

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?

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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

For over thirty years, *Lujan v. Defenders of Wildlife*² has defined the contours of Article III standing.³ Justice Antonin Scalia's opinion for the Court articulated a clear (if not always clearly applied⁴) test to determine whether litigants could invoke the jurisdiction of the federal courts.⁵ Under this test, the "irreducible constitutional minimum of standing contains three elements,"⁶ the "first and foremost" being that the plaintiff must have suffered an "injury in fact."⁷ This requirement of Article III is said to be "essential and unchanging."⁸ Yet some in the clerisy are expressing doubts.

minimum' of Article III standing. . . . [This baseline includes] 'an injury in fact.'" (first quoting *Valley Forge Christian Coll. v. Amers. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); then quoting *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 338 (2016)); *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.'" (quoting 3 Richard J. Pierce Jr., *Administrative Law Treatise* §§ 16.2–16.4 (4th ed. 2002))).

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

3. *See* Jeffrey G. Casurella, *Why Standing Matters*, 74 MERCER L. REV. 557, 572 (2023).

4. *See* Magill, *supra* note 1, at 1132 ("the doctrine is widely regarded to be a mess").

5. *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).

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

7. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) ("First and foremost, there must be alleged (and ultimately proved) an 'injury in fact.'" (quoting *Whitmore v. Arkansas* 495 U.S. 149, 149, 155 (1990))). 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 560–61.

8. *Id.* at 560.

The justices spar over *Lujan*'s boundaries and routinely disagree on its precise application.⁹ *Lujan* itself was not unanimous¹⁰ and has not produced anything remotely approaching a consensus within the academy.¹¹ Building on prior scholarship, which was 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.¹²

The academic critique of *Lujan* has been recently joined within the judiciary, including among those generally sympathetic to the conservative legal project. Lower court judges increasingly find the test difficult to apply in a clear and consistent fashion.¹³ 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

9. Cases in just the past ten years in which the Justices have split on the application of *Lujan* include *United States v. Texas*, 143 S. Ct. 1964 (2023) (state standing to challenge immigration policies); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (state standing to challenge student loan forgiveness); *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 Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (third-party 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); and *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) (standing to sue under Fair Credit Reporting Act).

10. In *Lujan*, the justices split 6-3 on whether the plaintiffs had demonstrated an injury in fact sufficient to satisfy Article III. 504 U.S. 555, 556–57. Four justices also concluded that the plaintiffs' alleged injuries were not redressable. *Id.* at 568 (opinion of Scalia, J.).

11. 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”).

12. See 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 ENV'T L. & POL'Y F. 155 (2001); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

13. See, e.g., *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 957 (11th Cir. 2020) (Jordan, J., dissenting); *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 148–49 (3d Cir. 2024) (Matey J., concurring-in-part) (“Ever shifting, the judicially created standard of modern standing confuses courts, commentators, and plaintiffs . . .”).

requirement of an “injury in fact.”¹⁴ 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.”¹⁵ 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.”¹⁶ 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.¹⁷

Judge Newsom’s critique of *Lujan* is particularly noteworthy not only because he is a prominent and well-respected federal appellate judge. Judge Newsom, like Justice Scalia, is an avowed formalist who embraces the principles of textualism and originalism.¹⁸ Yet despite his affinity for Justice Scalia’s mode of jurisprudence, Judge Newsom rejects a core element of one of Justice Scalia’s most important and influential opinions.¹⁹ Whereas Justice Scalia claimed the Constitution requires strict limits on standing, Judge Newsom believes “the Constitution, as originally understood, embodies *much* more liberal ‘standing’ rules than the Supreme Court has been willing to recognize.”²⁰ His critique has not only begun to attract interest

14. 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), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023).

15. *Sierra*, 996 F.3d at 1115.

16. *Id.* at 1115.

17. *Id.*; see also *id.* at 1132 (“the relevant limits on congressional power are thus found—in Article II of the Constitution, not Article III”).

18. See Kevin C. Newsom, *On Being Predictably Unpredictable*, 73 CASE W. RES. L. REV. 1009, 1013 (2024) (“Methodologically, I’m a confessed formalist.”) [hereinafter Newsom, *Predictably Unpredictable*]; see also *id.* (citing Justice Scalia and describing formalism as entailing “rigorous adherence” to principles of textualism, originalism, and stare decisis). Like Justice Scalia, Judge Newsom also authored some important originalist scholarship before becoming a judge. See, e.g., Kevin C. Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000).

19. Standing had been a particular interest of Justice Scalia’s well before he authored the majority opinion in *Lujan*. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

20. Newsom, *Predictably Unpredictable*, *supra* note 18, at 1017.

from scholars,²¹ but it has also received attention from the Supreme Court.²²

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.²³

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 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 embodied 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."²⁴ Discarding the current approach would unquestionably upend settled expectations and produce a period of judicial uncertainty, even if it would also augment

21. See Elizabeth Earle Beske, *Litigating the Separation of Powers*, 73 ALA. L. REV. 823, 837 n.100 (2022); Young, *supra* note 11, at 1888 n.21; Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON. L. REV. 729, 734 nn.33–34 (2022) [hereinafter Beske, *Charting*]; Jacob Phillips, *TransUnion, Article III, and Expanding the Judicial Role*, 23 FED. SOC. REV. 186, 199 (2022); Casurella, *supra* note 3, at 562 n.29.

22. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2219 (2021) (Thomas, J., dissenting) (citing *Sierra v. Hallandale Beach*, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring)). The opinion has also attracted the attention of judges on other courts. See, e.g., *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 149 n.1 (3d Cir. 2024) (Matey J., concurring in part) (citing *Sierra*, 996 F.3d at 1115 (Newsom, J., concurring)); *Hanes v. Merrill*, SC-2022-0869, 2023 WL 2818541, at *8 (Ala. Apr. 7, 2023) (Parker, J., concurring in part and concurring in the result) (same); *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 950 n.8 (7th Cir. 2022) (Hamilton, J., dissenting) (same); *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 804 (Iowa 2021) (McDonald, J., dissenting) (same).

23. See Scalia, *supra* note 19, at 885; see also *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

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

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.²⁵ 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.²⁶ Under *Lujan*, the "irreducible constitutional

25. 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).

26. 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. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), even though *Lujan* was 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*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 9, 2014), <https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/> (finding more citations to *Chevron* than *Lujan*).

minimum of standing” has three parts.²⁷ “First, the plaintiff must have suffered an ‘injury in fact’” that is both “actual or imminent” and “concrete and particularized.”²⁸ “Second, there must be a causal connection between the injury and the conduct complained of.”²⁹ Third, there must be a sufficient likelihood that “the injury will be ‘redressed by a favorable decision.’”³⁰

Lujan itself described this test as “an essential and unchanging part of the case-or-controversy requirement of Article III.”³¹ Demonstrating the existence of standing by showing each of these elements is more than a “mere pleading requirement[,]” but rather “an indispensable part of the plaintiff’s case.”³² The existence of standing is jurisdictional and thus cannot be waived.³³ 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.³⁴ 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?”³⁵ This requirement, in turn, is often understood as ensuring that there is sufficient adversity among the parties or ensuring that courts confine their jurisdiction to cases in which the rights of parties are at issue and avoid issuing advisory opinions.³⁶

27. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

28. *Id.*

29. *Id.*

30. *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976)).

31. *Id.* at 560.

32. *Id.* at 561.

33. *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990). 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.

34. See *Fletcher*, *supra* note 25, at 229 (“The essence of a true standing question is . . . [d]oes 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.*

35. See *Scalia*, *supra* note 19, at 882. See also *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing Justice Scalia’s quip).

36. See, e.g., *Scalia*, *supra* note 19, 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 Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 302 (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, 1666 (2007) (standing “prevent[s] inefficient dispositions of constitutional

More broadly, standing is understood, and often defended, as “a crucial and inseparable element” of the separation of powers.³⁷ 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.’”³⁸ In *Raines v. Byrd*,³⁹ 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.”⁴⁰

To Chief Justice Roberts, *Lujan* was a “sound and straightforward decision” that reaffirmed traditional (and, in his view, unremarkable) separation-of-powers principles.⁴¹ By contrast, academic commentary has long been divided on whether separation of powers concerns dictate the Court’s approach to Article III.⁴² *Lujan*

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, 547–48 (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 CHAP. 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: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* 19 (2021) (arguing that Article III “cases” need not feature adversity).

37. Scalia, *supra* note 19, 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”).

38. John G. Roberts, Jr., *Article III Limits on Standing*, 42 DUKE L.J. 1219, 1220 (1993) (quoting *Allen*, 468 U.S. at 750).

39. 521 U.S. 811 (1997).

40. *Id.* at 818 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976)).

41. *See* Roberts, *supra* note 38, at 1219; *see also id.* at 1226 (*Lujan* “can hardly be regarded as remarkable”).

42. *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, 691 (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, 818 (1969); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988).

itself provoked substantial criticism, as have some of its successors.⁴³ Nonetheless, most of the debate over standing within the judiciary focuses on its boundaries and particulars, not the underlying principle.

Regardless of 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—particularly the distinction between public and private rights.⁴⁴ As Chief Justice John Marshall noted in *Marbury v. Madison*,⁴⁵ “[t]he province of the court is, solely, to decide on the rights of individuals.”⁴⁶ 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.”⁴⁷ 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.⁴⁸

By most scholarly accounts, what we now call the doctrine of standing took root in the first part of the twentieth century.⁴⁹ In *Tyler v. Judges of Court of Registration*,⁵⁰ for instance, the Court concluded the plaintiff lacked “the requisite interest to draw in question” the

43. See, e.g., Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 270 (2021); Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 349–50 (2021); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 62 (2021); Beske, *Charting*, *supra* note 21, at 732.

44. 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 42, at 691 (“[E]ighteenth- 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.”).

45. 5 U.S. (1 Cranch) 137 (1803).

46. *Id.* at 170.

47. *Id.* at 166.

48. See Roberts, *supra* note 38, 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.”).

49. See, e.g., Hessick, *supra* note 44, at 290 (“Standing first flourished as an independent doctrine in the early 1900s.”); Sunstein, *supra* note 12, at 179 (in the early twentieth century “‘standing’ began to make a modest initial emergence as a discrete body of doctrine”).

50. 179 U.S. 405 (1900).

constitutionality of the law he sought to challenge.⁵¹ In order to sustain a 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.”⁵² Similarly, in *Frothingham v. Mellon*,⁵³ 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.⁵⁴ During this period, by many accounts, standing was deployed to protect progressive governmental interventions from legal attack.⁵⁵

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.⁵⁶ Thus, in *Tennessee Electric Power Co. v. Tennessee Valley Authority*,⁵⁷ the Court concluded competitors lacked standing to challenge TVA policies that threatened them with economic loss, as no right of theirs had been violated.⁵⁸ Yet in *Federal Communications Commission v. Sanders Bros. Radio Station*,⁵⁹ the Court allowed an economic competitor to sue, despite the lack of a legal right, because Congress

51. *Id.* at 410.

52. *Id.* at 406.

53. 262 U.S. 447 (1923).

54. 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.

55. See Hessick, *supra* note 44, at 291; Robert J Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996); Sunstein, *supra* note 12, at 179; MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 218 (2000).

56. See Magill, *supra* note 1, 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, 350 (1911), in which the Court held an act of Congress purporting to “authorize[] and empower[]” specific suits by specifically named parties exceeded the scope of Article III. The basis for the Court’s conclusion is “famously obscure.” Baude, *supra* note 5, 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).

57. 306 U.S. 118 (1939).

58. *Id.* at 146–47.

59. 309 U.S. 470 (1940).

had authorized such suit, thereby giving them “standing to appeal.”⁶⁰ 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 would respect that choice.⁶¹ Where a common-law cause of action was absent, Congress could create a cause of action by enacting a statute.⁶² It was only later that the Court concluded that the Constitution constrained Congress’s ability to authorize such suits.⁶³

The “injury in fact” formulation was a relatively 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 *Ass’n of Data Processing Service Organizations, Inc. v. Camp (ADPSO)*.⁶⁴ 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.”⁶⁵ If such an injury is alleged, Justice Douglas wrote, the next question is whether “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁶⁶ The former, as presented by Justice Douglas, was a requirement of Article III, while the latter was grounded in the Administrative Procedure Act.⁶⁷

The *ADPSO* formulation was “startling because the Supreme Court had never used the term ‘injury in fact’ in connection with standing law” before then.⁶⁸ Justice Douglas intended for this formulation to make it easier for litigants, particularly public interest groups, to bring claims in federal court.⁶⁹ He said as much in his

60. *Id.* at 477.

61. *Id.* See also Magill, *supra* note 1, at 1140–41.

62. Magill, *supra* note 1, at 1136.

63. *Id.* at 1174.

64. 397 U.S. 150, 152 (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. Magill, *supra* note 1, at 1161.

65. *ADPSO*, 397 U.S. at 152.

66. *Id.* at 153.

67. See Magill, *supra* note 1, 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.”).

68. Magill, *supra* note 1, 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.” Sunstein, *supra* note 43, at 349, 356.

69. See Magill, *supra* note 1, at 1161–62; see also Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations and a Solution*

ADPSO opinion⁷⁰ and made his approach perfectly clear in the “Mineral King” case just two years later.⁷¹

ADPSO had the desired effect, at least initially.⁷² 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.”⁷³ 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.⁷⁴

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.⁷⁵ In *Warth v. Seldin*⁷⁶ and *Simon v. Eastern Kentucky Welfare Rights Organization*⁷⁷ 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

to the Problem of Environmental Standing, 30 FORDHAM ENV’T L. REV. 21, 71 (2018).

70. Sunstein, *supra* note 43, at 357 (noting approvingly “the trend is toward enlargement of the class of people who may protest administrative action”).

71. See *Sierra Club v. Morton*, 405 U.S. 727, 759–60 (1972). This case concerned a citizen suit challenge to Walt Disney Enterprises’ proposed skiing development in the Mineral King Valley in the Sequoia National Forest, and standing ultimately turned on whether the plaintiffs had adequately alleged that their members frequented Mineral King. *Id.* at 735–36. In a famous dissent, Justice Douglas suggested that the suit should be understood as having been brought on Mineral King’s behalf and would have been “more properly labeled as Mineral King v. Morton.” *Id.* at 742 (Douglas, J., dissenting). See also M. MARGARET MCKEOWN, *CITIZEN JUSTICE: THE ENVIRONMENTAL LEGACY OF WILLIAM O. DOUGLAS* 143–58 (2022) (discussing the origins of Justice Douglas’s famous dissent).

72. As Chief Justice Roberts quipped, the “high-water mark of diluted standing requirements” would occur just three years later in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). *Massachusetts v. EPA*, 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting).

73. See *Sierra Club*, 405 U.S. at 733.

74. *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. See *ADPSO*, 397 U.S. 150, 153 (1970).

75. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1118 (11th Cir. 2021) (Newsom, J., concurring).

76. 422 U.S. 490 (1975).

77. 426 U.S. 26 (1976).

requirements of Article III.⁷⁸ This approach was reified in subsequent cases, such as *Allen v. Wright*,⁷⁹ 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 law⁸⁰ 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.⁸¹

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.⁸² The plaintiffs identified listed species they believed would be threatened by specific U.S.-funded projects and submitted affidavits from organization members who could plausibly attest to concern about those species.⁸³ Six justices of the Court concluded this was insufficient, as they had not shown the government’s actions produced an injury in fact.⁸⁴ Despite the existence of a citizen suit provision expressly authorizing suit,⁸⁵ 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.⁸⁶

Although a majority of justices rejected the plaintiffs’ standing claim,⁸⁷ 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.⁸⁸ In an oft-cited passage, Justice Kennedy suggested the plaintiffs could have prevailed had they only

78. *Warth*, 422 U.S. at 517–18; *Simon*, 426 U.S. 44–45; see *Sierra*, 996 F.3d at 1112 (majority opinion).

79. 468 U.S. 737 (1984).

80. See 16 U.S.C. § 1540(g)(1).

81. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992).

82. See 16 U.S.C. § 1536(a)(2).

83. See *Lujan*, 504 U.S. at 563.

84. See *id.* at 571. Four of the justices also argued that the plaintiffs could not show that any alleged injury was redressable. See *id.* at 582 (plurality opinion).

85. 16 U.S.C. § 1540(g)(1)(A).

86. See *Lujan*, 504 U.S. at 560–61.

87. *Id.* at 578.

88. *Id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment).

purchased plane tickets.⁸⁹ Justice Stevens concurred in the judgment on other grounds,⁹⁰ 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."⁹¹

The *Lujan* formulation is repeated by rote time and again, but lower court judges and even the justices themselves have at times struggled to apply the *Lujan* framework to specific cases.⁹² 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.⁹³ The justices themselves have divided on the extent to which informational injuries,⁹⁴ concerns about government surveillance,⁹⁵ mishandling or misrepresentation of personal data,⁹⁶ and unenforceable provisions within larger statutory schemes⁹⁷ 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.⁹⁸ 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.

89. *Id.* ("While it may seem trivial to require that Ms. 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 . . .").

90. *Id.* at 581 (Stevens, J., concurring in the judgement).

91. *Id.* at 606 (Blackmun, J., dissenting).

92. *See infra* notes 94–98 and cases cited therein.

93. *See* *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1116 (11th Cir. 2021) (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.").

94. *See* *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998).

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

96. *See* *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

97. *See* *California v. Texas*, 141 S. Ct. 2104 (2021).

98. *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), *and* *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 757–58 (6th Cir. 2018) (same), *with* *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), *and* *Frank v. Autovest, LLC*, 961 F.3d 1185, 1188 (D.C. Cir. 2020) (same); *see also* *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1116–17 (11th Cir. 2021) (Newsom, J., concurring) (summarizing "inter- and intra-circuit tensions and conflicts" over what constitutes a sufficient injury under *Lujan*).

While *Lujan* constrained citizen-suit standing, particularly in environmental cases,⁹⁹ 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 standing in cases alleging informational or environmental harms. In *Friends of the Earth v. Laidlaw Environmental Services*,¹⁰⁰ 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.¹⁰¹ In *Federal Elections Commission v. Akins*,¹⁰² the Court found a litigant's "failure to obtain information" also constituted an injury in fact.¹⁰³ In both cases, Justice Scalia dissented.¹⁰⁴ Although the Roberts Court was often accused 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.¹⁰⁵

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.¹⁰⁶ In *Spokeo v. Robins*,¹⁰⁷ the Supreme Court held that a statutory violation of the Fair Credit Reporting Act ("FCRA")¹⁰⁸ was not enough, by itself, to provide for

99. See *Lujan v. Defs. 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").

100. 528 U.S. 167 (2000).

101. *Id.* at 183. 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").

102. 524 U.S. 11 (1998).

103. *Id.* at 20.

104. See *Friends of the Earth*, 528 U.S. at 214 (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 electorate the power to invoke judicial direction of 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.").

105. See Adler, *supra* note 5, at 1068.

106. 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, *supra* note 5, at 1070 (noting Justice Kennedy's role determining the outcome in standing cases); see also Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 67 (2008) (explaining how Justice Kennedy was a "super median" justice).

107. 578 U.S. 330 (2016).

108. 15 U.S.C. § 1681.

standing.¹⁰⁹ 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.”¹¹⁰ That Robins could claim Spokeo had collected and disseminated information about him without observing the FCRA’s requirements satisfied the requirement that his injury be particularized.¹¹¹ The Court nonetheless concluded the U.S. Court of Appeals for the Ninth Circuit had not adequately considered whether this alleged injury was sufficiently concrete.¹¹² 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,¹¹³ it also concluded that a “bare procedural violation” of the FCRA’s requirements “cannot satisfy the demands of Article III.”¹¹⁴ For an injury to be sufficiently concrete, more is required.¹¹⁵

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.*¹¹⁶ 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 1974.¹¹⁷ Yet, as in *Spokeo*, there was a question of whether the plaintiff could allege a sufficient injury because there was no allegation that the plaintiff had suffered tangible harm from the allegedly wrongful conduct.¹¹⁸ Despite the alleged mismanagement, the plaintiffs were not exposed to any increased risk of loss to their retirement benefits.¹¹⁹ 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.¹²⁰ That U.S. Bank had fiduciary obligations to the plaintiffs made no difference.¹²¹

The Court revisited standing to bring suit for FCRA violations in *TransUnion LLC v. Ramirez*.¹²² Here, the Court reiterated and reinforced the principle it had declared in *Spokeo* of “no concrete

109. *Spokeo*, 578 U.S. at 342–43.

110. *Id.* at 340.

111. *Id.* at 342–43.

112. *Id.*

113. *Id.* at 340.

114. *Id.* at 342.

115. *Id.*

116. 140 S. Ct. 1615, 1619 (2020).

117. *Id.* at 1618.

118. *Id.*

119. *Id.* at 1620.

120. *Id.* at 1619.

121. *Id.* at 1621.

122. 141 S. Ct. 2190, 2200 (2021).

harm, no standing” in the context of the FCRA.¹²³ It acknowledged 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 it also cautioned that Congress’s conclusion is not dispositive.¹²⁴ Courts “cannot treat an injury as ‘concrete’ for Article III purposes based only on Congress’s say-so.”¹²⁵ Rather, any harm for which Congress would authorize a cause of action must be one that is concrete in light of “history and tradition.”¹²⁶ 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.”¹²⁷ For this showing, it is not necessary to trace a history of suits all the way back to the Founding Era, however, as the *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.¹²⁸

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.¹²⁹ 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

123. *Id.* at 2200. 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.

124. *Id.* at 2204–05.

125. *Id.* at 2205 (quoting *Trichell v. Midland Credit Mgmt. Inc.*, 964 F.3d 990, 999 n.2 (11th Cir. 2020)).

126. *Id.* at 2204.

127. *Id.* at 2213. Note that while *TransUnion* cites *Spokeo* for this formulation, Judge Newsom notes that *TransUnion* also modified the test in potentially significant ways. See *Laufer v. Arpan LLC*, 29 F.4th 1268, 1287 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023). 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. 1540, 1549 (2016). In *TransUnion*, the Court dropped the reference to “English” courts, leaving the focus exclusively on “American courts.” 141 S. Ct. at 2204.

128. See *Laufer*, 29 F.4th at 1287 (Newsom, J., concurring).

129. *TransUnion*, 141 S. Ct. at 2200 (holding class members about whom *TransUnion* has distributed inaccurate or misleading credit reports had standing to sue, but that those whose credit information had not been provided to third parties did not).

defamation suits.¹³⁰ 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.¹³¹ 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.¹³²

The Court's decision in *TransUnion*, in particular, prompted controversy and dissent.¹³³ Even conservative jurists generally thought sympathetic to Justice Scalia's constitutional project raised concerns about how *Lujan* was applied in *TransUnion*.¹³⁴ Justice Clarence Thomas, in particular, 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.¹³⁵ This concern caused Justice Thomas to write separately in *Spokeo*¹³⁶ and *Thole*¹³⁷ and to dissent in *TransUnion*.¹³⁸ Yet as sharp as the disagreement between Justice Thomas and the *TransUnion* majority was, 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

130. *Id.*

131. *Id.*

132. *Id.*

133. *See infra* notes 134–38 and sources cited therein. For an example of controversy and dissent among legal scholars, see Chemerinsky, *supra* note 43, at 270 ("Such an approach to standing [as put forth in *TransUnion*] significantly changes the law and places in doubt the ability to sue to enforce countless federal laws . . ."); Citron & Solove, *supra* note 43, at 62 (criticizing the far-reaching implication of the Court's holding in *TransUnion*, including how it "significantly undermined the effectiveness" of federal privacy laws); *Barclift v. Keystone Credit Servs., LLC*, 93 F.4th 136, 154 (3d Cir. 2024) (Matey, J., concurring in part) (noting *TransUnion* "marked the first time the Supreme Court required a private individual to make some threshold showing of concrete harm, even though he was seeking to vindicate a private right").

134. *See Laufer v. Arpan LLC*, 29 F.4th 1268, 1287 (Newsom, J., concurring) (noting "there are two defensible historical approaches to Article III's case-or-controversy requirement—but that *TransUnion*'s isn't one of them"), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023).

135. *See TransUnion*, 141 S. Ct. at 2214 (Thomas, J., dissenting).

136. 578 U.S. 330, 343 (2016) (Thomas, J., concurring).

137. 140 S. Ct. 1615, 1622 (2020) (Thomas, J., concurring).

138. 141 S. Ct. at 2214 (Thomas, J., dissenting).

consistent and principled manner.¹³⁹ 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.¹⁴⁰ These criticisms are no longer confined to academic commentary.

In a recent concurring opinion in *Sierra v. City of Hallandale Beach*,¹⁴¹ 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.¹⁴² 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.”¹⁴³ Federal standing jurisprudence, he concluded, “has jumped the tracks.”¹⁴⁴

Sierra addressed 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.¹⁴⁵ 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.¹⁴⁶ A long line of cases supported Article III standing for equivalent claims, even in cases involving “testers” who (unlike Sierra) monitor compliance with civil rights statutes and are never denied access to a service or accommodation they ever intended to use.¹⁴⁷ Indeed, the

139. Such complaints long predate *Lujan*. See, e.g., Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1980) (“It is not difficult to argue that the present law of standing is unsatisfactory. Announced principles do not explain even the major cases.”); Mark V. Tushnet, *The New Law of Standing, A Plea for Abandonment*, 62 CORNELL L. REV. 663, 664 (1977) (“The Court’s failure to articulate a coherent law of standing has led to a congeries of rules that are neither reconcilable nor rational.”).

140. See *infra* note 143 and sources cited therein.

141. 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring).

142. See *id.* Judge Newsom expanded on his critique in *Laufer v. Arpan LLC*, 29 F.4th 1268, 1283 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023).

143. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1116 (11th Cir. 2021) (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.”).

144. See *id.* at 1117.

145. *Id.* at 1112 (majority opinion).

146. *Id.* at 1114.

147. *Id.* at 1114 n.3.

substance of the standing claim was so straightforward that the court dispatched it in a single paragraph.¹⁴⁸

Judge Newsom concurred with the result, finding it compelled by existing precedent.¹⁴⁹ At the same time, Judge Newsom expressed doubt that this conclusion cohered with the test the Supreme Court purported 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."¹⁵⁰ 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.¹⁵¹ Rather, they seem "a lot like the kinds of harms that courts have historically *rejected* for Article III standing purposes,"¹⁵² 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.¹⁵³

This doctrinal inconsistency prompted Judge Newsom to revisit standing from its foundations and suggest a new approach he believes is as 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.¹⁵⁴ This alternative, he hopes, would be more coherent and perhaps easier for judges to administer and apply in a consistent fashion.¹⁵⁵

148. *Id.* at 1115.

149. *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.").

150. *Id.* at 1117.

151. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) ("Congress' role in identifying and elevating intangible [including stigmatic] harm does not mean that a plaintiff automatically satisfies the injury-in-fact requirement . . . Article III standing requires a concrete injury even in the context of a statutory violation.").

152. *Sierra*, 996 F.3d at 1117 (Newsom, J., concurring).

153. *See Spokeo*, 578 U.S. at 342 (stating that a plaintiff "cannot satisfy the [concreteness] demands of Article III by alleging a bare procedural violation" because simply violating a statute's "procedural requirements may result in no harm"); *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190, 2206 (2021) (stating that a plaintiff's intangible harms are not concrete when they are "not seeking to remedy any harm to [them]self but instead [are] merely seeking to ensure a defendant's 'compliance with regulatory law'").

154. *See Sierra*, 996 F.3d at 1115 (Newsom, J., concurring) (writing separately to explain his "doubt that current standing doctrine—and especially its injury-in-fact requirement—is properly grounded in the Constitution's text and history").

155. *Id.* at 1140 (noting he "joins a growing chorus of jurists and scholars who have questioned [the standing] doctrine and suggested that we need a recourse").

A. *Standing Without Injury*

Echoing arguments raised by academics over the years,¹⁵⁶ 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.”¹⁵⁷ 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.”¹⁵⁸ 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.”¹⁵⁹

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 generally absent from academic critiques of *Lujan*: 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 subordinates” in particular.¹⁶⁰ In this fashion, Judge Newsom proposes to reorient the standing inquiry while retaining the doctrine’s grounding in separation of powers—and retaining some limit on Congress’s authority to authorize private attorneys general to enforce federal law.

As Judge Newsom notes, it is not clear how current standing doctrine is rooted in the Constitution’s text.¹⁶¹ Article III of the Constitution speaks of “cases” and “controversies,”¹⁶² but says

156. 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) and William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

157. *See Sierra*, 996 F.3d at 1115 (Newsom, J., concurring).

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.* at 1121–22.

162. 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, § 2, cl. 1.

nothing explicitly about standing.¹⁶³ There is no reference to a required “injury,” let alone an “injury-in-fact” that is “actual or imminent” and “concrete” and “particularized.”¹⁶⁴ 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.”¹⁶⁵

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.¹⁶⁶ It was set there and made a fundamental part of constitutional law “for want of a better vehicle.”¹⁶⁷ Judge Newsom is sympathetic to the separation-of-powers concerns that drove the evolution of contemporary standing doctrine, but he 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.”¹⁶⁸

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

163. See RICHARD H. FALLON, JR. ET AL., 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.”).

164. *Sierra*, 996 F.3d at 1122 (Newsom, J., concurring) (“[D]espite 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.’”).

165. 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 2 (2021); Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448–49 (1994).

166. *Sierra*, 996 F.3d at 1122 (Newsom, J., concurring) (quoting Scalia, *supra* note 19, at 882).

167. Scalia, *supra* note 19, at 882.

168. *Sierra*, 996 F.3d at 1122 (Newsom, J., concurring).

violated and (2) that the law authorizes him to seek judicial relief.¹⁶⁹

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.”¹⁷⁰

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.”¹⁷¹ In the 1871 case of *Blyew v. United States*,¹⁷² 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.”¹⁷³

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.”¹⁷⁴ There is a long tradition of courts awarding nominal damages in cases where legal injuries were alleged but compensatory damages were not sought or could not be proven.¹⁷⁵ In English courts, Newsom notes, “it was well understood that for many torts, no showing of actual harm was required to obtain judicial relief.”¹⁷⁶ The mere fact of violation of a private right has been presumed to cause an injury.¹⁷⁷ As many first-year law students

169. *Id.*

170. *Id.*

171. *Id.* at 1822–23 (“One early American dictionary defined ‘case’ to mean ‘[a] cause or suit in court; as, the case was tried at the last term.’ It continued: ‘In this sense, case is nearly synonymous with cause, whose primary sense is nearly the same.’” (citation omitted) (quoting *Case*, WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828))).

172. 80 U.S. (13 Wall) 581 (1871).

173. *Id.* at 595.

174. *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring). For a somewhat different take on this history, see generally Woolhandler & Nelson, *supra* note 42, at 689; Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1006 n.29, 1034, 1038–40 (1997).

175. *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring); 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 (Newsom, J., concurring).

176. *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring).

177. 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.”).

learn, driving a mobile home across a 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.¹⁷⁸

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.¹⁷⁹ 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.¹⁸⁰ 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 a necessary nor a sufficient condition for an Article III ‘Case.’”¹⁸¹ A legal injury, on the other hand, including the violation of a statutory right, “was *both* a necessary *and* a sufficient condition.”¹⁸²

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 an injury-in-fact requirement.”¹⁸³ 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.¹⁸⁴ That is, in order for a private plaintiff to have a cause of action for public nuisance, they must be able to show that

178. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 164 (Wis. 1997). This case is the first case in a popular Property casebook. See THOMAS W. MERRILL ET AL., *PROPERTY: PRINCIPLES AND POLICIES* 1–7 (4th ed. 2022).

179. *Sierra*, 996 F.3d at 1124 (Newsom, J., concurring); 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).

180. See *Sierra*, 996 F.3d at 1124 (Newsom J., concurring) (“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.”).

181. *Id.*

182. *Id.*

183. *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 *ECOLOGY 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.

184. *Sierra*, 996 F.3d at 1126 n.8 (Newsom, J., concurring).

they have suffered a “special injury” from the alleged nuisance.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷

If the need for an “injury in fact” did not come from Article III’s text or history, then from where did it come? As noted earlier,¹⁸⁸ *ADPSO*¹⁸⁹ in 1970 was the first Supreme Court opinion to use the phrase.¹⁹⁰ 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 rather, 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.¹⁹¹ Thus, a trade association upset that a federal agency would open its 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

185. See, e.g., *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P’ship*, 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.”).

186. See *Spokeo, Inc. v. Robins*, 587 U.S. 330, 345 (2016) (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.”).

187. *Sierra*, 996 F.3d at 1126 (Newsom, J., concurring) (citations omitted).

188. See *infra* notes 65–75 and accompanying text.

189. 397 U.S. 150 (1970).

190. *Sierra*, 996 F.3d at 1117 (Newsom, J., concurring); see *id.* at n.1 (noting that the modern formulations of causation and redressability arose soon thereafter); see also *Winter*, *supra* note 42, at 1373 n.9 (“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).”).

191. *Sierra*, 996 F.3d at 1117 (Newsom, J., concurring).

right.¹⁹² Such an injury, the Court concluded in a “shockingly sloppy opinion,”¹⁹³ 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.”¹⁹⁴

As Judge Newsom recounts the tale (in accord with the accounts offered by various scholars)¹⁹⁵ *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.”¹⁹⁶ As explained by the Court at the time, this shift was justified because “[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.”¹⁹⁷ Justice Douglas wanted to make it easier for litigants to sue (environmental litigants in particular), and for a time, that is what *ADPSO* did.¹⁹⁸

Lujan’s innovation was not declaring that an injury in fact was necessary for standing. Rather it was declaring that such a

192. 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. Act of Oct. 23, 1962, Pub. L. 87-856, 76 Stat. 1132.

193. Sunstein, *supra* note 43, at 356.

194. *ADPSO*, 397 U.S. 150, 157 (1970) (quoting 5 U.S.C. § 702).

195. See Sunstein, *supra* note 12, at 205; Magill, *supra* note 1, at 1132; Hessick, *supra* note 44, at 289. 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, 621 & n.143 (2010).

196. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1118 (11th Cir. 2021) (Newsom, J., concurring); see also Scalia, *supra* note 19, at 889 (“[*ADPSO*] converted the requirement of a statutory review provision into merely a requirement that the plaintiff be within the ‘zone of interests’ that the statute seeks to protect.”).

197. *ADPSO*, 397 U.S. 150, 154 (1970). 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. See Scalia, *supra* note 19, at 882–83.

198. See Magill, *supra* note 1, 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 Antolini, *supra* note 183, at 755, 875.

requirement was part of Article III’s “irreducible minimum” that not even Congress could overcome.¹⁹⁹ While Congress could still create legal rights, the violation of which would constitute Article III injury, mere enactment of such a statutory right would not be enough to ensure federal court jurisdiction.²⁰⁰ Among other things, the claimed injury would still need to be “concrete.”²⁰¹ Subsequent decisions, most notably *Spokeo v. Robins*²⁰² and *TransUnion v. Ramirez*,²⁰³ 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.²⁰⁴ 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.²⁰⁵ Standing in such cases still requires that the “statutorily defined injury . . . independently satisfy Article III’s requirement of ‘concreteness.’”²⁰⁶

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.’”²⁰⁷ 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 fan.²⁰⁸ Standing doctrine, he warns, “mirrors substantive due process both in its (d)evolution and in its on-the-ground application.”²⁰⁹

Judge Newsom is concerned that determining which sorts of injuries should count, and which should not, is “inescapably value-laden.”²¹⁰ As he observes, “[T]he 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?”²¹¹ Common-law rights embody a particular

199. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

200. *Id.* at 577.

201. *See id.* at 560.

202. 578 U.S. 330 (2016).

203. 141 S. Ct. 2190 (2021).

204. *See id.* at 2205; *Spokeo*, 578 U.S. at 341.

205. *Spokeo*, 578 U.S. at 341.

206. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1120 (11th Cir. 2021) (Newsom, J., concurring) (quoting *Spokeo*, 578 U.S. at 341).

207. *Id.* at 1126 (quoting *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 957 (11th Cir. 2020) (Jordan, J., dissenting)).

208. *Id.* at 1127–28.

209. *Id.* at 1128.

210. *Id.* at 1129.

211. *Id.*

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.”²¹² 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.²¹³ Framed this way, Judge Newsom contends, the standing inquiry is coherent and administrable.²¹⁴ Claiming that only some rights violations count, on the other hand, is not.²¹⁵ Further, he argues, it has led to confusion and inconsistency in 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.²¹⁶

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.”²¹⁷ 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.²¹⁸ Were this all there was to his proposed 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.²¹⁹ But

212. *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, 2 (1960). Even then, Coase would counsel that 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.”).

213. *Sierra*, 996 F.3d at 1129–30 (Newsom, J., concurring).

214. See *id.* at 1130–31.

215. *Id.* at 1121.

216. See *id.* at 1116.

217. *Id.* at 1131.

218. *Id.*

219. 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. For instance, this approach need not accept the recognition of implied causes of action. Indeed, under recent doctrine, perhaps creating a cause of action would

that is not all there is to Judge Newsom’s proposal. He also suggests a limit on Congress’s ability to authorize suits²²⁰—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.”²²¹ 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.²²² 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.²²³ 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.²²⁴

Judge Newsom starts here with the “uncontroversial premise that certain kinds of lawsuits inherently involve the exercise of executive power,” whereas others do not.²²⁵ As characterized by

be deemed a “major question.” See generally Jonathan H. Adler, West Virginia v. EPA: Some Answers About Major Questions, 2022 CATO SUP. CT. REV. 37 (2022).

220. See *Sierra*, 996 F.3d at 1132 (Newsom, J., concurring).

221. *Id.*

222. Others have made this suggestion, albeit without claiming that such constraints are required by the original meaning of the Constitution’s text. See, e.g., Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 785 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1794–95 (1993); cf. Scalia, *supra* note 19, at 881–82.

223. U.S. CONST., art. II, § 1, cl. 1 (“the executive power shall be vested in a President of the United States”); *id.* at § 3, cl. 1 (“he shall take care that the laws be faithfully executed”).

224. *Sierra*, 996 F.3d at 1133 (Newsom, J., concurring) (“[*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.”).

225. *Id.* While this premise may not be “uncontroversial” among academics, it is well-supported by caselaw. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020) (characterizing “criminal investigations and prosecutions” as a “core executive power”); *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (“There is no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.”);

Newsom, criminal prosecutions are the most obvious example of the former, whereas common-law tort actions filed by one individual against another are the archetypal example of the latter.²²⁶ A single wrongful act could give rise to both kinds of suits, but they are distinct.²²⁷ 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.”²²⁸ 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.”²²⁹ As Newsom explains, the fundamental distinction is one between the rights of individuals to pursue justice, on the one hand, and (quoting Blackstone) the power to “put [the laws] in execution,” which entails “the right of punishing crimes.”²³⁰ 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.”²³¹ What is inherently executive is the authority to file (or decline to file²³²) suit on behalf of the public to see that laws are enforced and to obtain remedies that accrue to the public, including (but not limited to) obedience to law.

Buckley v. Valeo, 424 U.S. 1, 140 (1976) (executive power under Article II includes “conducting civil litigation in the courts of the United States for vindicating public rights”); *see also* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 532–33 (2005) (summarizing “judicial consensus” that prosecution is an executive function). *But see* William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 491 (1989) (“[T]here are no good reasons for considering criminal prosecutions as purely ‘executive’ in character.”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15–16 (1994) (“If the framers’ and early Congresses’ actual practice is any indication of their original understanding, then they did not understand prosecution to be within the notion of ‘executive Power’ exclusively, and therefore did not understand it to be within the exclusive domain of the President.”).

226. *Sierra*, 996 F.3d at 1133 (Newsom, J., concurring).

227. *Id.*; *see also id.* at 1135 (noting “conceptual dichotomy between actions of a personal nature and those of an executive nature”).

228. *Id.* at 1133.

229. *Id.*

230. *Id.* at 1134 (alteration in original) (quoting 4 BLACKSTONE, COMMENTARIES *7–8).

231. *Id.*

232. *See Heckler v. Cheney*, 470 U.S. 821, 832 (1985) (“the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch”).

Judge Newsom claims that the Vesting Clause bestows this exclusive authority upon the President and his subordinates.²³³ 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.”²³⁴ 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.’”²³⁵

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 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.²³⁶ Not every violation of every federal law may be worth the expenditure of limited resources to pursue, and making such determinations is in the exclusive province of the executive branch. As the Supreme Court put it “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”²³⁷

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

233. See *Sierra*, 996 F.3d at 1137 (Newsom, J., concurring) (“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”). 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).

234. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1292 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023).

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

236. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674–75 (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.* at 673.

237. See *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 233, at 1291.

necessarily public claims.²³⁸ 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.²³⁹ 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 unlawfully authorize him to exercise Article II “executive Power.”²⁴⁰

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.²⁴¹

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

238. See *Sierra*, 996 F.3d. at 1136 (Newsom, J., concurring) (“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 1135–36 n.14. Some scholars would also dispute Newsom’s claim. See, e.g., Lessig & Sunstein, *supra* note 225, at 21 (“nothing in principle would have stopped the framers from assigning the decision to prosecute someone . . . to private citizens”); see also Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers Intent*, 99 *YALE L.J.* 1069 (1990).

239. *Sierra*, 996 F.3d. at 1136 (Newsom, J., concurring).

240. *Id.*

241. 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 222, at 785.

basis upon which the case was decided.²⁴² This was because “the plaintiffs’ action sought to compel executive agencies to enforce the environmental laws in a particular manner,” thus impinging on the executive branch’s duty to “take Care that the Laws be faithfully executed.”²⁴³ 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.”²⁴⁴ The problem is that *Lujan* situated such limits in Article III as opposed to Article II.²⁴⁵

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.²⁴⁶ 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 plaintiffs), not to force federal enforcement or other action against private parties.²⁴⁷ 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.”²⁴⁸ While *Laufer* did not “seek[] to commandeer an Executive Branch agency and compel it to

242. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1289 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023); *see also Sierra*, 996 F.3d at 1132 (Newsom, J., concurring).

243. *Laufer*, 29 F.4th at 1289 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992)).

244. *Sierra*, 996 F.3d at 1132–33 (Newsom, J., concurring).

245. *See id.* at 1133 (“[T]he 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.”).

246. 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. *Lujan*, 504 U.S. at 587 (Stevens, J., concurring).

247. *Id.* at 587–89 (majority opinion).

248. *Laufer*, 29 F.4th at 1284 (Newsom, J., concurring).

regulate in a particular manner,” 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.²⁴⁹

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.²⁵⁰ While not a suit against the federal government seeking to force an agency’s hand, a tester suit of this kind 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.²⁵¹ The problem is not that a private suit would produce a public benefit, but rather that the suit would not produce any benefit to the plaintiff beyond vindicating an abstract right held by the public at large.²⁵²

The problem, as Newsom conceives of it, is that testers such as Laufer seek to “exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch.”²⁵³ Unlike executive branch officials, private testers are “not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant’s general compliance with regulatory law.”²⁵⁴ While such concerns generally arise in the context of criminal prosecutions,

249. *Id.* at 1289. In *Acheson Hotels v. Laufer*, the Supreme Court had the opportunity to consider this question but dismissed the case as moot. No. 22-429, slip op., at 3 (Dec. 5, 2023). This case involved another ADA suit filed by the same plaintiff. In a concurrence, Justice Thomas quoted Judge Newsom approvingly. *Id.* at 8 (Thomas, J., concurring) (citing *Laufer*, 601 U.S. at 1291 (Newsom, J., concurring) (“Yet, as Judge Newsom has explained, ‘[t]esters exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch,’ with none of the corresponding accountability.”)).

250. *See Laufer*, 29 F.4th at 1270 (Newsom, J., concurring) (noting Laufer “admits that she has (and had) no intention to visit the hotel”). 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.*

251. *See id.* at 1290 (“Without apology, Laufer considers herself a ‘private attorney general.’”).

252. *Id.* (“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 (majority opinion). According to Judge Newsom, this was sufficient to satisfy 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. *See id.* at 1297 (Newsom, J., concurring).

253. *See id.* at 1291.

254. *Id.* (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021)).

Judge Newsom concluded that civil-enforcement actions can present the same issue.²⁵⁵

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.²⁵⁶ 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.²⁵⁷ 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 likely satisfy this requirement. Those that raise questions under current Article III jurisprudence could likely be revised to satisfy these requirements, such as by expressly affording private rights to affected individuals and authorizing statutory damages or bounties for successful suit. In this fashion, a determined Congress might be able to ensure that Article II is rarely, if ever, a barrier to those citizen suits Congress wishes to facilitate. If necessary, the executive branch’s Article II prerogative could be further protected by ensuring the executive branch can intervene where necessary to protect federal interests.²⁵⁸ Yet if this is all that Article II requires, circumventing these limits may require little more than more careful and intentional drafting of statutory provisions.²⁵⁹

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,²⁶⁰ but it is not clear why such suits implicate the same Article II interests as does criminal law enforcement. Indeed, he has acknowledged that questions of case-by-case enforcement are distinct from “programmatic non-

255. *Id.* at 1291–92 (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.” (citing *In re Aiken Cnty.*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013))).

256. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1137 (11th Cir. 2021) (Newsom, J., concurring).

257. *Id.*

258. *See infra* notes 335–46 and accompanying text.

259. As Judge Newsom has acknowledged, it is possible that the Article II limitation he envisions would only prevent suit in “limited instances.” *See* Newsom, *Predictably Unpredictable*, *supra* note 18, at 1018.

260. *See Sierra*, 996 F.3d at 1132–33 (Newsom J., concurring) (proposing that Article II provides a better footing for the Supreme Court’s decision in *Lujan*).

enforcement.”²⁶¹ In these and other contexts, 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.²⁶² 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.²⁶³ 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.

261. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1294 n.3 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023) (“the historical sources seem to reflect a distinction between ordinary, case-by-case discretionary enforcement determinations, which Article II protects, and what I’ll call ‘programmatic’ non-enforcement, which it does not”); *id.* (“I readily confess, of course, that the distinction between case-by-case and programmatic non-enforcement could get a little fuzzy at the border, but that doesn’t render the line illusory.”).

262. For one example of what such a theory might look like, see Grove, *supra* note 222, at 782. 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. *Id.* at 784. For another approach to identifying Article II limits on standing, see Krent & Shenkman, *supra* note 222, at 1793–94.

263. 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.*, *United States v. Morrison*, 529 U.S. 598, 606 (2000) (civil cause-of-action for gender-motivated violence exceeded the scope of Congress’s enumerated powers); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) (Congress’s 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.

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* and *Laufer v. Arpan LLC*, Judge Newsom readily concluded that existing precedent recognizes the stigmatic injury caused by discrimination as sufficiently concrete to provide for standing even in the absence of other damages.²⁶⁴ 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).²⁶⁵ In *Laufer*, on the other hand, the plaintiff was a so-called “tester” who regularly visited hotel websites to monitor ADA compliance but had no plans to visit (let alone patronize) any of the hotels in question.²⁶⁶ 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.²⁶⁷

Because the ADA provides an express cause of action, both suits would satisfy the first part of Judge Newsom’s proposed standing test.²⁶⁸ 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.²⁶⁹ It is one thing for victims of discrimination to allege lost opportunities or other tangible harms. 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-

264. See *Sierra*, 996 F.3d at 1111–12; *Laufer*, 29 F.4th at 1270. Both 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 that are indisputably “concrete.”

265. *Sierra*, 996 F.3d at 1111–12.

266. *Laufer*, 29 F.4th at 1270.

267. See *id.* at 1270–71; *Sierra*, 996 F.3d at 1117.

268. See *Sierra*, 996 F.3d at 1139–40 (Newsom, J., concurring).

269. See *id.* at 1117.

law causes of action.²⁷⁰ Nonetheless, the Supreme Court has long held that prohibited discrimination imposes “serious non-economic injuries” to the victims of such conduct by stigmatizing them.²⁷¹

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 Hallandale never raised Article II in its defense.²⁷² 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 any other statute identifying and defining tortious conduct and providing a legal remedy.²⁷³ 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. As at common law, the same action may give rise to both public and private claims, and each is capable of producing the public benefit of greater adherence to the law.

Judge Newsom did raise the Article II concern in *Laufer*, however (albeit only in a concurrence to his own opinion for the court).²⁷⁴ Whereas Eddie Sierra filed suit after he was unable to obtain information about local government activities in his own community, Deborah Laufer surfed the internet in search of noncompliant firms.²⁷⁵ Whereas Sierra was in a position much like a common-law tort plaintiff, Laufer had taken it upon herself to identify and pursue

270. *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 for an intentional infliction of emotional distress claim. *Id.* at 1273.

271. *See, e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984); *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 382 (1982); *Allen v. Wright*, 468 U.S. 737, 753 (1984).

272. *Sierra*, 996 F.3d at 1140 (Newsom, J., concurring). 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.

273. *See Sierra*, 996 F.3d at 1112 (majority opinion) (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).

274. *Laufer*, 29 F.4th at 1283–84 (Newsom, J., concurring).

275. *See Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 263–64 (1st Cir. 2022), *cert. granted*, 144 S. Ct. 18, 22 (2023), *vacated and remanded*, 60 U.S. 1 (2023); *Laufer*, 29 F.4th at 1270; *Laufer v. Looper*, 22 F.4th 871, 874–75 (10th Cir. 2022); *Laufer v. Mann Hosp., LLC*, 996 F.3d 269, 271 (5th Cir. 2021); *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 158 (4th Cir. 2023).

those violating federal law, targeting hotels she had no intention of ever even attempting to visit.²⁷⁶ Whereas Sierra suffered an injury that prompted him to sue, Laufer sought out an injury that would facilitate a suit.²⁷⁷ A “tester” such as Laufer is not merely (or not exclusively) seeking to vindicate her own rights, so much as she is seeking to “exercise the sort of proactive enforcement discretion reserved to the Executive Branch.”²⁷⁸

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 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 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.²⁷⁹ As discussed below, Congress often creates causes of action authorizing individuals to obtain information.²⁸⁰ 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*

276. 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”).

277. *Id.* at 1291 (Newsom, J., concurring) (“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.”).

278. *Id.* at 1291. “Without apology,” Newsom noted, “Laufer considers herself a ‘private attorney general.’” *Id.*

279. *Id.* 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, 102 (1982)]”).

280. See *infra* notes 301–14 and accompanying text.

*Realty*²⁸¹ alleged, among other things, that the defendants had violated their “statutorily created right to truthful housing information.”²⁸² In particular, Sylvia Coleman alleged that Havens Realty had repeatedly told her that no apartments were available for rent and that this was untrue.²⁸³ This produced a judicially cognizable injury: “the denial of the tester’s own statutory right to truthful housing information caused by misrepresentation to the tester.”²⁸⁴

Although the primary purpose of civil rights statutes such as the ADA is not to generate information, that is one purpose that they serve. The ADA enables those with disabilities to obtain information about the extent to which their disabilities can or will be accommodated by public establishments. And if the text of the ADA, as currently written, does not sufficiently embrace this purpose, Congress could certainly revise such statutes to make the recognition of such a right and accompanying cause of action more explicit.²⁸⁵ If so, and if the authorization of suits seeking to vindicate rights to information is within Congress’s power,²⁸⁶ 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 FCRA, *TransUnion v. Ramirez* in particular.²⁸⁷ Judge Newsom is quite critical of the *TransUnion* decision for representing an unprincipled and indefensible historical approach to Article III standing.²⁸⁸ 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.”²⁸⁹ As noted, Judge Newsom would recognize standing “whenever the plaintiff has a cause of action.”²⁹⁰ This approach is historically grounded because, as Judge Newsom argued in both his *Sierra* and *Laufer* concurrences, “the constitutional term ‘Case’ . . . simply meant (and means) a cause of suit in court.”²⁹¹ A second

281. *Havens Realty*, 455 U.S. at 374.

282. *Id.*

283. *Id.* at 368.

284. *Id.* at 375.

285. *See Laufer*, 29 F.4th at 1280 (Jordan, J., concurring) (“[I]n 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.”).

286. *See supra* note 262.

287. *See supra* notes 106–32 and accompanying text.

288. *See Laufer*, 29 F.4th at 1287 (Newsom, J., concurring).

289. *Id.*

290. *Id.* (quoting *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring)).

291. *Id.* (quoting *Sierra*, 996 F.3d at 1123).

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 close analogues to such suits.²⁹² 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.²⁹³

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.²⁹⁴ FCRA further created an express cause of action for individuals to bring suit for statutory damages where these legislatively created rights were violated.²⁹⁵ Some of the rights at issue here are procedural, to be sure. 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,²⁹⁶ and “each class member established a violation of his or her private rights” with regard to information about them.²⁹⁷ As such, it appears 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 seem 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,

292. *Id.* at 1288.

293. *Id.*

294. 15 U.S.C. § 1681.

295. *Id.* § 1681p.

296. 141 S. Ct. at 2218 (Thomas, J., dissenting).

297. *Id.*

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.²⁹⁸ This has generally been recognized as sufficient for standing.²⁹⁹ Where federal statutes require that private parties disclose information to the government or the public, however, it may be more difficult to demonstrate standing under Judge Newsom's proposed Article II limitation.

The Emergency Planning and Community Right-to-Know Act ("EPCRA") requires covered facilities to report information about the use and storage of potentially hazardous materials and to disclose such information to local authorities.³⁰⁰ EPCRA is primarily enforced by the Environmental Protection Agency, which is authorized to seek criminal, civil and administrative penalties.³⁰¹ 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.³⁰²

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.³⁰³ 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

298. 5 U.S.C. § 552.

299. *See* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 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.").

300. 42 U.S.C. §§ 11021–23.

301. *Id.* §§ 11045, 11049.

302. *Id.* § 11046(a)(1). EPCRA also expressly provides for enforcement by state and local governments. *See id.* at § 11046 (a)(2), (c).

303. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105–07 (1998).

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*. 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 candidates for public office and organize their own political activities.³⁰⁴ 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.”³⁰⁵ While the dissenters and the government thought the plaintiffs were merely raising a “generalized grievance,”³⁰⁶ the Court’s majority found the asserted injury to be sufficiently concrete to constitute an injury in fact.³⁰⁷

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.³⁰⁸

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.

304. *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998).

305. *Id.* at 22.

306. *Id.* at 34–35 (Scalia, J., dissenting).

307. *Id.* at 24–25 (majority opinion).

308. *Cf. Prisology v. Fed. 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).

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),³⁰⁹ 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.³¹⁰

Qui tam actions are a “unique private-public scheme” for enforcing federal law.³¹¹ *Qui tam* provisions authorize private individuals—called “relators”—to file suit “in the name of the Government” to enforce federal law.³¹² There are several *qui tam* provisions in the U.S. Code, the most prominent being that in the False Claims Act.³¹³ 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.³¹⁴ The government also retains the right to dismiss the suit, even if the government does not initially intervene in the case.³¹⁵ If the suit is successful, the relator receives a substantial share of the penalties assessed or eventual settlement,

309. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (noting “the long tradition of *qui tam* actions in England and the American colonies”); See generally Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989) (surveying the history); Sarah Leitner, *The Private-Rights Model of Qui Tam*, FLA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4558341.

310. See, e.g., Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, 209–10 (1989) (authored by William P. Barr, Assistant Attorney General, Office of Legal Counsel); James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J. L. & PUB. POL'Y 701, 702–03 (1993); Woolhandler & Nelson, *supra* note 42, at 731 (noting the “dangers” of allowing “self-appointed” individuals to exercise prosecutorial discretion). But see Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 367 (1989).

311. *United States ex rel. Polansky v. Exec. Health Res.*, 143 S. Ct. 1720, 1727 (2023).

312. 31 U.S.C. §§ 3730(b), 3733(a)(1).

313. 31 U.S.C. §§ 3729–33; see also Robin Kundis Craig, *Will Separation of Powers Challenge “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, 142 (“the most commonly used *qui tam* provision is that in the FCA”). There is also a *qui tam* provision in the Indian Protection Act. See 25 U.S.C. § 201.

314. U.S. Dep't of Just., Crim. Res. Manual § 932 (2020).

315. See *United States ex rel. Polansky v. Exec. Health Res.*, 143 S. Ct. 1720, 1727 (2023).

in addition to their costs and attorney's fees.³¹⁶ *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.³¹⁷

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.³¹⁸ The Court left open, however, whether such suits might violate Article II.³¹⁹ 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.³²⁰ More recently, these concerns have been embraced by Justice Thomas.³²¹

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.”³²² Such mechanisms were but one example of how early Congresses “assigned some criminal law enforcement responsibility outside of the Executive's control altogether.”³²³

In his *Sierra* concurrence, Judge Newsom acknowledges that “the existence of *qui tam* actions offers some counterevidence against a

316. *Id.* at 1728.

317. See Craig, *supra* note 313, 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 assessed and bring suit in the name of the government, instead of on their own behalf. *Id.*

318. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000). Indeed, the Court was unanimous on this point.

319. See *id.* at 778 n.8.

320. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

321. *United States ex rel. Polansky v. Exec. Health Res.*, 143 S. Ct. 1720, 1737 (2023) (Thomas, J., dissenting) (noting “serious constitutional questions” about *qui tam* litigation); see also *id.* (Kavanaugh, J., concurring) (suggesting Court should consider “competing arguments” on the compatibility of *qui tam* with Article II).

322. See Krent, *supra* note 309, 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.”). For a broader discussion of how federal prosecutions were handled prior to the creation of the modern Department of Justice, see Jed. H. Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 128–35 (2014).

323. See *id.* at 290.

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.”³²⁴ After all, the ability of a private litigant who has suffered no personal injury herself to decide when and whether to seek enforcement of a federal law would seem to epitomize the delegation of law enforcement responsibility to a private party. But perhaps *qui tam* suits are an “idiosyncratic exception to the general rule that private parties can’t exercise executive power.”³²⁵ One reason *qui tam* suits may be permissible under Article II is that the executive branch retains the ability to terminate such suits and end their prosecution.³²⁶ Under some early *qui tam* statutes and the False Claims Act (FCA) today, the executive branch retains substantial authority to intervene and, if necessary, end the prosecution of such suits.³²⁷

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 suit 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 of permitted limits.³²⁸ Before commencing such a suit, however, a prospective citizen suit plaintiff must provide the EPA (and the regulated entity) with notice.³²⁹ This provides the regulated entity with an opportunity to cure the regulatory violation before a suit is filed.³³⁰ This notice requirement also provides the EPA (or the relevant state agency, if one is enforcing the federal program) with the opportunity to preclude the citizen suit altogether by initiating its

324. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1135 n.14 (2021) (Newsom, J., concurring).

325. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1294 n.4 (2022), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023).

326. *Sierra*, 996 F.3d at 1135 n.14 (Newsom, J., concurring).

327. *Id.*; *see also* *United States ex rel. Polansky v. Exec. Health Res.*, 143 S. Ct. 1720, 1735 (2023).

328. *See* 33 U.S.C. § 1365(a)(1).

329. *Id.* at (b)(1).

330. *See* *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 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”).

own enforcement action.³³¹ 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.³³²

A potentially important distinction between *qui tam* suits, such as those 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.³³³ This preserves the executive branch's ability to fully exercise its prosecutorial discretion and decline to prosecute where the executive believes pursuing enforcement is unwarranted or represents a poor use of resources.³³⁴ This is true even if the federal government delays its decision to intervene.³³⁵ 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.³³⁶ 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. In this way, the CWA constrains prosecutorial discretion.

If a statutory requirement that the executive branch must actively or fully enforce a regulatory provision in order to take over or displace a citizen suit represents too great a constraint on the executive branch's inherent enforcement discretion, there would seem to be an easy legislative fix. Statutes such as the CWA that contain such provisions could be revised to replicate the *qui tam* model, such as by providing that the initial citizen suits are filed on behalf of the government and allowing the relevant federal agency (here the EPA) to terminate the prosecution of regulatory offense after intervening in the suit.³³⁷

331. See 33 U.S.C. § 1365(b)(1)(B) (providing that "[n]o 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").

332. *Id.* § 1365(c)(2).

333. United States *ex rel.* Polansky v. Exec. Health Res., 143 S. Ct. 1720, 1727 (2023).

334. Of course the executive branch will expend time and other resources monitoring such suits, determining whether intervention is warranted and intervening, but these represent less significant incursions on core executive power than directing the section of litigation.

335. *Polansky*, 143 S. Ct. at 1727.

336. See 33 U.S.C. § 1365(b)(1)(B).

337. 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

E. Taxpayer Suits

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.³³⁸ Going back to *Massachusetts v. Mellon*,³³⁹ 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.³⁴⁰ The plaintiff's interest in such a case is "minute and indeterminable."³⁴¹ Further, "the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain" makes it difficult to identify an injury in fact, let alone an injury that could be redressable.³⁴² This is true whether the suit targets appropriations or tax expenditures and is filed by a federal taxpayer or a state taxpayer.³⁴³

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

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 that ensures political accountability for prosecutorial decisions.

338. 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, 88 (1968). That this exception remains narrow was confirmed in *Hein v. Freedom from Religion Foundation*, 551 U.S. 587, 593 (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).

339. 262 U.S. 447 (1923).

340. *Id.* at 487.

341. *Id.*

342. *Id.*

343. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343–45 (2006).

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.³⁴⁴ And insofar as such a suit were to challenge administrative misconduct, it would rest on the same footing as *qui tam* litigation.³⁴⁵ 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.³⁴⁶ 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,”³⁴⁷ even though *Lujan* did not involve the sort of case-by-case enforcement discretion characterized as lying at the core of executive branch authority.³⁴⁸ This approach could have a dramatic effect on environmental citizen suits, both those that seek to encourage greater enforcement of and compliance with federal environmental law.

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.”³⁴⁹ The ESA did not purport to create private rights in wildlife. The

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

345. 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 were standing constrained by Article II in the way that Judge Newsom suggests.

346. See Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 200 U. ILL. L. REV. 185, 185 (2000) (noting the importance of citizen suits in federal environmental law).

347. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1289 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023).

348. See *infra* notes 357–73 and accompanying text.

349. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1137 (Newsom, J., concurring) (11th Cir. 2021).

named plaintiff was Defenders of Wildlife, not owners of wildlife seeking to protect their own animals from harm caused by federal policy. The plaintiffs did not seek to vindicate their own interests so much as they wanted federal law to be enforced in accordance with Congress's commands. They wanted the executive branch to execute this particular law more faithfully.³⁵⁰

Because the suit was more focused on ensuring compliance with federal law than it was on 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.³⁵¹ 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* and *Summers v. Earth Island Institute*.³⁵² 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 major environmental laws in order to guard against potential executive branch underenforcement.³⁵³ In *Lujan*, the question was

350. 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 19, at 897 (acknowledging his approach would allow “important legislative purposes, heralded in the halls of 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 Hous. 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”).

351. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring).

352. 555 U.S. 488 (2009).

353. See Sunstein, *supra* note 12, at 165 (observing citizen suits are “a mechanism for controlling unlawfully inadequate enforcement of the law”); Craig, *supra* note 313, at 94; 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*

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—and there is no reason such effects would be limited to environmental law.

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 complete, environmental impact statements before undertaking major actions "significantly affecting the quality of the human environment."³⁵⁴ 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*³⁵⁵ 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.³⁵⁶ 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.³⁵⁷ 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*, 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.³⁵⁸ This would not affect

Citizens?, 54 MD. L. REV. 1552, 1555 (1995) (discussing the reasons for enacting environmental citizen suit provisions).

354. 42 U.S.C. § 4332(C).

355. 405 U.S. 727 (1972).

356. *Id.* at 734–35.

357. See Baude, *supra* note 5, at 229.

358. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 181 (2000).

the existence of the cause of action expressly authorized under the CWA. 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 where fines are also paid to the Treasury, and there is no bounty paid to the plaintiffs.³⁵⁹ While there are statutory causes of action in nearly all such cases, few could be 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.³⁶⁰

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"³⁶¹ than was Justice Scalia's *Lujan* 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.³⁶² Existing pollution control laws do not 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 CWA (and is sufficient for Article III standing).³⁶³ Yet one could

359. For a recent example still in litigation, see *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 47 F.4th 408, 418 (5th Cir. 2022), *reh'g en banc granted*, 61 F.4th 1012 (2023).

360. 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.

361. See *Lujan v. Defs. 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.").

362. For consideration of similar ideas in the context of *Lujan*, see Adler, *supra* note 101, at 69–82.

363. See *Friends of the Earth*, 528 U.S. at 181.

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 in local environmental resources held by local residents, the violation of which would create a cause of action that could provide the basis for a suit in federal court. Statutory remedies could also be designed so as to ensure that plaintiffs are not merely suing for benefits that would accrue to the public as a whole. 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 with 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*, however.

Another alternative might be to include statutory provisions that replicate the law of public nuisance. That is, pollution control laws could 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 the National Environmental Policy Act ("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.³⁶⁴

364. 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* 56, 60–68 (T. Henderson ed., 2018) (discussing potential of property rights to protect environmental resources);

G. *Special Solitude 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.³⁶⁵ As explained by Justice Stevens in *Massachusetts v. EPA*, such solicitude compensates for the fact that states “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.³⁶⁶ 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.³⁶⁷ Thus, Justice Stevens reasoned, states should receive a “special solicitude” when seeking to vindicate their interests in suits against the federal government.³⁶⁸ 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.³⁶⁹

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

Jonathan H. Adler, *Free and Green: A New Approach to Environmental Protection*, 24 HARV. J.L. PUB. POL’Y 653, 667–76 (2001) (same); Jonathan H. Adler & Nathaniel Stewart, *Learning How to Fish: Catch Shares and the Future of Fishery Conservation*, 31 UCLA ENV’T. L. & POL’Y REV. 150, 168–73 (2013) (discussing how property rights in fishery resources enhance conservation and outperform traditional regulations); Jonathan H. Adler, *Taking Property Rights Seriously: The Case of Climate Change*, 26 SOC. PHIL. & POL’Y 296, 312–16 (2009) (discussing role of property rights in climate change).

365. 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).

366. *Id.*

367. *Id.*

368. *Id.* at 520.

369. 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, 11:55 AM), <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: J. OF FEDERALISM, 469, 470, 488 (2018) (discussing pattern of state attorney general lawsuits against federal policies).

any, such special solicitude should play.³⁷⁰ 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.³⁷¹

As with many of the other examples discussed, 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, Congress could choose whether to include states among those authorized to bring suit, as it has done under some statutes.³⁷² 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 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.³⁷³ 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

370. After recent decisions such as *United States v. Texas*, it is also not clear what role "special solicitude" continues to play in the Supreme Court's own analyses. 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., dissenting) (suggesting that "special solicitude" has not played "a meaningful role" in the Court's decisions since *Massachusetts v. EPA*). Some scholars suggest that "special solicitude" may not ever have had much effect in other cases. See Katherine Mims Crocker, *Not-So-Special Solicitude* 1–2 (Jan. 31, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4713677.

371. See Robert D. Cheren, *Environmental Controversies "Between Two or More States"*, 31 PACE ENV'T L. REV. 105, 177–78 (2014).

372. See, e.g., 42 U.S.C. § 11046 (a)(2), (c).

373. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring).

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 by 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.³⁷⁴

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 provides self-evident.³⁷⁵ This is particularly true without a clear theory identifying what it is about Article II that bars private suits to enforce federal law (whether or not such a theory is grounded in the original public meaning of the Constitution's text). Scholars have hypothesized constitutional limits on the standing that derive from Article II.³⁷⁶ Judge Newsom, for his part, has suggested that a robust theory of Article II is not necessary for his approach to work. Yet such a theory would seem to be essential if there is to be a coherent and judicially administrable limit on Congress's ability to define private rights and authorize suit for their enforcement.

Particularly without a governing theory, identifying the precise line between a suit to enforce a legitimate legislative recognized private 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 can Congress not 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? Are judges to engage in a purposivist inquiry to determine whether the legislation in question was intended more to create true private rights than to ensure the greater enforcement of federal law for public benefit? And would judges also be called to consider the motivations

374. One question that 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.

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

376. See *Grove*, *supra* note 222, at 785–92; Krent & Shenkman, *supra* note 222, at 1810–22.

of individual plaintiffs to determine whether their motivations are sufficiently not-public spirited? Setting such inquiries aside, if there is no constitutional barrier to recognizing stigma, 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.³⁷⁷ 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 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 *qui tam* litigation, would address such concerns to some extent, but this might also be vulnerable to careful legislative drafting. Allowing the executive branch to intervene would prevent private litigants from over-riding the executive branch’s judgment about how, when, and how stringently to enforce federal law, but it would still influence executive branch resource allocation and enforcement decisions on the margin, as even monitoring and responding to private suits is not cost-free.

Professor Grove has suggested that the proper Article II limit on standing is a limit on the ability of Congress to authorize private

377. 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 generally Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083 (2023); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323 (2022); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022); 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); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (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 L.J. 1288 (2021); Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2020); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019).

individuals to assert “abstract grievances, such as the ‘injury to the interest in seeing that the law is obeyed,’ that would allow her to sue any person, anywhere in the country, for any violation of law.”³⁷⁸ 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.”³⁷⁹ On this basis, there would be no standing in cases such as *Laufer* or *FEC v. Akins*, as both implicate “private liberty.”³⁸⁰ But Professor Grove’s theory would not necessarily preclude a suit such as that in *Lujan*, provided that an injury could be shown, as *Lujan* did not involve an effort to deploy government power against private parties. Rather, it was an effort to force government agencies to comply with federal law in funding and implementing federal programs.³⁸¹ Thus, Professor Grove’s theory 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.³⁸² 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.³⁸³ 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.

378. Grove, *supra* note 222, at 783.

379. *Id.* at 784.

380. *Id.* at 785.

381. 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.

382. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 346 (2016) (Thomas, J., concurring); *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615, 1623 (2020) (Thomas, J., concurring); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2220 (2021) (Thomas, J., dissenting); *Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18, 22 (2023) (Thomas, J., concurring in the judgment). Other judges have also expressed sympathy for this approach. *See Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 970–73 (11th Cir. 2020) (Jordan, J., dissenting); *Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 290–91 (6th Cir. 2018) (Thapar, J., concurring). *See also* Baude, *supra* note 5, at 229 (“The historical categories of public and private rights, though not of crystalline purity, seem more workable and more apt than the Court’s struggle to define some injuries as ‘real’ and ‘concrete.’”).

383. *See Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (“My reservation about the rights-based framework has been its constitutional source.”).

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 jurists and 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 be applied, and some justices seem to think the doctrine should evolve in competing directions.³⁸⁴ The Court's majority seems intent on ratcheting down on standing, but this is producing anomalies in the law and disagreement from some justices.

At times, standing requirements—the injury-in-fact requirement in particular—have been disparaged as nothing more than a demand for “careful pleading.”³⁸⁵ In this view, injury in fact is a hurdle readily overcome by the careful selection of plaintiffs and curation of affidavits. In *Lujan* itself, Justice Kennedy suggested the plaintiffs would have had standing if only Joyce Kelley or Amy Skilbred had purchased a plane ticket so that their alleged injuries would occur on a certain.³⁸⁶ No doubt Justice Scalia's formulation of standing's requirements in *Lujan* and subsequent decisions demanding more “concrete” injuries are meant to erect a barrier harder to clear through pleading alone. It is this effort that has generated the incoherence and inconsistent application that concerns Judge Newsom and injury's critics.

Eliminating injury as a requirement for standing in favor of a mere cause of action may do little more than shift the drafting obligation to Congress, where artful crafting of citizen suit provisions will be sufficient to ensure plaintiffs have the opportunity to sue. This would solve the problems of incoherence and unworkability, but it would do so at the cost of giving Congress the power to throw open the courthouse doors. Erecting a new hurdle through Article II would restore a constraint on standing, but it risks recreating the very problems the elimination of injury is meant to solve. Absent a robust,

384. Compare *TransUnion*, 141 S. Ct. at 2200 (majority opinion), with *id.* at 2220 (2021) (Thomas, J., dissenting).

385. See Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1516 (2008) (stating that *Lujan v. National Wildlife Federation* “clearly signaled a more restrictive attitude toward standing, but did not represent so much a shift in doctrine as a demand for more careful drafting of affidavits”).

386. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring) (“While it may seem trivial to require that Ms. 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, nor do the affiants claim to have visited the sites since the projects commenced.”).

textured theory of what Article II preserves, an Article II standing inquiry promises to generate its own inconsistencies and difficulties as judges seek to identify when legislatively created rights are sufficiently private to withstand scrutiny. This new gospel may not be preferable to the old, but that alone will not stop a reformation.