of private and public actions, based in Article II, just as it is one of several reasons to doubt that Article III requires every plaintiff to demonstrate a concrete injury in fact."[271] After all, the ability of a private litigant who has suffered no personal injury themselves to decide when and whether to seek enforcement of a federal law would seem to epitomize the delegation of law enforcement responsibility to private party. But perhaps *qui tam* suits are an "idiosyncratic exception to the general rule that private parties can't exercise executive power,"[272] that are permissible under Article II at least insofar as the executive branch retains the ability to terminate such suits and end their prosecution.[273] Under some early *qui tam* suits, and under the False Claims Act (FCA) today, *qui tam* the executive branch retains substantial authority to end the prosecution of such suits.[274]

This way of saving the constitutionality of *qui tam* suits would seem to create additional means for Congress to authorize other private enforcement of public law under Judge Newsom's proposed standing architecture. If what saves the constitutionality of the *qui tam* mechanism is not an assigned injury, but rather the ability of the executive branch to ultimately dispose of the suit, one could imagine how such a mechanism could preserve the constitutionality of other citizen suits provisions of which Judge Newsom is suspect. This would then suggest a third necessary element of a legislatively-created cause of action that does not infringe upon Article II.

Under the Clean Water Act (CWA), for instance, citizen suits may be filed directly against firms that are discharging pollution in excess permitted limits.[275] Before commencing such a suit, however, a prospective citizen suit plaintiff must provide the EPA (and the regulated entity) with notice. This provides the regulated entity with an opportunity to cure the regulatory violation before a suit is filed.[276] This notice requirement also provides the EPA (or the relevant state agency, if one is

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[270] *See* Krent, *supra* note __, at 290.
[271] *Sierra*, 996 F.3d, at 1135 n. 14.
[272] *Laufer*, 29 F.4th, at 1295 n.4.
[273] *Sierra*, 996 F.3d at 1136 n. 14.
[274] *Sierra*, 996 F.3d at 1136 n. 14; *Polansky*.
[275] *See* 33 U.S.C. §1365(b).
[276] *See* Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (notice provides the subject of the suit "an opportunity to bring itself into complete compliance . . . and thus . . . render unnecessary a citizen suit.").

enforcing the federal program) with the opportunity to preclude the citizen suit altogether by initiating its own enforcement action.[277] The prospective citizen suit plaintiff may still intervene in the suit, but the federal government retains the authority to assume control of the litigation and conduct the prosecution in line with the Executive Branch's enforcement priorities.

A potentially important distinction between *qui tam* suits, such as are provided for under the FCA, and CWA suits is that the federal government lacks the authority to prevent prosecution of the violation altogether. As noted, under the FCA the federal government retains the authority to intervene in the litigation at any time and have the suit dismissed. This preserves the executive branch's ability to fully exercise its prosecutorial discretion and decline to prosecute.[278] This is true even if the federal government delays its decision to intervene.[279] The CWA, on the other hand, only precludes a citizen suit against a CWA violator if the EPA has "commenced and is diligently prosecuting" the offense.[280] So while the federal government retains the authority to assume responsibility for enforcement, it cannot choose to have the CWA's effluent limits left unenforced if there are citizen groups prepared to file suits of their own.

If the need to actively enforce the federal law in question is too great a constraint on the executive branch's enforcement discretion, or environmental citizen suit provisions as currently written, transgress Judge Newsom's Article II constraints, Congress could revise environmental citizen suit provisions to more closely track the *qui tam* model, such as by stating that such suits are filed on behalf of the government and allowing the EPA to terminate the prosecution of a regulatory offense.[281]

### *E. Taxpayer Suits*

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[277] *See* 33 U.S.C. §1365(b) (providing that "No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, . . . ").

[278] *Polansky*, 143 S.Ct. 1720.

[279] *Id.* at 1728.

[280] *See* 33 U.S.C. §1365(b).

[281] While providing for such authority for the executive branch would preserve prosecutorial discretion, it is important to note that the need for the executive branch agency to affirmatively intervene and dismiss a suit might increase the political costs of nonenforcement decisions. Such political costs might, in practice, constrain the exercise of prosecutorial discretion, at least in the context of politically sensitive programs or highly salient prosecutions, but such constraints need not be considered an Article II problem. Rather, if the executive branch feels constrained to pursue a prosecution for political reasons, this could be seen as the natural, and perhaps desirable, result of a system then ensures political accountability for prosecutorial decisions.

Suits filed by taxpayers challenging the lawfulness of government expenditures are perhaps the archetypal example of a generalized grievance that lies beyond the jurisdiction of federal courts.[282] Going back to *Frothingham v. Mellon*, the Court has rejected such suits as a federal taxpayer's interest in the federal treasury is generic and indistinguishable from that of any other.[283] The plaintiff's interest in such a case is "minute and indeterminable."[284] Further, "the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain" as to make it difficult to identify an injury-in-fact, let alone an injury that could be redressable.[285] This is true whether the suit targets appropriations or tax expenditures, and is filed by a federal taxpayer or a state taxpayer.[286]

The prohibition on taxpayer suits makes some sense within the current Article III framework. Insofar as the plaintiff must have an injury-in-fact that is concrete and particularized, and that must be redressable, it is difficult to see how a taxpayer qualifies. Under Judge Newsom's injury-less alternative, however, it is not clear that such suits would be precluded if expressly and appropriately authorized by Congress, particularly if combined with a *qui tam*-like bounty mechanism.

Were Congress to create a cause of action for taxpayers to challenge the unlawful or unconstitutional expenditure of money, and added a bounty provision so as to ensure that the litigants would benefit from a successful suit, that would likely be sufficient to satisfy Judge Newsom's test. The lack of a traditionally justiciable injury would be no problem, provided the suit complied with whatever legislative enactments Congress adopted. Nor would Article II be much of a concern. Unlike suits challenging agency action, or a lack thereof, this sort of suit would not implicate the enforcement discretion of the executive branch. To the contrary, insofar as such suits challenged the appropriation of money by Congress, they would not implicate Article II concerns much at all.[287] And insofar as such a suit were to challenge administrative misconduct, it

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[282] The Court has recognized a narrow exception to this rule for taxpayer challenges to legislative violations of the Establishment Clause. *See Flast v. Cohen*, 392 U.S. 83 (1968). That this exception remains narrow was confirmed in *Hein v. Freedom from Religion Foundation* 551 U.S. 587 (2007). For a critique of the resulting doctrine, see Jonathan H. Adler, *God, Gaia, the Taxpayer and the Lorax: Standing, Justiciability, and Separation of Powers after Massachusetts and Hein* 20 REGENT U. L. REV. 175, 181 (2007).

[283] 262 U.S. 447 (1923).

[284] *Id*.at 487.

[285] *Id*.

[286] *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332. (2006).

[287] In this sense, the framework might replicate the *Flast*/*Hein* framework of making it easier to challenge legislative malfeasance than executive misfeasance.

would rest on the same footing as *qui tam* litigation.[288] Thus under Judge Newsom's framework, the only limitation on taxpayer suits would be Congress's willingness to authorize such suits.

### *F. Environmental Citizen Suits*

One area in which Judge Newsom's approach could have a particularly significant impact is environmental law, where citizen suits are quite common. Judge Newsom may reject the *Lujan* standing inquiry, but that does not mean his injury-less approach would have counseled a different result in that case. To the contrary, Judge Newsom characterizes *Lujan* as "the quintessential example of a suit that ran afoul of Article II's vesting of executive authority."[289] His approach could have a dramatic effect on environmental citizen suits.

Although Judge Newsom did not think the injury inquiry was necessary, he suggests that concern for the Vesting and Take Care clauses "straightforwardly explain[] the result in *Lujan*" as the plaintiffs "sought to challenge broad-based government policies that they claimed had far-reaching injurious effects, and sought a remedy accruing not to them individually, but rather to society at large."[290] The ESA did not purport to create private rights in wildlife. The name plaintiff was Defenders of Wildlife, not owners of wildlife seeking to protect their own animals from harm caused by federal policy. They rather wanted federal law to be enforced in accordance with Congress's commands. They wanted the executive branch to execute this particular law more faithfully than it was.[291]

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[288] As a matter of political economy, one might question why Congress would want to facilitate taxpayer challenges to legislative appropriations. It might not. On the other hand, a contemporary Congress might believe that such a mechanism could serve as a means of disciplining future legislatures. Whether or not such a legislative enactment is likely, the question for this article is whether such an authorization would be constitutional.

[289] *Laufer*, 29 F.4th at 1289.

[290] *Sierra*, 996 F.3d at 1137.

[291] According to Justice Scalia, that the *Lujan* plaintiffs did not seek to influence the exercise of enforcement discretion, as such, did not make their claims any more appropriate for an Article III court. *See* Scalia, *supra* note __, at 897 (acknowledging his approach would allow "important legislative purposes, heralded in the halls ocf Congress" to be "lost or misdirected in the vast hallways of the federal bureaucracy" and that this is "a good thing" as "lots of once-heralded programs out to get lost or misdirected"); *see also* Antonin Scalia, *Responsibilities of Regulatory Agencies under Environmental Laws*, 24 HOUST. L. REV. 97, 97-98 (1987) (noting that even where an agency's statutory duties are clear "it may not be the business of the courts to hold the agency to them").

Because the suit was more focused on ensuring compliance with federal law than it was vindicating private rights, Judge Newsom's framework would seem to be no more favorable to the *Lujan* plaintiffs. Indeed, it would likely be even worse for them. Unlike in *Lujan*, the purchase of plane tickets or announcement of date-certain plans to visit the habitat of species imperiled by federally funded projects overseas would not have altered the result.[292] Such actions may have been sufficient to convince a majority of justices in *Lujan* that at least some plaintiffs had suffered an injury in fact, but it would not have been enough for Judge Newsom, for the Article II problem would remain.

What is true of *Lujan* would also likely be true of other environmental citizen suits challenging programmatic activity, as was at issue in *National Wildlife Federation v. Lujan*[293] and *Summers v. Earth Island Institute*.[294] In those cases, it would seem equally likely that a court would conclude that what plaintiffs were seeking was broader enforcement of federal law—specifically making a federal agency regulate in a particular manner—and not the protection or vindication of private rights. While most environmental citizen suit provisions "specify that a citizen plaintiff sues 'on his own behalf,'" it is understood that Congress enacted citizen suit provisions in most to major environmental laws in order to guard against potential executive branch underenforcement.[295] In *Lujan* itself the question was not one of simple enforcement discretion, but rather whether federal agencies had complied with Congress's instructions when promulgating regulations governing federal agency action. Insofar as such suits would be precluded by Article II concerns, Judge Newsom's approach might dramatically constrain judicial review of agency rulemakings by limiting the ability of regulatory beneficiaries or non-regulated parties from bringing suits to challenge executive branch implementation of federal statutes.

One obvious question is whether the same conclusion would be required in suits seeking to enforce the National Environmental Policy Act's requirement that federal agencies consider, and sometimes

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[292] *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring).

[293] Lujan v. Nat'l Wildlife Fed'n v, 497 U.S. 871 (1990).

[294] Summers v. Earth Island Inst., 555 U.S. 488 (2009).

[295] *See* Sunstein, *What's Standing*, *supra* note __, at 165 (observing citizen suits are "a mechanism for controlling unlawfully inadequate enforcement of the law"); Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from* Qui Tam *Litigation*, 94 U. COLO. L. REV. 93, 94 (2001); *see also* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1555 (1995) (discussing the reasons for enacting environmental citizen suit provisions).

complete, environmental impact statements before undertaking major actions "significantly affecting the quality of the human environment."[296] Under current doctrine, the injury-in-fact requirement serves to identify potential plaintiffs from among those generally concerned about environmental protection. Thus individuals can sue to enforce federal environmental laws to control pollution in their own communities, but not to encourage greater enforcement of federal law nationwide.

Under *Sierra Club v. Morton*[297] and its progeny, concerns about the loss of natural beauty and other aesthetic harms are sufficiently concrete injuries provided that the plaintiffs can connect themselves to those specific places or resources that are likely to be impacted.[298] In this respect, the injury-in-fact requirement functions something like the special injury requirement for public nuisance claims, in that it serves to identify those potential plaintiffs who can plausibly claim sufficiently distinctive and discreet harms to make their complaints something more than a generalized grievance about the failure to enforce federal environmental laws. Yet Judge Newsom's framework (unlike that suggested by Justice Thomas) does not incorporate this concern.[299] Given that most major environmental statutes expressly authorize citizen suits, such plaintiffs would have little difficulty claiming a cause of action under Judge Newsom's framework, but they would likely still have a problem with his emphasis on Article II.

In a case such as *Friends of the Earth v. Laidlaw Environmental Services*,[300] it would be no problem that the plaintiffs could not identify any environmental consequence, let alone harm, from the pollution discharges in excess of permitted amounts.[301] This would not affect the existence of the cause of action expressly authorized under the Clean Water Act. What would be a problem, however, is that the plaintiffs were suing to enforce federal law in lieu of the federal government, and seeking to impose fines payable to the Treasury, instead of suing to vindicate or protect their own rights and obtain damages themselves. And what would be true for the plaintiffs in *Friends of the Earth* might well be true of citizen suit plaintiffs in the mine run of environmental cases.[302] While there are statutory causes of action in nearly all such cases, few could be

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[296] 42 U.S.C. § 1332.

[297] Sierra Club v. Morton, 405 U.S. 727 (1972)

[298] *Sierra Club* 405 U.S. 727 at 734.

[299] *See* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197 (2017).

[300] Friends of the Earth, Inc v Laidlaw Envtl. Servs. (TOC). Inc., 528 U.S. 167 (2000).

[301] *Id* at 181.

[302] For a recent example still in litigation, see Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408 (5th Cir. 2022), *reh'g en banc granted* ___.

characterized as efforts to protect private rights. Most all such suits, including many brought under the Administrative Procedure Act, are efforts to ensure greater enforcement of federal law by and within the executive branch.[303]

Judge Newsom's suggestion to ditch the injury-in-fact requirement while granting greater protection for executive branch authority under Article II would likely be more of a "slash and burn expedition through the law of environmental standing" than was Justice Scalia's standing opinion. But would this mean Judge Newsom's approach is necessarily bad for environmental protection? That would depend on the extent to which Congress could legislate around the Article II constraints by recognizing private rights in environmental resources. As with anti-discrimination statutes, reconceptualizing the nature of the cause of action created by Congress might preserve broad citizen access to the courts.

An interesting thought experiment is whether it would be possible to rewrite or reconceive at least some federal environmental laws to overcome the obstacles of a robust Article II inquiry.[304] Existing pollution control laws do not themselves require plaintiffs to demonstrate that they themselves have been harmed or even affected in any way by the violation of pollution control requirements. As *Friends of the Earth* made clear, a permit violation even without any identification of any measurable effect of the violation violates the Clean Water Act (and is sufficient for Article III standing).[305] Yet one could imagine a statute that provides for a cause of action for those who are affected by permit violations, or perhaps even by those in the immediate community. Such a law would, in effect, recognize property rights held by local residents, the violation of which would create a cause of action that could provide the basis for suit in federal court. Thus, just as the FCPA creates de facto private rights in one's own financial information, an environmental rights law would create such rights in local environmental conditions or common resources in the absence of underlying property rights. If suits to vindicate the former would satisfy Article III, so too would the latter. As wth trespass, a mere rights violation would be enough. Such an approach might well preserve the sort of citizen suit at issue in *Friends of the Earth*. It might not be sufficient for that in *Lujan*.

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[303] While the focus here is on environmental citizen suits, it is possible that this would be true of public interest suits more broadly. Suits brought by regulated entities, on the other hand, would still largely be permitted insofar as they are filed to protect private rights.

[304] For consideration of similar ideas in the context of *Lujan*, see Adler, *Stand or Deliver*, *supra* note __.

[305] *See Friends of the Earth*, 528 U.S. at __.

Another alternative would be to include statutory provisions that replicate the law of public nuisance. That is, pollution control laws would declare that violations of applicable pollution control requirements are public nuisances, and then require prospective plaintiffs to identify a special injury that entitles them to sue. If the showing of such special injury is sufficient to allow private individuals to take action against public harms in the public nuisance context, it is not immediately apparent why this would not also be sufficient here. Such suits have a long history, and the entire purpose of a special injury requirement was to allow for the vindication of private interests without usurping or otherwise interfering with the executive enforcement of the law and vindication of public rights.

Note that one of these approaches might work to fortify citizen suit provisions under federal pollution control statutes, but it is not immediately apparent how either approach would work to preserve citizen suits under other sorts of environmental laws, such as NEPA, the various public lands statutes, or the Endangered Species Act. Challenges to environmental regulations by those other than regulated parties would remain difficult, and would perhaps be more difficult than under *Lujan*. Absent a willingness to create or recognize private rights in such natural resources, it is not clear how citizen suits under these sorts of environmental laws would be able to evade Judge Newsom's Article II constraint.[306]

### *G. Special Solicitude for States*

One of the more contentious (and perhaps questionable) elements of contemporary standing is the "special solicitude" federal courts are supposed to show to states.[307] As explained by Justice Stevens in in *Massachusetts v. EPA*, such solicitude compensates for the fact that states

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[306] It should be noted, however, that there are many reasons why a legislative willingness to recognize such rights would enhance the sustainability and protection of many such natural resources. *See, e.g.*, Jonathan H. Adler, *Environmental Protection: Final Frontier or Achilles Heel?*, *in* THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT (T. Henderson ed., 2018) (discussing potential of property rights to protect environmental resources); Jonathan H. Adler, *Free and Green: A New Approach to Environmental Protection*, 24 HARV. J.L. PUB. POL'Y 653 (2001) (same); Jonathan H. Adler & Nathaniel Stewart, *Learning How to Fish: Catch Shares and the Future of Fishery Conservation* 31 UCLA ENVTL L. & POL'Y REV. 150 (2013) (discussing how property rights in fishery resources enhance conservation and out perform traditional regulations); Jonathan H. Adler, *Taking Property Rights Seriously: The Case of Climate Change*, 26 SOC. PHIL. & POL'Y (2009) (discussing role of property rights in climate change).

[307] *See* Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (holding that a state is "entitled to special solicitude" in the Court's standing analysis).

"surrender[ed] certain sovereign prerogatives" when entering the Union, such as the ability to take direct action against other states to protect their own interests.[308] So when one state's territory is threatened by pollution from another, it cannot "invade" or "negotiate an emissions treaty," and some exercises of the state's sovereign policy power may be preempted.[309] Thus, Justice Stevens reasoned, states should receive a "special solicitude" when seeking to vindicate their interests in suits against the federal government. While courts do not often state they are providing special solicitude to states, state litigants regularly lay claim to the special solicitude they believe they are due, and the doctrine has appeared to facilitate an increase in state litigation against the federal government, much of which is driven by political concerns.[310]

Whether or not this special solicitude is justified, it operates as an easing of the *Lujan* requirements for standing, such as the requirement that an injury be concrete or immediately redressable. Absent the injury requirement, however, it is not clear what role, if any, such special solicitude should play. States would retain their ability to bring cases in the Supreme Court's original jurisdiction, which is certainly an avenue for litigation ordinary litigants cannot pursue, but such suits (much like common law suits) need to satisfy traditional requirements.[311]

As with taxpayer suits, whether states should have an easier or more difficult time bringing claims in federal court would seem to be left with Congress. In authorizing suits or creating causes of action, as Congress has done in some instances, Congress could choose whether to include states among those authorized to bring suit. A statutory cause of action could be defined solely to allow suits by individuals, or perhaps even to allow suits only by states. But this would be a choice left to Congress. And again as with taxpayer suits, allowing (or precluding) suits by states would not appear to raise independent Article II concerns. So long as the cause of action was such that a state was litigating on behalf of its own interests (or perhaps even the interests of its citizens) and did not

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[308] *Massachusetts*, 549 U.S. at 519.

[309] *Id.*

[310] It has become commonplace for attorneys general of one political party to file suit against the primary policy initiatives of a President of the opposite political party. *See* Erik Ortiz, *State Attorneys General Have Sued Trump's Administration 138 Times — Nearly Double Those of Obama and Bush*, NBC News (Nov. 16 2020, 5:30am), https://www.nbcnews.com/politics/politics-news/state-attorneys-general-have-sued-trump-s-administration-138-times-n1247733; *see also* Paul Nolette & Chris Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS: THE J. OF FEDERALISM, 469 (2018)(discussing pattern of state attorney general lawsuits against federal policies).

[311] *See* Robert Cheren, *Environmental Controversies 'Between Two or More States'* 31 PACE ENVTL L. REV. 177 - 178 (2014).

represent an effort to enforce generally applicable laws, such suits would be permissible, and the fact that the plaintiff were a state would not really enter into the picture.

## IV. ASSESSMENT

Echoing much academic commentary, Judge Newsom has condemned the centrality of injury in fact in the current doctrine as unadministrable, incoherent, and ungrounded in the original public meaning of Article III. His proposed alternative would give Congress greater leeway to authorize causes of action and shift judicial attention from the enforcement of Article III's bounds, to those of Article II.

Abandoning the injury-in-fact inquiry for a consideration of whether there is a cause of action would seem to address all three of Judge Newsom's concerns. Identifying the existence of a cause of action would not force judges to figure out whether an asserted injury could be intangible and yet concrete at the same time. Nor would it force judges to engage in what is essentially a normative inquiry about what sorts of harms should count. Rather, insofar as such questions were not already answered by the common law or the Constitution, they could be answered dby Congress through the enactment of legislation authorizing precise causes of action. Questions would likely remain about how to apply traditional causes of action to contemporary concerns or how to identify the precise contours of legislative authorizations, but such questions are the ordinary stuff of judicial review.[312]

The limits placed on judicial review by Article II might be another matter. As Judge Newsom himself noted, this alternative to the contemporary Article III inquiry is no panacea, nor are the answers it provide self-evident. This is particularly true without a clear theory identifying what it is about Article II that bars private suits to enforce federal law Scholars have hypothesized constitutional limits on the standing that derive from Article II.[313] Judge Newsom, for his part, has suggested that a robust theory of Article II is not necessary for his approach to work.

Particularly without a governing theory, identifying the precise line between a suit to enforce a legitimate legislative recognized private

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[312] One question which might well arise is whether to recognize implied causes of action and perhaps whether to consider the creation of a cause of action as the sort of "major question" that requires express legislative authorization. Further, insofar as certain types of citizen suits might raise Article II concerns, refusing to recognize an implied cause of action might be considered a form of constitutional avoidance.

[313] *See* Grove, *supra* note __; Krent & Shenkman, *supra* note __.

harm and a suit to supplant or second-guess the executive branch's enforcement discretion might be difficult to draw. If Congress has the authority to recognize new rights and authorize causes of action to vindicate such rights, why cannot Congress do so with an eye toward advancing the public interest? If, as Judge Newsom accepts, private suits to vindicate harms to individuals may produce public benefits—positive externalities, if you will—where is the barrier to Congress's legislating with such effects in mind? And if there is no constitutional barrier on recognizing stigma or informational harms or other intangible impacts as the bases of a cause of action, how is the authorization of a new cause of action to vindicate a private interest more than a formalist exercise of legislative drafting?

A formalist fallback position would leave such questions in the hands of Congress, allowing such suits to proceed provided that Congress articulates the interest and authorizes actions in the proper terms. [314] Yet such an approach could easily devolve into a "magic words" test that protects Article II interests in form but not in substance. Judge Newsom would presumably object to such aggressive efforts to constrain executive branch discretion in such a fashion, but what would the constitutional basis for such a limitation be? Further constraining such suits by requiring that the executive branch retain the ultimate authority to dismiss or quash an ongoing suit enforcing federal law, much as is the case with *quit tam* litigation would address such concerns to some extent, but this might also be vulnerable to careful legislative drafting.

Professor Grove has suggested that the proper Article II limit on standing is a limit on the ability of Congress to authorize private individuals to assert "Abstract grievances, sich as the 'injury to the interest

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[314] Whether the Constitution's text, history and tradition prevent the delegation of enforcement authority or other governmental power to private entities is a subject of active academic debate. On delegation to private parties, see generally B. Jessie Hill, *Due Process, Delegation, and Private Veto Power*, 108 IOWA L. REV. 1199 (2023); Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31 (2021); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

On the broader debate over whether there are constitutional limits on the delegation of legislative power, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*," 121 COLUM. L. REV. 277 (2021)*;* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021)*;* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE. LJ. 1288 (2021)*;* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019); Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2020).

in seeing that the law is obeyed,' that would allow her to sue any person, anywhere in the country, for any violation of law."[315] But the point of this limitation is not so much to protect the executive branch as it is to "protect individual liberty by shielding private parties from arbitrary exercises of private prosecutorial discretion."[316] On this basis, there would be no standing in cases such as *Laufer* or *FEC v. Akins*, as both implicate "private liberty."[317] But Professor Grove's theory would not necessarily preclude a suit such as that in *Lujan*, provided that an injury could be shown..[318] Thus it would not provide the degree of insulation for Article II that Judge Newsom suggests is necessary.

Justice Thomas has suggested an approach that relies upon traditional distinctions between public and private rights.[319] Much as the law of public nuisance allows a suit by an individual who has suffered a special injury, courts could allow those suits in which the enforcement of public law would serve to protect the plaintiff's private interest. While finding such an approach amenable, Judge Newsom claims it lacks sufficient constitutional foundation. Further, such an approach, and the need to identify a special injury, might just replicate the problems with injury in fact that prompted Judge Newsom's critique.

## CONCLUSION

While the current *Lujan* test for Article III standing is well-established, it is showing signs of strain. Long the subject of academic criticism, *Lujan*'s formulation is being challenged by prominent jurist at the same time that justices are dividing over its application. The relatively large number of standing cases heard in the Roberts Court suggests the justices recognize the doctrine as one in need of some refinement. The Supreme Court itself has seemed unsure in recent years about how the test should apply, and some justices seem to think the doctrine should evolve in competing directions.[320] The Court's majority seems intent on ratcheting

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[315] Grove, *supra* note __, at 783.

[316] *Id.* at 784.

[317] *Id.* at 785.

[318] According to Professor Grove, the citizen suit provision in the ESA may have been constitutionally overbroad in that it allows any person to sue, but the facts at issue in *Lujan* would not themselves present a constitutional problem under her theory. *See id.* at 831-32.

[319] Spokeo, Inc. v. Robins, 578 U.S. 330, 346 (2016) (Thomas, J., concurring); Thole v. U.S. Bank, N.A., 140 S.Ct. 1615, 1622 (2020) (Thomas, J., concurring); TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2220 (2021) (Thomas, J., dissenting).

[320] *Compare* TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2200 (2021) and TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2220 (2021) (Thomas, J., dissenting).

down on standing, but this is producing anomalies in the law and disagreement from some justices.

In proposing to allow standing without injury, Judge Newsom has prompted greater consideration of the premises and operation of standing doctrine. Whether such concerns lead to standing's reformulation, or a mere reconsideration of some of the doctrine's application, it will have prompted a worthwhile discussion. The new gospel may not be preferable to the old, but that alone will not stop a reformation.