

STANDING, INJURY IN FACT, AND PRIVATE RIGHTS

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Under current law, a plaintiff has standing to bring suit only upon alleging an injury in fact. The Supreme Court has noted that this factual injury requirement is necessary to preserve the separation of powers by limiting courts to their historical function of resolving only the rights of individuals. But, despite this stated purpose, the Court has required a showing of injury in fact in actions where a plaintiff alleges the violation of a private right, that is, a right conferred by law on private individuals. This Article argues that the injury-in-fact requirement is superfluous in such actions. Yet the Court has not distinguished such cases and has denied standing in cases alleging the violation of private rights. As this Article shows, requiring a showing of factual injury in private rights cases is ahistorical and actually undermines the separation of powers by preventing the courts from guarding rights and by limiting Congress’s power to create rights.

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INTRODUCTION

The Supreme Court has told us that the case or controversy requirement of Article III restricts the judiciary to resolving only those cases “of the sort traditionally amenable to, and resolved by, the judicial process.”¹ One of the doctrines the Court has developed to preserve this traditional limitation on the judicial process is standing. Under modern standing law, a private plaintiff seeking to bring suit in federal court must demonstrate that he has suffered “injury in fact,” that the injury is “fairly traceable” to the actions of the defendant, and that the injury will “likely be redressed by a favorable decision.”²

Although seemingly simple on its face, this doctrine has produced an incoherent and confusing law of federal courts.³ One reason for this incoherence is that the Court originally developed the injury-in-fact requirement to facilitate access to the judiciary—precisely the opposite purpose to which it is now put. Standing developed principally at the hands of Justices Brandeis and Frankfurter in an effort to protect progressive legislation from judicial attack and to prevent the Court from unnecessarily passing on constitutional questions. The Court limited standing to those plaintiffs who had suffered the invasion of a private right. In 1970, the Court abandoned this legal-interest test, finding that the test was overly restrictive and prevented judicial intervention necessary to stop illegal government conduct.⁴ To facilitate access to the federal courts, the Supreme Court held that a litigant’s standing depended on the showing of a factual injury rather than the invasion of a legal right.⁵

In its more recent efforts to restrict access to the judiciary, the Court has not abandoned the injury-in-fact test. Instead, a desire to

¹ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998).

² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (explaining that the constitutional minimum of standing contains three elements: (1) an injury in fact (2) that is both fairly traceable to the defendant and (3) that a favorable decision will redress); *accord* *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

³ For criticisms of this area of the law, see, e.g., Susan Bandes, *The Idea of a Case*, 42 *STAN. L. REV.* 227, 227–29 (1990); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 *N.Y.U. L. REV.* 1, 6–8 (1984); William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 221–24 (1988); Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 *CAL. L. REV.* 315, 315–16 (2001); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 *MICH. L. REV.* 2239, 2246 (1999); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 *CAL. L. REV.* 1915, 1918–19 (1986); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 *CORNELL L. REV.* 393, 397–99 (1996); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 *U. PA. L. REV.* 613, 639–41 (1999); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *STAN. L. REV.* 1371, 1374 (1988).

⁴ *See* *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

⁵ *See* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 *MICH. L. REV.* 163, 183–86 (1992).

limit private individuals' ability to invoke the judiciary to vindicate public rights has motivated the Court to limit the types of factual injuries that support standing. According to the Court, private individuals may invoke the judiciary only to resolve their private disputes.

Although commentators have discussed and criticized the injury-in-fact test, they have done so almost exclusively in the public law context.⁶ They have generally assumed that the injury-in-fact requirement poses no obstacle to suits alleging violations of private rights.⁷ But this is not so. In requiring a factual injury to limit standing in public rights cases, the Court has failed to distinguish cases in which plaintiffs seek to vindicate violations of their private rights. The Court has instead proclaimed a one-size-fits-all standing doctrine. The consequence is that plaintiffs no longer have standing to bring claims based solely on the violation of their personal rights; they must demonstrate that some factual harm resulted from the violation.

In imposing this restriction, the Court has put the cart before the horse. The purpose of the factual injury requirement is to ensure that plaintiffs are asserting their own private rights. The requirement therefore is superfluous in cases alleging the violation of a private right. And, contrary to the Court's contention, it is also historically unwarranted. Early American courts followed the rule, as the Supreme Court first noted in *Marbury v. Madison*, "that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."⁸ That rule has ancient roots tracing back through Blackstone and the early common law. Thus, although the Court has claimed that its standing requirements are necessary to preserve the traditional limits on the judiciary, those requirements have precluded claims that courts historically would have permitted.

This Article argues that, whatever the virtue of limiting the judiciary's role in the vindication of public interests, the restriction on a

⁶ See, e.g., Abram Chayes, *The Supreme Court, 1982 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 14–15 (1982) (discussing the Supreme Court's application of standing to public law); Fallon, *supra* note 3, at 3–5 (discussing private suits for prospective injunctions against public institutions); Gilles, *supra* note 3, at 341–55 (discussing private enforcement of public interests through *qui tam* actions); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1368–69 (1973) (arguing that standing has evolved to accommodate public law actions); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1461–69 (1988) (criticizing the application of the injury-in-fact requirement in challenges of administrative actions); Sunstein, *supra* note 5, at 191–92 (criticizing standing limitations on citizen-suit actions).

⁷ See, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3, at 68 (4th ed. 2003). ("The law is clear that injuries to common law, constitutional, and statutory rights are sufficient for standing."); cf. Monaghan, *supra* note 6, at 1377 ("[W]here private rights are involved Article III or other provisions of the Constitution might guarantee private parties access to some court on constitutional questions." (emphasis omitted)).

⁸ 5 U.S. (1 Cranch) 137, 163 (1803) (internal quotation marks omitted).

litigant's ability to seek redress in the courts for a violation of a private right is ahistorical and unjustified. Part I describes the distinction between private rights and public rights. It explains that, historically, individuals were entitled to relief for violations of private rights, regardless of whether they suffered any additional injury in fact, and that this practice continues today through the awarding of nominal damages. Part II begins by providing a brief overview of the development of the standing doctrine. It recounts that the Court developed standing to limit private litigants to asserting only their private rights in court; that during the mid-twentieth century, the Court abandoned this private rights limitation in favor of a quasi-public rights model that extended standing to any individual who suffered injury in fact; and that more recently, the Court has again sought to restrict standing by limiting the types of injuries that suffice for standing and by introducing the cognizability requirement. Part II then explores the incoherent results arising from the Court's standing doctrine. It explains that the incoherence is attributable in part to the fact that the Court designed the injury-in-fact test to expand standing beyond cases involving private rights and that the Court now uses it largely as a proxy to ensure that a plaintiff is asserting a private right. It also explains that injury in fact is superfluous in private rights cases because private rights cases have no need for such a proxy. Part II concludes by examining the cognizability requirement. It explains that the Court has given different content to the cognizability requirement in different circumstances. On occasion, the Court has indicated that the requirement reintroduces the private rights standard, while other times the Court has indicated that it merely requires a material, tangible harm. Part III demonstrates that one consequence of the Court's failure to distinguish private rights cases has been to limit standing in such actions. Part IV addresses some of the arguments supporting an injury-in-fact requirement and ultimately concludes that none of the arguments justify limiting standing in private rights cases.

I

PRIVATE AND PUBLIC RIGHTS

Article III of the Constitution extends the judicial power to resolving "Cases" and "Controversies." But the Constitution does not define those terms. Nor does the Constitutional Convention provide any insight. The only evidence on the matter is James Madison's statement that the judicial power ought "to be limited to cases of a Judiciary Nature."⁹ The Supreme Court has largely turned to the common

⁹ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed. 1966).

law to glean the meaning of Article III. For example, the Court has stated that the “Cases” and “Controversies” provision in Article III limits the judicial power to resolving disputes that were “traditionally amenable to, and resolved by, the judicial process.”¹⁰ According to the Supreme Court, standing is necessary to confine the judiciary to resolving such disputes¹¹ and therefore to preserve the separation of powers.¹²

Under early English and American practice, a private individual could bring suit only to vindicate the violation of a private, as opposed to a public, right. An individual who demonstrated the violation of a private right, however, did not have to demonstrate that the violation had resulted in some other factual harm: the violation alone entitled the plaintiff to relief. The Supreme Court has continued to distinguish between public and private rights in a number of contexts. And, in some cases, it has adopted the common-law default rule that the violation of a right alone entitles the victim to nominal damages.

A. Private Rights in Early English and American Cases

The law has long distinguished between “public rights” and “private rights.” Blackstone defined public rights as those rights held collectively by the community.¹³ They include the right to navigate the public waters of the state and to fish therein, to use the public high-

¹⁰ *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)); *see also Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (stating that the terms “The judicial Power,” “Cases,” and “Controversies” have “virtually no meaning except by reference” to “the traditional, fundamental limitations upon the powers of common-law courts”); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (“[The Constitution established that j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”); *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (defining a “case” as “a suit instituted according to the regular course of judicial procedure”).

¹¹ *See DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (“Article III standing . . . enforces the Constitution’s case-or-controversy requirement.” (alteration in original) (internal quotation marks omitted)).

¹² *See Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2569 (2007) (plurality opinion); *id.* at 2583 (Scalia, J., concurring in the judgment) (noting the “vital separation-of-powers aspect of Article III standing”); *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 750 (1984).

¹³ *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *5 (referring to “the public rights and duties, due to the whole community, considered as a community, in it []s social aggregate capacity”); *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 568–70 (2007) (discussing the distinction between private and public rights).

ways,¹⁴ and to be free from violations of the criminal laws.¹⁵ The legislature could restrict and regulate these rights¹⁶ and could create new rights by enacting new regulations or criminal statutes.¹⁷ A violation of a public right was a public wrong; the king was the only one injured by such a violation, and he was the proper prosecutor.¹⁸

By contrast, private rights are those rights held by individuals. Blackstone explained that private rights included the “absolute” rights of personal security, life, liberty, and property,¹⁹ as well as “relative” rights which individuals acquired “as members of society, and standing in various relations to each other.”²⁰ The victim of a private wrong could seek a remedy by bringing the appropriate form of action, such as a writ of trespass or a writ of trespass on the case.²¹ Factual injury (damnum) alone was not sufficient to warrant judicial intervention; rather, a person could maintain a cause of action only if he suffered a legal injury, that is, the violation of a legal right (injuria). A factual

¹⁴ See *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829) (“The right to navigate the public waters of the State and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large.”). See generally Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693–95 (2004) (discussing the distinction between public and private rights).

¹⁵ See 4 BLACKSTONE, *supra* note 13, at *5; FRANCIS PLOWDEN, *JURA ANGLORUM* 484 (London, R. & R. Brooke 1792).

¹⁶ See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829); *Atkinson v. Phila. & T. R. Co.*, 2 F. Cas. 105, 108 (C.C.E.D. Pa. 1834) (No. 615) (“Laws in relation to roads, bridges, rivers and other public highways, which do not take away private rights to property, may be passed at the discretion of the legislature, however much they may affect common rights.”); *Rogers v. Jones*, 1 Wend. 237, 260–61 (N.Y. Sup. Ct. 1828).

¹⁷ See Woolhandler & Nelson, *supra* note 14, at 694.

¹⁸ See 4 BLACKSTONE, *supra* note 13, at *2. The one possible exception was the *qui tam* action, in which a private individual could bring suit to prosecute fraud on the government. Commentators have debated the significance of these actions, with some arguing that *qui tam* actions establish that there is no restriction whatsoever on private individuals enforcing public rights, see, e.g., Sunstein, *supra* note 5, at 175–76, and others arguing that such actions were *sui generis*, see, e.g., Woolhandler & Nelson, *supra* note 14, at 727. For its part, the Supreme Court explained that the relator is vindicating the government’s rights, which have been assigned to the relator. See *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 768–69 & n.1 (2000).

¹⁹ See 1 BLACKSTONE, *supra* note 13, at *117–41; 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW I* (O.W. Holmes, Jr., ed., 12th ed., Boston, Little, Brown & Co. 1873) (“The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable.”).

²⁰ 1 BLACKSTONE, *supra* note 13, at *119.

²¹ See WILLIAM BLACKSTONE, *TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND* 15 (3d ed., Oxford, Clarendon Press 1771) (discussing “[t]he remedial [part of law]; or method of recovering private rights, and redressing private wrongs”); WILLIAM BOHUN, *THE ENGLISH LAWYER* 109 (London, E. & R. Nutt 1732) (listing various actions); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 6 (5th ed. 1984); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 547–48 (2005).

harm without a legal injury was *damnum absque injuria* and provided no basis for relief.²²

While factual injury alone was never sufficient to warrant redress, legal injury alone was adequate for some actions. For example, in an action for trespass, which was the appropriate action to remedy a direct, forcible invasion of a right, a plaintiff needed to prove only the violation of a legal interest.²³ Although the forcible invasion of the right frequently resulted in damage, proof of actual harm was unnecessary. The essence of the claim was in the invasion of the right. An early example of this rule is the 1348 case of *I de S et ux. v. W de S*.²⁴ There, a woman brought suit against a man who tried to strike her head with a hatchet.²⁵ The court found for the woman even though the assailant missed and consequently did “no other harm” than the trespass itself.²⁶ In the fifteenth century, *Hulle v. Orynge* held that an individual could maintain an action in trespass against a neighbor who had entered the land to collect thorns that had blown onto the land, even though the entry had caused no damage.²⁷ Courts would award nominal damages for the proof of a violation of a right when the plaintiff failed to prove harm.²⁸

But legal injury was not sufficient for all actions. For example, to maintain an action on the case, which was the appropriate action for the indirect invasion of a right,²⁹ the plaintiff needed to demonstrate both legal injury and damage.³⁰ The distinction between actions for trespass and actions on the case began to collapse in the early eight-

²² See 1 THEODORE SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* § 32, at 28 (Arthur G. Sedgwick & Joseph H. Beale eds., 9th ed. 1920) (“There must not only be loss, but it must be injuriously brought about by a violation of the legal rights of others.”).

²³ See RALPH SUTTON, *PERSONAL ACTIONS AT COMMON LAW* 57 (1929) (explaining that damage is presumed in trespass actions).

²⁴ *I de S et ux. v. W de S*, Y.B.Lib.Ass. folio 99, placitum 60 (Assizes 1348), reprinted in WILLIAM L. PROSSER & JOHN W. WADE, *CASES AND MATERIALS ON TORTS* 36 (5th ed. 1971).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *Hulle v. Orynge*, Y.B. 6 Edw. 4, fol. 7, Mich, pl. 18 (1466), reprinted in A.K.R. KIRALFY, *A SOURCE BOOK OF ENGLISH LAW* 128–32 (1957); 3 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 299–300 (discussing *Hulle*).

²⁸ See, e.g., *Robinson v. Lord Byron*, 2 Cox 4, 30 Eng. Rep. 3, 3 (1788) (awarding nominal damages where the plaintiff proved that the riparian rights had been invaded but failed to offer proof of damage); *Greene v. Cole*, 2 WMS Saunders 252, 85 Eng. Rep. 1037 (1670) (awarding nominal damages where a tenant installed a new door in a rented house and doing so did not “weaken or injure” the house).

²⁹ See KEETON ET AL., *supra* note 21, § 6. Prosser and Keeton illustrate the distinction between an action in trespass and an action on the case with the following example: A person struck by a log thrown into the street could maintain an action for trespass, but an individual injured by stumbling over the log could maintain only an action on the case. See *id.* § 6, at 29.

³⁰ See DAN B. DOBBS, *THE LAW OF TORTS* 26 (2000) (noting that a plaintiff suing in trespass did not have to show a pecuniary loss, whereas a plaintiff could not recover under a writ of case unless he proved some legally cognizable harm).

eenth century as courts became resistant to denying relief to plaintiffs whose rights had been violated but who could not demonstrate harm. In the English case *Ashby v. White*, Chief Justice Holt rejected the notion that a plaintiff could not maintain an action on the case arising from the violation of a right if he suffered no harm.³¹ He explained that “[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.”³² Responding to the argument that an action on the case was “not maintainable because here is no hurt or damage to the plaintiff,” Chief Justice Holt argued that “surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.”³³ Regardless of the type of action, the violation of the right was what mattered. Thus, Chief Justice Holt stated,

[I]n an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there.³⁴

Although Chief Justice Holt’s opinion was in dissent,³⁵ his judgment prevailed on appeal in the House of Lords.³⁶ By the nineteenth cen-

³¹ See *Ashby v. White*, 2 Ld. Raym. 938, 953–56, 92 Eng. Rep. 126, 136–37 (1702) (Holt, C.J., dissenting), *rev’d*, 3 Salk. 17, 91 Eng. Rep. 665. Ashby had brought an action on the case against the constables of his county for refusing to receive his vote for the person to represent him in Parliament. See *id.* at 938, 92 Eng. Rep. at 127.

³² *Id.* at 953, 92 Eng. Rep. at 136 (footnote omitted).

³³ *Id.* at 955, 92 Eng. Rep. at 137.

³⁴ *Id.*

³⁵ The justices in the majority provided different reasons for their conclusions. Justice Gould said that Ashby suffered no injury because Parliament might conclude that Ashby had no right to vote. See *id.* at 942–43, 92 Eng. Rep. at 129. Justice Powys concluded that Ashby had suffered neither wrong nor damnum, and that even if he had suffered injury it was so minor as not to warrant redress. See *id.* at 943–46, 92 Eng. Rep. at 130–31. Justice Powell argued that Ashby had failed to demonstrate damage and therefore could not bring an action on the case. See *id.* at 948–49, 92 Eng. Rep. at 133.

³⁶ See *Ashby v. White*, 3 Salk. 17, 18, 91 Eng. Rep. 665, 665 (1703) (appeal taken from Eng.). According to Louis Jaffe, the reversal was more for political than legal reasons, see Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 14 (1963), but Chief Justice Holt’s views were accepted as law nevertheless.

ture, both England³⁷ and the United States³⁸ regarded Chief Justice Holt's view as correctly stating the law.

Subsequent cases reflect the trend toward permitting actions solely on the violation of a right. In *Wells v. Watling*, a commoner who was entitled to graze his sheep on a common pasture brought suit against the defendant for depleting the common pasture by releasing 3000 sheep to graze on it.³⁹ The plaintiff presented no evidence that he had let any of his sheep graze on that pasture during the same time—and thus suffered any injury from the pasture's depletion—yet the court held that the plaintiff was entitled to nominal damages.⁴⁰

³⁷ See *Embrey v. Owen*, 6 Ex. 353, 368, 155 Eng. Rep. 579, 585 (1851) (“Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable, as was laid down in the case of *Ashby v. White* by Lord Holt, and in many subsequent cases” (citation omitted)); see also *Mayor of London v. Mayor of Lynn*, 1 Bos. and Pul. 487, 516, 126 Eng. Rep. 1026, 1041 (1796) (appeal taken from Eng.) (“[T]he inference seems unavoidable, that damages actually sustained could not be of the essence of the action, and that the right alone was essential.”).

³⁸ See, e.g., *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322); *Parker v. Griswold*, 17 Conn. 288, 304 (1845) (“The principle that every injury legally imports damage, was decisively settled, in the case of *Ashby v. White*”). Professors Woolhandler and Nelson suggest that American law did not clearly adopt the rule that *injuria absque damno* was actionable and point to a statement of Joseph Story in his commentary on the law of agency that “to maintain an action, both [wrong and damage] must concur; for *dammum absque injuria*, and *injuria absque damno*, are equally objections to any recovery.” Woolhandler and Nelson, *supra* note 14, at 719 n.146 (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 236 (Boston, Little & Brown 1839)). Professors Woolhandler and Nelson also point to a quote from Bouvier's Law Dictionary that “[i]njury without damage or loss will not bear an action.” *Id.* (quoting 1 JOHN BOUVIER, A LAW DICTIONARY 636 (4th ed., Phila. 1853)). But both Justice Story and Bouvier's Law Dictionary note elsewhere that the requisite damages may be inferred from the violation of the right itself, see JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 217c (N. St. John Green ed., Boston, Little, Brown, & Co. 8th ed. 1874) (“Where the breach of duty is clear, it will, in the absence of all evidence of other damage, be presumed that the party has sustained a nominal damage.”); 1 BOUVIER, *supra*, at 366 (stating that “the law implies” general damages “to have accrued from the act of a tort-feasor” and giving the examples that “the law presumes that calling a man a thief must be injurious to him” and that, when a person suffers an assault or battery, “the law implies that his person has been more or less deteriorated, and that the injured party is not required to specify what injury he has sustained, nor to prove it”), and many other sources are to the same effect, see, e.g., HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 818 (St. Paul, Minn., West 1891) (defining nominal damages as a “trifling sum awarded to a plaintiff . . . where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights”); HERBERT BROOM, COMMENTARIES ON THE COMMON LAW 101 (Phila., T. & J.W. Johnson & Co. 1856) (observing that “*injuria sine damno* . . . does very frequently suffice as the foundation of an action” and providing a number of examples); WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIA OF LAW 482 (1901) (stating that the “doctrine of *injuria absque damno* applies only in those cases, though there was a wrongful act, it did not amount to an invasion of a *substantial* right” and that, if the right infringed is not “trivial,” the law will “presume nominal damages” (second emphasis added)).

³⁹ See *Wells v. Watling*, 2 Black. W. 1233, 1233, 96 Eng. Rep. 726, 726 (1778).

⁴⁰ See *id.* at 1235, 96 Eng. Rep. at 727.

Chief Justice De Gray reasoned that “[i]t [was] sufficient if the right be injured.”⁴¹ At the same time, the justices appeared unwilling to completely abandon the factual harm requirement.⁴² They therefore stretched the concept of harm to its limits, saying that the plaintiff had been harmed because he would have been unable to graze his sheep had he wanted to.⁴³

It was against this backdrop that Blackstone stated that it was “a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.”⁴⁴ Indeed, Blackstone viewed all judicial remedies as vindicating the violation of rights.⁴⁵ Courts awarded damages not to compensate for factual loss the victim suffered but instead to make the plaintiff whole by compensating for the consequences of the violation.⁴⁶

Early American law adopted the English rule that the violation of every right carried a remedy. Five state constitutions expressly guaran-

⁴¹ *Id.* at 1234, 96 Eng. Rep. at 727.

⁴² *See id.* at 1234–35, 96 Eng. Rep. at 727.

⁴³ *See id.* at 1235, 96 Eng. Rep. at 727. A similar expansion of the concept of harm occurred in *Hobson v. Todd*, 4 T. R. 71, 100 Eng. Rep. 900 (1790). There, a commoner brought suit against another for depleting the common by overgrazing. *See id.* at 71–72, 100 Eng. Rep. at 900. The defendant sought to distinguish *Wells* on the ground that the plaintiff here had also grazed an excessive number of cattle during the same period. *See id.* at 72, 100 Eng. Rep. at 900–01. The Court rejected the argument. *See id.* at 73–74, 100 Eng. Rep. at 901. According to Justice Buller, the defendant had injured the plaintiff, just as the defendant had injured the plaintiff in *Wells*, because “the plaintiff’s cattle might have eaten every blade of grass which was consumed by the defendant’s.” *Id.* at 73, 100 Eng. Rep. at 901.

⁴⁴ 3 BLACKSTONE, *supra* note 13, at *23; *accord id.* at *109 (“For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it’s proper redress.”); *see also* 1 *id.* at *55–56 (“[I]n vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law.”); EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND 55–56 (London, Fletcher & Young 1642) (“[E]very subject of this realme, for injury done to him in bonis, in terris, vel persona, by any other subject . . . may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.”).

⁴⁵ *See* Goldberg, *supra* note 21, at 548–49; *cf.* ROBERT MALCOLM KERR, AN ACTION AT LAW 1 (Phila., T. & J. W. Johnson 1854) (“The object of every proceeding in a court of justice is the recovery of a right or the redress of a wrong; . . . to destroy or impair a right is to commit a wrong . . .”).

⁴⁶ *See* Goldberg, *supra* note 21, at 548–49 (“The immediate purpose of the typical common law suit was to permit the victim to obtain a pecuniary satisfaction from the wrongdoer as an ‘equivalent’ to a literal restoration of his rights. The equivalence here concerns rights rather than harm or loss. The point of these actions was not (or not only) to compensate for the loss suffered by the victim, although the loss was usually compensated. Rather, the aim was to provide the victim with satisfaction—a payment that, from the perspective of an objective observer, would permit the victim to vindicate himself as against the injurer.” (footnotes omitted)).

teed redress for the violation of a right.⁴⁷ Similar language was proposed for the federal constitution.⁴⁸ Although that language was ultimately rejected, the principle was not. To the contrary, in *Marbury v. Madison*, Chief Justice Marshall, quoting Blackstone, stated that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”⁴⁹ Indeed, Chief Justice Marshall stated that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁵⁰ The United States “has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”⁵¹

Based on this rule, early American courts awarded nominal damages for violations of rights that did not result in harm. In *Webb v. Portland Manufacturing Co.*, which involved a dispute about the diversion of a stream, Circuit Justice Story explained that “[a]ctual, perceptible damage is not indispensable as the foundation of an action.”⁵² To the contrary, it was “among the very elements of common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages.”⁵³ State courts similarly awarded nominal damages for the

⁴⁷ See DEL. CONST. of 1792, art. I, § 9; MD. CONST. of 1776, para. 17; MASS. CONST. of 1780, art. XI; N.H. CONST. of 1783, art. 14; VT. CONST. of 1786, ch. I, para. 4.

⁴⁸ See Goldberg, *supra* note 21, at 560–61.

⁴⁹ 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 BLACKSTONE, *supra* note 13, at *23); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 n.3 (1971) (Harlan, J., concurring) (noting that the jurisprudential thought at the time of the Framers “appeared to link ‘rights’ and ‘remedies’ in a 1:1 correlation”). There were some exceptions to the rule that the violation of a right always warranted a remedy. For example, sovereign immunity barred suit against the United States despite the violation of a right. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1781 (1991). A plaintiff could bring suit against the official through whom the government had acted, and the official could raise a defense of immunity. Unlike sovereign immunity, however, official immunity was a defense rather than a prohibition on suit. The violation of the right therefore entitled the plaintiff at least access to the courts. See *id.*

⁵⁰ *Marbury*, 5 U.S. at 163.

⁵¹ *Id.*

⁵² 29 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322).

⁵³ *Id.* at 507; see also *id.* at 508 (“The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.”); *Whipple v. Cumberland Mfg. Co.*, 29 F. Cas. 934, 936 (Story, Circuit Justice, C.C.D. Me. 1843) (No. 17,516) (“In short, wherever a wrong is done to a right, the law imports, that there is some damage to the right, and, in the absence of any other proof of substantial damage, nominal damages will be given in support of the right.”).

violation of rights.⁵⁴ Since that time, courts have continued to award plaintiffs nominal damages to vindicate violations of their private rights even when those violations resulted in no harm.⁵⁵

B. Private Rights in Modern Cases

American law continues to recognize the distinction between public and private rights.⁵⁶ The Supreme Court has stated, for example, that individuals typically vindicate violations of private rights, while the government typically enforces violations of public rights.⁵⁷ The concept of private rights, however, has expanded since the time of Blackstone. Private rights now include not only those common-law rights that Blackstone enumerated⁵⁸ but also those rights created by

⁵⁴ See, e.g., *Hendrick v. Cook*, 4 Ga. 241, 261 (1848) (rejecting the argument that “there must be some *perceptible damage* shown, to entitle the plaintiff to recover; that injury without damage, is not actionable” and explaining that “whenever there has been an illegal invasion of the *rights* of another, it is an *injury*, for which he is entitled to a remedy by an action”); *Dixon v. Clow*, 24 Wend. 188, 190–91 (N.Y. Sup. Ct. 1840) (“If the plaintiff succeeded in showing an unlawful entry upon his land, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for nominal damages at the least. It was not necessary for him to prove a *sum*, or that any particular *amount* of damages had been sustained” (emphasis added)); *Abel v. Bennet*, 1 Root 127, 127–28 (Conn. Super. Ct. 1789) (permitting award of nominal damages for breach of bond when an inmate of debtors’ prison briefly walked off the premises of the jail and then immediately returned of her own accord).

⁵⁵ See 1 SEDGWICK, *supra* note 22, ch. VI, §§ 96–109, at 164–91 (listing several hundred cases awarding nominal damages for violations of rights); 1 J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 9–10 (John R. Berryman ed., 4th ed. 1916) (same); see also *Root v. Ry. Co.*, 105 U.S. 189, 197 (1881) (endorsing the rule that proof of infringement alone in a patent case entitles the patentee to maintain an action for nominal damages); *Tracy v. Swartwout*, 35 U.S. (1 Pet.) 80, 85 (1836) (stating that an award of nominal damages “plainly intimate[s] that the *law* [is] with the plaintiffs”).

⁵⁶ In this Article, I use the term “right” to refer to what would traditionally include both “rights” and “privileges.” One may conceive of privileges as negative rights, that is, a “privilege” correlates with a right to engage in certain conduct without interference. In any event, the Supreme Court has abandoned the distinction between rights and privileges. See, e.g., *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 (1972) (“[T]he Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’”). See generally William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (examining the doctrines that led to the downfall of the right-privilege distinction).

⁵⁷ See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997). See generally WILLIAM C. ROBINSON, ELEMENTS OF AMERICAN JURISPRUDENCE § 123 (1900) (providing definitions of private and public rights similar to those given by Blackstone). The Court has also relied on the distinction between public and private rights in determining the scope of the Seventh Amendment’s guarantee to jury trials in civil cases. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (stating that only an Article III court can resolve claims involving private rights while non-Article III tribunals may resolve public rights); *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932).

⁵⁸ Cf. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939) (recognizing the existence of legal rights arising from the common law of property, contract, and tort).

legislatures.⁵⁹ The Constitution also provides private rights.⁶⁰ The Fourth Amendment, for example, states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”⁶¹ Other rights, such as the First Amendment rights to freedom of speech and to free exercise of religion and the Eighth Amendment right to be free from cruel and unusual punishment, are well known.⁶² In addition to these textually enumerated rights, cases like *Roe v. Wade*⁶³ and *Griswold v. Connecticut*⁶⁴ recognize a set of unenumerated, personal constitutional rights.⁶⁵

The Supreme Court’s discussion of these constitutionally conferred private rights has often occurred in the context of 42 U.S.C. § 1983, which confers a cause of action for the deprivation of the “rights, privileges, or immunities secured” by the Constitution and federal law.⁶⁶ The Court has held that this provision affords a remedy

⁵⁹ See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (stating that “determining whether a private right of action can be implied from a particular statute” requires “determin[ing] whether Congress intended to create a federal right” in that statute (emphasis omitted) (internal quotation marks omitted)). See generally *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 257 (1930) (collecting cases that base standing on the violation of a statutory right). Congress has created private rights on many occasions. See, e.g., 42 U.S.C. § 1973c (2000) (“[N]o person shall be denied the right to vote”); 45 U.S.C. § 152 (2000) (“Employees shall have the right to organize and bargain collectively through representatives of their own choosing.”). See generally *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979) (collecting cases where the Court recognized a cause of action premised on a statutory right).

⁶⁰ See Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 351 (1993) (discussing private rights endowed by the Constitution and the interests those rights protect). Professor Bandes and then-Professor Nichol argue that all constitutional provisions should be cognizable. See Bandes, *supra* note 3, at 284–85; Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 86 (1984). Whether or not that is correct, my point is only that the Court itself has recognized that some provisions of the Constitution confer individual rights enforceable by the judiciary.

⁶¹ U.S. CONST. amend. IV.

⁶² Although written as prohibitions, these provisions have been interpreted to create affirmative rights. See *Boumediene v. Bush*, 476 F.3d 981, 993 (D.C. Cir. 2007) (holding that it is irrelevant that many rights are written as “limitation[s] on congressional power rather than [as] constitutional right[s]” because “[c]onstitutional rights are rights against the government and, as such, are restrictions on governmental power”), *cert. granted* 127 S. Ct. 3078; THE FEDERALIST NO. 84, at 510–11 (Alexander Hamilton) (Clinton Rossiter ed., 1961); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (“[I]t would be dangerous to read too much . . . into the generally valid principle that ours . . . is a Constitution of negative rather than positive liberties.”). Indeed, the Ninth Amendment was included so that the “rights” enumerated in the first eight amendments would not be thought to be exclusive. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 & n.15 (1980) (recounting events leading to Ninth Amendment).

⁶³ 410 U.S. 113 (1973).

⁶⁴ 381 U.S. 479 (1965).

⁶⁵ See Fallon, *supra* note 60, at 351 (noting the “entrenched though limited practice of recognizing ‘unenumerated rights’”).

⁶⁶ Section 1983 provides that “[e]very person who, under color of [law] . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or

only for the deprivation of an “individual” right “secured by the Constitution and laws of the United States.”⁶⁷ By contrast, § 1983 provides no redress for a mere “violation of federal law.”⁶⁸ A plaintiff thus cannot use it to enforce the “broader or vaguer ‘benefits’ or ‘interests’” in assuring obedience to the law.⁶⁹ Under this standard, the Court has recognized § 1983 actions for violations of, inter alia, the Establishment Clause,⁷⁰ the Free Speech Clause,⁷¹ the Due Process Clause,⁷² the prohibition on unreasonable searches and seizures,⁷³ the prohibition on cruel and unusual punishment,⁷⁴ and the Equal Protection Clause.⁷⁵

The Supreme Court’s decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* is consistent with its conclusion that the Constitution confers private rights.⁷⁶ In *Bivens*, the Court found that the Fourth Amendment provides a cause of action for damages against federal officers.⁷⁷ Following *Bivens*, the Court recognized similar implied rights of action for damages under the Equal Protection component of the Fifth Amendment’s Due Process Clause⁷⁸ and the Eighth Amendment’s prohibition on cruel and unusual punishment.⁷⁹

Not only has the Supreme Court recognized that the Constitution confers private rights, but it has also extended to those rights the com-

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983 (2000).

⁶⁷ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (internal quotation marks omitted) (“[Section] 1983 merely provides a mechanism for enforcing individual rights ‘secured’ elsewhere, i.e., rights independently ‘secured by the Constitution and laws’ of the United States. ‘[O]ne cannot go into court and claim a “violation of § 1983”—for § 1983 by itself does not protect anyone against anything.’” (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979))).

⁶⁸ *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis omitted) (“[T]o seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*.”).

⁶⁹ *Gonzaga*, 536 U.S. at 283.

⁷⁰ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (upholding a § 1983 challenge to the Ten Commandments).

⁷¹ *See Waters v. Churchill*, 511 U.S. 661, 668 (1994).

⁷² *See Carey v. Phipus*, 435 U.S. 247, 266–67 (1978).

⁷³ *See Wilson v. Layne*, 526 U.S. 603, 609 (1999).

⁷⁴ *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004).

⁷⁵ *See Hibbs v. Winn*, 542 U.S. 88, 93 (2004).

⁷⁶ 403 U.S. 388 (1971).

⁷⁷ *See id.* at 395.

⁷⁸ *See Davis v. Passman*, 442 U.S. 228, 234 (1979).

⁷⁹ *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994); *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Carlson v. Green*, 446 U.S. 14, 19 (1980). In *Bush v. Lucas*, 462 U.S. 367, 368 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412, 421–22, 428–29 (1988), the Court limited the availability of a *Bivens* action for federal employees because Congress had created a comprehensive remedial scheme. But in none of these cases did the Court say that it would be permissible to deprive a plaintiff of *any* remedy for the violation of a right.

mon-law principle that the violation of a right warrants at least nominal damages. In *Carey v. Piphus*, students brought § 1983 actions after their school suspended them without due process.⁸⁰ The Supreme Court held that the students could maintain an action for nominal damages for the deprivation of their due process rights “[e]ven if [their] suspensions were justified, and even if they did not suffer any other actual injury.”⁸¹ The Court did not base its holding on the ground that § 1983 created a right in the plaintiffs or that nominal damages were appropriate to vindicate the violation of that statutory right. Instead, it stated that the award of nominal damages was necessary to recognize the “importance to organized society” of the constitutional right to due process.⁸² The Court has since indicated that *Carey*’s reasoning applies to other individual constitutional rights, specifically those found in the First and Fourth Amendments.⁸³

II

THE MODERN STANDING DOCTRINE AND THE INJURY-IN-FACT REQUIREMENT

Standing grew out of the distinction between public and private rights. In its original form, standing enforced the rule that the judiciary had the power only to vindicate private rights in suits by private litigants. During the mid-twentieth century, however, the Court expanded standing by abandoning the private rights requirement and conditioning standing on a showing of factual injury. Then, during the last twenty-five years, the Court has again restricted standing.⁸⁴ The belief that liberal access to the courts by private litigants seeking

⁸⁰ See 435 U.S. 247, 249–50 (1978).

⁸¹ *Id.* at 266.

⁸² See *id.* at 266–67. *Carey* was not the first time the Supreme Court saw a claim for nominal damages based on the violation of a constitutional right. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504 (1969), for example, students challenged a school’s prohibition on wearing black arm bands, seeking nominal damages (for past wrongs) and an injunction (to prevent future injury).

⁸³ See *Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (2006) (endorsing the propriety of nominal damage awards for violations of the Fourth Amendment); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–08 (1986) (endorsing same for violations of the First Amendment right to freedom of speech); *cf. Davis v. W. Cmty. Hosp.*, 755 F.2d 455, 462 (5th Cir. 1985) (awarding nominal damages for a violation of the Equal Protection Clause). The Court has also used the concept of individual rights to explain the incorporation of provisions of the Bill of Rights into the liberty component of the Due Process Clause of the Fourteenth Amendment. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) (accepting incorporation of “the Free Exercise Clause, which clearly protects an individual right” and rejecting incorporation of the Establishment Clause on the ground that it protects the rights of the states, not individuals).

⁸⁴ Although some very recent cases suggest another possible expansion, those cases continue to adhere to the injury-in-fact requirement. See *infra* notes 133–35 and accompanying text.

to enforce public rights endangers the separation of powers⁸⁵ has driven the Court again to revert to what is essentially a private rights model for standing, stating that the “province of the court . . . is, solely, to decide on the rights of individuals.”⁸⁶ But in doing so, the Court has not abandoned the injury-in-fact requirement, even though it developed that doctrine to expand standing. Instead, it has limited the types of injuries that constitute injury in fact.⁸⁷ The Court has also introduced a “cognizability” requirement.⁸⁸ Although the cognizability requirement purports to reintroduce the private rights test by limiting standing to invasions of “legally protected right[s],”⁸⁹ the Court has applied the standard in a way that indicates that cognizability merely requires the injury be material and tangible.

According to the Court, these doctrines ensure that plaintiffs assert only their own private interests. Thus, such doctrines are superfluous in cases involving the violation of private rights. But the Court has not distinguished such suits for standing purposes. It continues to require proof of injury in fact and demonstration of cognizability. The consequence has been the development of a confused and confusing body of law.

A. The Development of the Modern Standing Doctrine

Standing first flourished as an independent doctrine in the early 1900s.⁹⁰ Before that time, whether a case was justiciable depended on

⁸⁵ See Sunstein, *supra* note 5, at 187 (“In the context of standing, the reluctance to take this step has been embodied in a private law model of standing—that is, in the idea that standing should be reserved principally to people with common law interests and denied to people without such interests.”); *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 329, 336 (2000) (“Much of the Supreme Court’s standing jurisprudence in the past two decades reflects the view that Article III limits the federal courts to a private law litigation model.”).

⁸⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

⁸⁷ See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (holding that psychological injury is insufficient to confer standing).

⁸⁸ See, e.g., *Allen v. Wright*, 468 U.S. 737, 755–56 (1984) (refusing to find standing for stigmatic injury because “such injury is not judicially cognizable”).

⁸⁹ *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772–73 (2000).

⁹⁰ See Pushaw, *supra* note 3, at 458–59. An early example of the independent doctrine of standing is *Tyler v. Judges of Court of Registration*, 179 U.S. 405 (1900), in which the Court stated that “[s]ave in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.” *Id.* at 406. Professors Woolhandler and Nelson argue that courts implicitly applied standing in earlier decisions. See Woolhandler & Nelson, *supra* note 14, at 691–92. But they agree that judicial access was available in private rights cases.

whether the plaintiff had invoked the appropriate form of action.⁹¹ Standing developed principally at the hands of Justice Brandeis, and later Justice Frankfurter, to achieve the goals of protecting legislation from judicial attack⁹² and avoiding unnecessarily passing on constitutional questions.⁹³ The Court could not rely simply on the traditional forms of action to perform these screening functions because of the creation of nontraditional forms of action, such as declaratory judgments and actions authorizing agency review,⁹⁴ and the abolition of the forms of action by adoption of the Federal Rules of Civil Procedure in 1938.⁹⁵ Building on the idea stemming from *Marbury* that the judicial function was to resolve the rights of individuals,⁹⁶ standing turned on whether the plaintiff had alleged the invasion of a common-law right or a right conferred by statute or the Constitution.⁹⁷ As Justice Frankfurter explained, if no private right was involved, the would-be litigant's only recourse was through the elected branches of

⁹¹ See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (stating that the judicial "power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the [C]onstitution declares, that the judicial power shall extend to all cases arising under the [C]onstitution, laws, and treaties of the United States."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1640 (Boston, Hilliard, Gray & Co. 1833); Winter, *supra* note 3, at 1395 (asserting that standing was subsumed within the question "whether the matter before it fit one of the recognized forms of action"). But see Woolhandler & Nelson, *supra* note 14, at 691 (arguing that standing became an independent doctrine earlier). The idea that justiciability depended on whether a party invoked the proper form of action was evident even in the 1920s. See *Tutun v. United States*, 270 U.S. 568, 577 (1926) (stating that Article III is satisfied "[w]henver the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued").

⁹² See MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 218 (2000) ("Justice Louis Brandeis and then-professor Felix Frankfurter developed standing to shield progressive regulatory programs, culminating in the New Deal, from attack in the federal courts . . ."); Pushaw, *supra* note 3, at 458–59; Sunstein, *supra* note 5, at 179.

⁹³ See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); see also Fletcher, *supra* note 3, at 225 (attributing standing to the growth of the administrative state and an increase in constitutional litigation). In Justice Brandeis's view, standing was a prudential doctrine. See, e.g., *Ashwander*, 297 U.S. at 341. The Court did not link standing and Article III until the 1940s. See, e.g., *Stark v. Wickard*, 321 U.S. 288, 307–11 (1944).

⁹⁴ See Pushaw, *supra* note 3, at 458.

⁹⁵ See FED. R. CIV. P. 2; see also FED. R. CIV. P. 2 advisory committee's note.

⁹⁶ See Monaghan, *supra* note 6, at 1365–66. Professor Monaghan argues that the private rights model of adjudication derives from *Marbury v. Madison* and became firmly entrenched during the nineteenth century. See *id.*

⁹⁷ See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 159 (1951). Although Professor Sunstein suggests that constitutional rights were not sufficient to support standing at that time, see Sunstein, *supra* note 5, at 180, that is not so. *Pierce v. Society of Sisters*, 268 U.S. 510, 535–36 (1925), found standing based on infringement of Fourteenth Amendment rights.

government.⁹⁸ The violation of a public right was insufficient. For example, in *Fairchild v. Hughes*, citizens of New York brought suit seeking to invalidate the Nineteenth Amendment on the grounds that there was no proof of its ratification and that enforcing the Amendment would interfere with state elections.⁹⁹ The Court dismissed the suit because the plaintiffs' "interest in the question submitted is not such as to afford a basis for this proceeding."¹⁰⁰ It explained that the only right of the plaintiffs at stake was "the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted," and "this general right does not entitle a private citizen to institute . . . suit."¹⁰¹ Likewise, factual injury was insufficient. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*,¹⁰² for example, several power companies sued to enjoin the Tennessee Valley Authority from generating or selling energy, alleging that they were harmed by the increased competition.¹⁰³ The Court denied standing. It explained that the mere loss of revenue from competition was an insufficient basis for standing; rather, standing required the invasion of a "legal right."¹⁰⁴

During the mid-twentieth century, the Court found the legal-rights standard too restrictive. Although the Warren Court sought to expand its constitutional oversight of other branches of government—to prevent, for example, vote dilution or the award of govern-

⁹⁸ See *Coleman v. Miller* 307 U.S. 433, 464 (1939) ("No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all.")

⁹⁹ *Fairchild v. Hughes*, 258 U.S. 126, 127, 129 (1922).

¹⁰⁰ *Id.* at 129.

¹⁰¹ *Id.* at 129–30.

¹⁰² 306 U.S. 118 (1939).

¹⁰³ See *id.* at 134–35.

¹⁰⁴ See *id.* at 137–38. Many other cases rest on the same ground. See *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 304 (1940) (denying standing to food buyers and sellers who sought to challenge a railroad extension that would benefit competitors); *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) ("[I]njury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain." (quoting *Parker v. Griswold*, 17 Conn. 288, 302–03 (1845))). In *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930), for example, cotton warehouses located in port areas challenged an order of the Interstate Commerce Commission directing railroads to stop assessing a surcharge against inland warehouses. See *id.* at 251. Although the plaintiffs were competitively harmed by the order, the Court, speaking through Justice Brandies, found no standing because no "independent right" of the plaintiffs had been violated. See *id.* at 255. Likewise, in *Edward Hines Yellow Pine Trs. v. United States*, 263 U.S. 143 (1923), the Court, again speaking through Justice Brandeis, denied standing to lumber companies complaining that an order of the Interstate Commerce Commission would cause them economic injury, explaining that standing depends on a showing of "legal injury, actual or threatened." *Id.* at 148.

ment funds to religious groups—the legal-rights test limited the Court’s ability to exercise that oversight.¹⁰⁵ Moreover, expansive reliance on administrative agencies required greater oversight and accountability of those agencies.¹⁰⁶ Although statutes placed duties on administrative agencies, those statutes did not create rights in individuals. Under the legal-interest standard, individuals factually harmed by agency action had no recourse in the courts, and the judiciary was largely unable to address unlawful agency conduct.¹⁰⁷

One option open to the Court to expand standing was to adopt a public rights model—to permit a private individual to bring suit for any violation of the public interest. Although the Court appeared to head down that path in *Flast v. Cohen*, which held that a taxpayer had standing under the Establishment Clause to challenge a statute giving money to religious schools,¹⁰⁸ the Court did not ultimately adopt that model. Instead, it took an intermediate stance. In the 1970 decision of *Association of Data Processing Service Organizations, Inc. v. Camp*,¹⁰⁹ the Court unanimously concluded that standing turned on whether the plaintiff suffered an “injury in fact, economic or otherwise.”¹¹⁰ The

¹⁰⁵ See Nichol, *supra* note 3, at 1920–22 (discussing reasons for the evolution of the doctrine).

¹⁰⁶ See Chayes, *supra* note 6, at 9–10; Monaghan, *supra* note 6, at 1380 (“Erosion of standing as an embodiment of the private rights model is largely a by-product of the rise of the administrative agencies.”); Sunstein, *supra* note 5, at 183–84 (listing agency hostility to congressional programs, underregulation, and capture by regulated industry as difficulties in implementing congressional intent).

¹⁰⁷ See Thomas A. Cowan, *Group Interests*, 44 VA. L. REV. 331, 334–35 (1958); Sunstein, *supra* note 6, at 1435; cf. Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 264 (1961) (“In so far as civil law formulates its protection of interest in these firm right-duty terms, it cannot usually be a criterion for standing in administrative law.”).

¹⁰⁸ See 392 U.S. 83, 103 (1968). One possible justification for the holding in *Flast* is that the Establishment Clause confers on each individual a private right to a government that does not aid religion. But the Court did not base standing on this ground. Instead, it premised standing on the plaintiff’s status as a taxpayer, holding that a taxpayer has standing to challenge legislation enacted under the Taxing and Spending Clause if the taxpayer invokes any constitutional provision—be it structural or one that confers private rights—that limits Congress’s taxing power. See *id.* at 102–04; cf. *id.* at 114 (Stewart, J., concurring) (basing standing on the conclusion that “every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution”).

¹⁰⁹ 397 U.S. 150 (1970).

¹¹⁰ *Id.* at 152. Although Justices Brennan and White dissented, their disagreement was not over the injury-in-fact test. Indeed, they rejected the legal interest test more explicitly than the majority did, stating that “for purposes of standing, it is sufficient that a plaintiff allege *damnum absque injuria*.” *Id.* at 172 n.5 (Brennan, J., concurring and dissenting). Earlier cases also focus on factual injury. The earliest example is *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). Sanders, the holder of a radio license, appealed from an FCC order awarding a license to a competitor. See *id.* at 471–72. Sanders argued that awarding the license was not in the public interest and therefore violated the Communications Act because the market could not sustain another radio station. See *id.* at 471. The Court found standing. See *id.* at 477. Although acknowledging that Sanders had no right at stake, it explained that § 402 of the Communications Act authorized suit by anyone who had

legal-interest question, the Court explained, went only to the merits of the case.¹¹¹ In doing so, the Court created a quasi-public model of standing.¹¹² Litigants no longer had standing only to vindicate their own, private rights but also could sue to vindicate public interests. The only requirement for standing was that the challenged actions affect the litigant.¹¹³ Moreover, litigants were not required to demonstrate the violation of a private right in order to prevail on the merits; a litigant could prevail merely by demonstrating that the statute violated a public right.¹¹⁴ A litigant thus could bring and prevail in litigation although no legal interest of his own was at stake.¹¹⁵

been “aggrieved” by an order of the FCC. *See id.* at 476. Another example is *Doremus v. Board of Education of Borough of Hawthorne*, 342 U.S. 429 (1952), in which the Court suggested that standing would be available in a suit to “remedy [a] taxpayer’s action to restrain unconstitutional acts which result in direct pecuniary injury.” *Id.* at 434. Likewise, in *Baker v. Carr*, 369 U.S. 186 (1962), which presented the question whether voters had standing to challenge an outdated districting plan that resulted in their votes being diluted, the Court did not focus on the legal rights at stake but instead said that standing rested on whether the plaintiff had alleged “a personal stake in the outcome of the controversy.” *Id.* at 204.

¹¹¹ *See Data Processing*, 397 U.S. at 153. The Court further held that the injury must fall within the “zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* Although *Data Processing*, which involved a suit under the Administrative Procedure Act (APA), did not clearly indicate whether the injury-in-fact requirement applied to all cases or only to those brought under the APA, the Court clarified in *Singleton v. Wulff*, 428 U.S. 106, 112 (1976), that injury in fact is a general requirement of Article III.

¹¹² *See Monaghan*, *supra* note 6, at 1379–80. Aside from expanding access to the courts, focusing on factual injury also had the surface virtue of creating a test for standing that was independent of the merits. *See Nichol*, *supra* note 60, at 74. A court without jurisdiction has no power to evaluate the merits of a claim, and the legal interest test required a court to make the merits determination of whether the plaintiff had a viable claim of a violation of a right to determine its jurisdiction. By contrast, the injury-in-fact test only requires that a court examine whether the plaintiff has alleged some sort of harm to determine jurisdiction. *See Nichol*, *supra* note 3, at 1924.

¹¹³ *See Monaghan*, *supra* note 6, at 1382.

¹¹⁴ Thus, the personal stake requirement is only a threshold requirement for bringing suit. A plaintiff who demonstrates an interest may raise any legal argument, including an argument based solely on public interests. In other words, the mere fact of an individual’s injury, no matter how minute or fortuitous, enables that individual to make assertions about the public interest despite the injury’s being entirely personal. Of course, the court has discretion not to hear certain arguments under the third-party standing doctrine, which provides that “a party ‘generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.’” *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). But the rule is designed only to protect the rights of the absent; it does not restrict the assertion of other public interests, such as those at issue in *Ex parte Lévit*, 302 U.S. 633, 633–34 (1937), which dismissed a challenge to Justice Black’s appointment, *United States v. Richardson*, 418 U.S. 166 (1974), which dismissed a case seeking publication of CIA expenditures under the Accounts Clause in Article I, Section 9, Clause 7 of the Constitution, and *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), which dismissed a challenge to congressmen’s membership in the Armed Forces Reserve as violating the Incompatibility Clause in Article I, Section 6, Clause 2.

¹¹⁵ *See, e.g., Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942). In this early case dealing with standing based on factual injury, the Court, speaking through Justice Frank-

The Court did not intend the adoption of the injury-in-fact standard to confer standing in some cases at the cost of restricting standing in cases where standing had existed before. Instead, the Court intended to “expand[] the types of ‘personal stake(s)’ which are capable of conferring standing on a potential plaintiff.”¹¹⁶ In other words, under the Court’s vision of the injury-in-fact standard, all of those actions that were justiciable under the legal-interest test would continue to be justiciable, while standing also could exist in many cases that were not justiciable under the former test. Consistent with that purpose, *Data Processing* defined injury in fact broadly, stating that it includes not only injuries to economic interests but also to “aesthetic,” “conservational,” “recreational,” and “spiritual” values.¹¹⁷ The Court emphasized the breadth of the test in *United States v. Students Challenging Regulatory Agency Procedures*, stating that standing could be based on any “identifiable trifle.”¹¹⁸ Moreover, despite its insistence in *Data Processing* that standing depended on factual rather than legal injuries, the Court continued to acknowledge the role of Congress and of rights in standing. In a number of cases, the Court stated that the “injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”¹¹⁹ Standing, it appeared, could be based on either a factual injury or the violation of a right.

furter, explained that private litigants who have standing based on factual as opposed to legal injury “have standing only as representatives of the public interest.” *Id.*

¹¹⁶ *Linda R.S. v. Richard D.*, 410 U.S. 614, 616–17 (1973); see also *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976) (“Reduction of the threshold requirement to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum under this statute.”); Chayes, *supra* note 6, at 10 (describing the Court in the 1960s as seeking “to relax the old ‘legal interest’ test by requiring simply ‘injury in fact,’ rather than injury to a preexisting legal interest, as a basis for standing”); Jaffe, *supra* note 107, at 255–56 (describing the legal interest test as “narrower” than the injury-in-fact test).

¹¹⁷ *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

¹¹⁸ 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

¹¹⁹ *Warth*, 422 U.S. at 500 (quoting *Linda R.S.*, 410 U.S. at 617 n.3); see, e.g., *Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) (“The Illinois Legislature . . . has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met.”); *E. Ky. Welfare Rights Org.*, 426 U.S. at 41 n.22; *Linda R.S.*, 410 U.S. at 617 n.3 (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” (citations omitted)); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (stating that to have standing the plaintiff must have either a “personal stake in the outcome of the controversy” or must “rely on any specific statute authorizing invocation of the judicial process” (internal quotation marks omitted)). While these cases suggest that legal rights rather than injuries in fact are what matter when so designated by Congress and several Justices understood that to be the law for many years, see, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972), the Court rejected this view in *Lujan*.

Under Chief Justice Burger, the Court again began to restrict standing in response to courts' growing use of injunctions to regulate state and federal governments. Especially problematic to the Court were suits in which the plaintiff did not allege the violation of a personal right or a traditional injury, such as economic loss, but brought suit only to enforce the publicly held interest in seeing the law obeyed.¹²⁰ In the Court's view, such suits violated the separation of powers by permitting the use of the judiciary to correct majoritarian concerns.¹²¹ To preserve its conception of separation of powers, the Court interpreted Article III as limiting the judicial power to resolving disputes that were "traditionally amenable to, and resolved by, the judicial process."¹²² Invoking the common-law conception of the judiciary's role as vindicating only private rights, the Court reinstated a private rights model, stating that "to satisfy the Art. III prerequisite the complaining party [is] required to allege a specific invasion of the right suffered by him."¹²³ Disputes over purely public interests, the

¹²⁰ See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (denying standing in a suit to prevent another's execution based on "the public interest protections of the Eighth Amendment" (internal quotation marks omitted)); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982) ("[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."); *United States v. Richardson*, 418 U.S. 166 (1974) (denying standing to a taxpayer who brought suit challenging Congress's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the Accounts Clause of the Constitution); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (denying standing in an Incompatibility Clause challenge on the ground that the challenged action, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.").

¹²¹ See *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993) (stating that the "Cases" and "Controversies" provision of Article III "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded" (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984))). See generally David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 823-24 (2004) (questioning the rise of the modern separation of powers foundation of standing); Pushaw, *supra* note 3, at 467 (tracing the rise of the separation of powers justification for standing).

¹²² *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998)). For the perspective that the Constitution incorporated the traditional common-law limitations on the powers of the courts, see sources cited *supra* note 10. See generally Pushaw, *supra* note 3, at 477-80 (discussing the Court's use of historical justifications for standing). The Court similarly employed history to conclude that Article III impounds concepts of sovereign immunity. See, e.g., *Alden v. Maine*, 527 U.S. 706, 722 (1999).

¹²³ *Schlesinger*, 418 U.S. at 224 n.14; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (stating that standing is necessary because "[t]he province of the court is, solely, to decide on the rights of individuals" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803))); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."); Bandes, *supra* note 3, at 262, 277-79

Court explained, are more appropriately vindicated through the political branches of government.¹²⁴ According to the Court, standing “enforces” this limitation.¹²⁵

But in returning to a private rights model, the Court did not abandon the injury-in-fact test even though it had developed that test to extend standing to individuals who had not suffered the violation of a right. Instead, the Court limited the types of factual injuries that would suffice for standing.¹²⁶ The Court stated that the injury must be “actual,” “distinct,” “palpable,” and “concrete.”¹²⁷ “Abstract” injuries, such as the injury caused by the government’s failure to obey the law, were insufficient.¹²⁸ Motivating this limitation was the concern that if any injury suffices for standing, no real limits would exist on judicial power and any person with a complaint could invoke the judiciary to interfere with the political branches.¹²⁹ Thus, in *United States v. Richardson*, for example, the Court denied standing to a taxpayer who claimed that Congress’s failure to disclose the expenditures of the Central Intelligence Agency violated the Accounts Clause of the Constitution.¹³⁰ The Court explained that a generalized grievance

(discussing the private rights model); Sunstein, *supra* note 5, at 187–88 (describing standing as based on a private rights model).

¹²⁴ See *Lujan*, 504 U.S. at 576.

¹²⁵ *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)).

¹²⁶ The Court has also introduced the requirements of causation and redressability, which respectively require a plaintiff to demonstrate that the injury is traceable to the actions of the defendant and that a favorable decision by the court will likely redress that injury. See *id.* at 1861 (“The requisite elements of this ‘core component derived directly from the Constitution’ are familiar: ‘A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.’” (quoting *Allen*, 468 U.S. at 751)). According to the Court, the separation of powers notion mandates these requirements just as it mandates the injury requirement. See *Allen*, 468 U.S. at 752; Pushaw, *supra* note 3, at 475 (discussing the separation of powers foundation for requirements).

¹²⁷ See *Allen*, 468 U.S. at 750–51, 756.

¹²⁸ See *id.* at 751.

¹²⁹ The Court stated in *Allen v. Wright*:

If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders. Constitutional limits on the role of the federal courts preclude such a transformation.

Id. at 755–56 (citations omitted) (internal quotation marks omitted).

¹³⁰ 418 U.S. 166 (1974). The Accounts Clause provides that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” U.S. CONST. art. I, § 9, cl. 7.

about the government's misconduct could not support standing, stating that standing required the plaintiff to allege that he was in "danger of suffering any particular concrete injury as a result of" the government's misconduct.¹³¹ These limitations on standing culminated in the Court's decision in *Lujan*, which held that Congress lacked the power to confer standing through a citizen suit provision on individuals who had not suffered factual injury.¹³²

Recently, the Court has purported to backpedal from its restrictive standing views. In *Massachusetts v. EPA*,¹³³ for example, the Court found that Massachusetts had standing to challenge the EPA's refusal to issue a rule regulating emissions that allegedly contribute to global warming. In doing so, the Court stated that "Congress has the power to define injuries" necessary to support standing.¹³⁴ But even while apparently disavowing the injury-in-fact requirement, the Court based standing not on the fact that a legal right created by Congress had been violated but instead on the factual consequences of global warming.¹³⁵

In addition to restricting the types of injuries that suffice for standing, the Court limited standing by requiring that the alleged factual injury involve the invasion of a "judicially cognizable interest." But it is not clear what this cognizability requirement entails. On some occasions, the Court has suggested that the cognizability requirement is a reincarnation of the legal-interest test abandoned in *Data Processing*,¹³⁶ stating that a cognizable interest is one that "consist[s] of obtaining compensation for, or preventing, the violation of a legally protected right."¹³⁷ On other occasions, the Court has indi-

¹³¹ See *Richardson*, 418 U.S. at 177. The Court expressed similar sentiments in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), when it stated that the challenged action, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance." *Id.* at 217; see *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (holding that the plaintiff lacked standing to bring a citizen suit to prevent another's execution on the basis of "the public interest protections of the Eighth Amendment," because the "allegation raise[d] only the generalized interest of all citizens in constitutional governance." (quoting *Schlesinger*, 418 U.S. at 217)).

¹³² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–78 (1992).

¹³³ 127 S. Ct. 1438 (2007).

¹³⁴ *Id.* at 1453 ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring))).

¹³⁵ See *id.* at 1456. In *Federal Election Commission v. Akins*, the Court stated that the fact that a plaintiff alleges only a "generalized grievance" does not itself defeat standing and that standing turns on whether the grievance, widely shared or not, is too "abstract." 524 U.S. 11, 23 (1998). In doing so, the Court did not purport to abandon the factual injury requirement. To the contrary, it reaffirmed that a factual injury is essential to standing by finding that the plaintiffs had "suffered a genuine 'injury in fact,'" in the form of their inability to acquire certain information. See *id.* at 20–21.

¹³⁶ See *supra* note 111 and accompanying text.

¹³⁷ *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772–73 (2000).

cated that a cognizable interest is implicated whenever an individual experiences a material harm, such as the loss of money.¹³⁸ And, as discussed below, that ambiguity has led to confusion in the standing doctrine and the inappropriate denial of standing in certain cases.¹³⁹

B. Problems with Injury in Fact and Cognizability

1. *The Role of Injury in Fact*

According to the Court, the injury-in-fact requirement is necessary to ensure that the Court adjudicates only those disputes that are “traditionally amenable to, and resolved by, the judicial process.”¹⁴⁰ But, as Part I explained, under early American and English law, proof of injury in fact was not a requirement for suits to vindicate the violation of a private right.¹⁴¹ Historical practice therefore does not justify inserting the injury-in-fact requirement into Article III.¹⁴²

The absence of any mention of an injury-in-fact requirement for over one hundred years after the adoption of the Constitution suggests that the requirement is not essential to the exercise of the federal judicial power. If injury in fact is fundamental to ensuring the balance of power, one would expect the Court to have adopted the injury-in-fact requirement long before 1970. Likewise, if the injury-in-fact requirement were fundamental, one would think that the Court would have adopted a consistent theoretical justification for it.¹⁴³ Yet as late as 1980 the Court expressly rejected the formalist notion that standing was based on separation of powers¹⁴⁴ and instead based the

¹³⁸ See *infra* notes 190–210 and accompanying text.

¹³⁹ See *infra* Part III.

¹⁴⁰ *Vi. Agency of Natural Res.*, 529 U.S. at 774 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998)); see sources cited *supra* notes 10, 122.

¹⁴¹ Several commentators have argued that conditioning standing in public law suits on injury in fact also lacks historical foundation. See, e.g., Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816, 818 (1969). See generally Sunstein, *supra* note 5, at 169–77 (reiterating history). They note that, under early English and American practices, third-party strangers who had not suffered any injury could bring an action for a prerogative writ of prohibition, certiorari, mandamus, or quo warranto, and that relators whose personal interests were not at stake could bring qui tam actions. See Berger, *supra*, at 822–25.

¹⁴² This is not to say that the violation of a right necessarily warrants recovery. Congress has the ultimate authority to create causes of action and to prescribe or preclude remedies for legal wrongs. My point is simply that history does not support the conclusion that the Founders built into the Constitution a categorical bar precluding the judiciary from hearing any suit alleging the violation of a private right unless a factual injury accompanies the violation.

¹⁴³ As the reader will note, these arguments sound in originalism and foundationalism. Other arguments in this Article are based on pragmatism and doctrinalism. Each of these methods supports the conclusion that the injury-in-fact requirement in private rights cases is extraneous, if not injurious.

¹⁴⁴ See *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980) (“The question whether a particular person is a proper party to maintain the action does not, by its own

requirement on the functional ground that it would improve the quality of litigation by assuring “that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”¹⁴⁵ Moreover, it is difficult to understand why the Court would want to require injury in fact. The function of courts is to provide relief to those who have suffered a legally cognizable injury. Not every factual injury provides a basis for relief. Courts have the power to award relief only if authorized by law.¹⁴⁶

So, why does current standing doctrine require injury in fact? The most likely reason is that it is firmly entrenched in the law. Since 1970, the Court has reiterated the injury-in-fact requirement dozens of times, demonstrating that it is a core component of the Constitution. But the Court, of course, has never given that reason. Instead, it has stated that the injury-in-fact requirement is necessary to ensure that the judiciary stays within its “province . . . of decid[ing] on the rights of individuals.”¹⁴⁷

Therefore, according to the Court’s stated rationale, the injury-in-fact requirement functions as a proxy to ensure that plaintiffs are alleging their own, personal rights.¹⁴⁸ But it is not a very good proxy. Not every person who suffers an injury has suffered the violation of a personal right—just think of the person who trips over his own foot. Nor does every person who suffers the violation of a personal right suffer an injury because of that violation. Consider a situation where the government fires an employee based on incontrovertible evidence of misconduct but fails to provide the employee with adequate process. The employee has suffered the violation of the right to due process, but that violation was not a but-for cause of the deprivation of property.¹⁴⁹ Nor do the origins of the injury-in-fact requirement pro-

force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.” (quoting *Flast v. Cohen*, 392 U.S. 83, 100 (1968)); Pushaw, *supra* note 3, at 464.

¹⁴⁵ *Baker v. Carr*, 369 U.S. 186, 203 (1962); see Driesen, *supra* note 121, at 815–16.

¹⁴⁶ See David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 42–43.

¹⁴⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 130, 170 (1803)); accord *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007) (plurality opinion); *id.* at 2584 (Scalia, J., concurring in the judgment).

¹⁴⁸ Even while justifying the injury-in-fact requirement as necessary to ensure that individuals assert only their private rights, the Court held in *Lujan* that the violation of a private right created by Congress could not support standing unless accompanied by a factual injury. See 504 U.S. at 576–78.

¹⁴⁹ *Cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977) (commenting that “[i]n other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused” and holding that the plaintiff must show that his constitutionally protected conduct “was a ‘substantial factor’ or . . . a ‘motivating factor’ in the Board’s decision not to rehire him” (footnotes omitted)).

vide any reason to expect it to be a good proxy. Indeed, the Court developed the injury-in-fact test to permit standing in suits where the plaintiff could not point to the violation of a private right.¹⁵⁰

The injury-in-fact requirement is not only a poor proxy for identifying cases involving the violation of private rights but also entirely superfluous in those cases. In cases involving the violation of a private right, the violation of the right itself provides the basis for a court's intervention.¹⁵¹ No further inquiry into injury is required.¹⁵² But the Court has not dispensed with the injury-in-fact requirement in cases alleging the violation of a private right. The Court has determined the plaintiff's standing by focusing not on whether the plaintiff has alleged a violation of that right but on whether the plaintiff has alleged an injury resulting from that violation.

In *Public Citizen v. U.S. Department of Justice*,¹⁵³ the Court held that plaintiffs had standing to challenge the denial of information sought under the Federal Advisory Committee Act about advice given by the American Bar Association (ABA) to the Department of Justice concerning potential federal judgeship nominees. The Court found standing not because the statute created a private right of action, but based on the Department's "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows."¹⁵⁴ Similarly, in *Trafficante v. Metropolitan Life Insurance Co.*, the Court found standing for two tenants who brought suit under the Civil Rights Act of 1968 and alleged that the owner of their apartment complex had racially discriminated against other individuals who were seeking to rent in the complex.¹⁵⁵ Although the Act authorizes suit by "any per-

¹⁵⁰ See *supra* text accompanying notes 108–15.

¹⁵¹ The common law tort of battery illustrates the point. Battery creates a right in each person to be free from an intentional and offensive touching by another without lawful justification. Suppose *A* punches *B* in the nose. The battery—the violation of the right—consists of the punching. But the factual injury is not the hitting; it is the bloody nose sustained from the blow. That injury obviously is unnecessary to ensure that the plaintiff's claim is based on the violation of an individual right.

¹⁵² Likewise, the injury-in-fact requirement is unnecessary in suits brought by the government to vindicate public rights since the government is the proper party to vindicate such rights. Cf. Hartnett, *supra* note 3, at 2248–49 (criticizing standing doctrine on the ground that the government must have standing to enforce public laws). *Virginia v. Hicks* is a vivid example. 539 U.S. 113 (2003). There, the Commonwealth of Virginia challenged a decision of the Virginia Supreme Court prohibiting the Commonwealth from enforcing its trespass law. See *id.* at 117–18. The Supreme Court found standing not because the Commonwealth has the power to vindicate state law, but on the ground that the Commonwealth suffered an "actual injury in fact . . . that is sufficiently 'distinct and palpable'" by not being able to enforce its trespass law. *Id.* at 120–21.

¹⁵³ 491 U.S. 440 (1989).

¹⁵⁴ *Id.* at 449 ("[R]efusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.").

¹⁵⁵ See 409 U.S. 205, 209 (1972).

son who claims to have been injured by a discriminatory housing practice,” the Court did not rely on the statute to support the tenants’ standing; instead, it pointed to the fact that the tenants had alleged the factual injury of being deprived of the “important benefits from interracial associations.”¹⁵⁶ But had the statute not given the plaintiffs the right to sue, the Court almost certainly would have denied standing on the ground that the plaintiffs were seeking only to vindicate the public interest in ensuring general compliance with the Equal Protection Clause.¹⁵⁷

More recent cases have followed the same course. In *Federal Election Commission v. Akins*,¹⁵⁸ for example, the Court found standing for plaintiffs seeking relief under the Federal Election Campaign Act of 1971, which requires certain groups to disclose information about campaign involvement and which creates a private cause of action for “[a]ny person who believes a violation of th[e] Act . . . has occurred.”¹⁵⁹ The plaintiffs could claim injury only because the statute gave them a right to that information.¹⁶⁰ But the Court’s injury analysis did not focus on the violation of this statutory right. Instead, the Court found the requisite injury by examining the consequences of the violations. The Court explained that the plaintiffs had suffered injury because they were deprived of information and, without the sought information, they were less able “to evaluate candidates for public office” and “to evaluate the role” that the financial assistance to candidates “might play in a specific election.”¹⁶¹ Similar is *Massachusetts v. EPA*.¹⁶² Although stating that “Congress has the power to de-

¹⁵⁶ *Id.* at 208–10.

¹⁵⁷ Indeed, the Court made almost that exact point in *Warth v. Seldin*. 422 U.S. 490 (1975). In that case, the Court denied standing to plaintiffs alleging the same injuries as those alleged in *Trafficante*. See *id.* at 490–91. The Court distinguished *Trafficante* on the ground that the plaintiffs in *Trafficante* had standing to sue because the Civil Rights Act had created a statutory right against discrimination. See *id.* at 512–14; cf. *Allen v. Wright*, 468 U.S. 737, 755 (1984) (finding that stigma caused by discrimination against a third party was insufficient to support standing).

¹⁵⁸ 524 U.S. 11 (1998).

¹⁵⁹ *Id.* at 19 (quoting 2 U.S.C. § 437g(a)(1) (2000)).

¹⁶⁰ No one would think, for example, that I suffer an injury if I am not allowed access to all of my neighbor’s private information.

¹⁶¹ *Akins*, 524 U.S. at 21. Professor Sunstein has concluded that “the principal question after *Akins*, for purposes of ‘injury in fact,’ is whether Congress or any other source of law gives the litigant a right to bring suit.” Sunstein, *supra* note 3, at 642–43. I agree that this is the appropriate question for standing, but it is not clearly the correct question in the Court’s view. The Court in *Akins* did not say standing was present based solely on the statute. Instead, it expressly stated that factual injury was a precondition for standing, see *Akins*, 524 U.S. at 20, and that Congress had the power to permit vindication of that injury, see *id.* at 24–25 (“[T]he informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”).

¹⁶² 127 S. Ct. 1438 (2007).

fine injuries” necessary to support standing,¹⁶³ the Court did not base its finding of standing on the fact that Congress had conferred a cause of action on Massachusetts or had defined the effects of global warming to be an injury. Instead, it found standing based on a potential factual injury: global warming could cause flooding of Massachusetts land.¹⁶⁴

This is not to say that the Court has never found that the violation of a right is an injury supporting standing. One example where it has done so is *Havens Realty Corp. v. Coleman*.¹⁶⁵ That case involved a suit under the Fair Housing Act, which makes it unlawful to misrepresent to any person because of that person’s race that an apartment is not available for sale or rental¹⁶⁶ and which confers an explicit cause of action to enforce this prohibition.¹⁶⁷ The plaintiff in *Havens* was a black woman who brought suit after she received false information about the availability of housing. Although the plaintiff never intended to rent the apartment, the Court nonetheless held that she had standing because she had alleged injury to her “statutorily created right to truthful housing information.”¹⁶⁸ Similarly, in *Heckler v. Matthews*, the Court granted standing to a male social security beneficiary who challenged a provision granting higher benefits to female beneficiaries based on the violation of the plaintiff’s “right” to receive benefits without regard to his sex.¹⁶⁹

But the Court explained in *Lujan* that standing in cases like *Havens* and *Matthews* was *not* based on the fact that the plaintiffs had alleged a violation of their rights. Instead, in an effort to justify the injury-in-fact requirement, the Court stated that standing in those cases was appropriate because the plaintiffs had alleged “de facto” injuries that were judicially cognizable only because of the statutes they invoked.¹⁷⁰ By insisting that standing is not based on a violation of a right but instead is dependent on some pre-existing concept of de facto injury, the Court turned the concept of the law on its head. The law no longer has the power to create individual rights which, if violated, will support standing. Instead, it has the power merely to iden-

¹⁶³ *Id.* at 1453 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

¹⁶⁴ *See id.* at 1456.

¹⁶⁵ 455 U.S. 363 (1982).

¹⁶⁶ The Fair Housing Act makes it unlawful for an individual or firm covered by the Act “[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.” 42 U.S.C. § 3604(d) (2000).

¹⁶⁷ *Id.* § 3612(a).

¹⁶⁸ *Havens*, 455 U.S. at 374.

¹⁶⁹ 465 U.S. 728, 737–40 (1984).

¹⁷⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

tify *which* factual injuries are sufficient to sustain standing.¹⁷¹ Thus, even while stating that the injury-in-fact requirement ensures that the plaintiff is alleging the violation of private rights, the Court used the injury-in-fact requirement to bar access to the courts when a private right created by Congress had been violated.¹⁷²

In addition to being superfluous in cases involving private rights, the injury-in-fact requirement in such cases has depleted the requirement of objective meaning.¹⁷³ The Court has been hesitant to deny standing in cases involving the violation of a right that the Court deems particularly important even when the plaintiff has not suffered a perceptible injury. This has resulted in a phenomenon similar to that which occurred when the English courts continued to insist that an action on the case required factual injury but at the same time were hesitant to dismiss such actions when the plaintiff had alleged only the violation of a right.¹⁷⁴

The Supreme Court has strained to find factual injury where the plaintiff has not been injured in any traditional sense, and it has recognized injuries that are a far cry from the “concrete” and “palpable” injuries that the Court purports to require.¹⁷⁵ In *Regents of the University of California v. Bakke*, for example, Allan Bakke challenged the affirmative action admission program at the medical school of the University of California at Davis, claiming that the program violated his equal protection rights.¹⁷⁶ Although Bakke failed to establish that he would have been admitted if race had not been considered, the Court found standing. Instead of basing standing on the ground that the University of California had violated Bakke’s right to equal protection, the Court explained that “the University’s decision not to permit Bakke to compete for all 100 places in the class, simply because of his

¹⁷¹ See Gene R. Nichol, *The Impossibility of Lujan’s Project*, 11 DUKE ENVTL. L. & POL’Y F. 193, 203 (2001) (“[T]he assumption [in *Lujan*] is that there exists a universe of ‘de facto’ injuries that constitutes the outer boundary of federal jurisdiction. So long as Congress chooses from among the pool, Article III is not transgressed.”). In *Akins*, the Court appeared to acquiesce in, if not reaffirm, *Lujan*’s holding regarding de facto injuries. See Fed. Election Comm’n v. *Akins*, 524 U.S. 11, 24–25 (1998) (“[T]he informational injury at issue here . . . is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”).

¹⁷² See *Lujan*, 504 U.S. at 578.

¹⁷³ Justice Powell acknowledged this problem soon after the adoption of the injury-in-fact requirement, stating “that the Court’s allegiance to a requirement of particularized injury has on occasion required a reading of the concept that threatens to transform it beyond recognition.” *United States v. Richardson*, 418 U.S. 166, 195 (1974) (Powell, J., concurring).

¹⁷⁴ See *supra* notes 29–43 and accompanying text.

¹⁷⁵ According to Webster’s Dictionary, “concrete” and “palpable” both mean “tangible.” See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1627 (1976) (defining “palpable” as “capable of being touched or felt”); *id.* at 472 (defining “concrete” as “tangible”).

¹⁷⁶ 438 U.S. 265 (1978).

race,” satisfied Article III’s injury requirement.¹⁷⁷ Relying on this same analysis in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*¹⁷⁸ and *Adarand Constructors, Inc. v. Peña*,¹⁷⁹ the Court held that nonminority contractors had standing to challenge government programs that set aside contracts for, or otherwise gave preference to, minority businesses. Although the plaintiffs in neither case could prove that they would have received the contracts if race were not a factor, the Court held the plaintiffs had suffered “injury in fact” by being denied the opportunity “to compete on an equal footing.”¹⁸⁰ But these rulings seem contrived: in no sense can denying an opportunity be characterized as tangible, concrete, or palpable.¹⁸¹

The Court’s continued reliance on the injury-in-fact requirement, together with its actual focus on whether the plaintiff has alleged the infringement of a private right, has led to an incoherent standing doctrine.¹⁸² The Court has found that racial stigma resulting from discrimination is a sufficient injury in fact to support standing for the

¹⁷⁷ *Id.* at 281 n.14.

¹⁷⁸ 508 U.S. 656 (1993).

¹⁷⁹ 515 U.S. 200 (1995).

¹⁸⁰ *Id.* at 211 (“The injury in cases of this kind is that a ‘discriminatory classification prevent[s] the plaintiff from competing on an equal footing.’” (alteration in original) (quoting *Northeastern*, 508 U.S. at 667)); *Northeastern*, 508 U.S. at 666 (“[I]n the context of a challenge to a set-aside program, the ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract.”). The abstract injury in *Northeastern* provided the basis for standing in *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998). There, New York challenged the President’s exercise of the line item veto to excise a provision granting massive tax relief to New York. *See id.* at 430. The Court found injury sufficient to support standing based on *Northeastern*, which the Court characterized as granting standing because the discrimination resulted in the diminution of the plaintiff’s bargaining power, not because the plaintiff suffered an equal protection violation. *See id.* at 433 n.22. The Court explained that, by enacting a tax benefit, Congress gave New York a statutory “bargaining chip” which the President’s veto took away. *See id.* at 432. Equally abstract are the injuries recognized in the redistricting cases in which voters complained that redistricting plans designed to benefit minority voters violated the Equal Protection Clause. *See, e.g.*, *United States v. Hays*, 515 U.S. 737, 744–45 (1995). In *Hays*, the Court found standing not on the equal protection violation itself, but on the fact that elected officials in a district designed to benefit members of a particular race “are more likely to believe that their primary obligation is to represent only the members of that group.” *See id.* at 744 (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

¹⁸¹ The fact that interference with the ability to compete on equal terms also supported standing under the legal interest test illustrates the intangible nature of the injury. *See The Chicago Junction Case*, 264 U.S. 258, 266 (1924) (finding standing based on a determination that the “plaintiffs are no longer permitted to compete with the New York Central on equal terms”). Professors Bandes and Monaghan make the converse complaint—that by insisting on maintaining a private rights model while at the same time granting standing in public rights cases, the Court has expanded the concept of injury in fact to include such abstract injuries as interference with the opportunity to appreciate wildlife and other aesthetics. *See Bandes, supra* note 3, at 284–85; Monaghan, *supra* note 6, at 1380–82.

¹⁸² *See Fletcher, supra* note 3, at 221–22; Monaghan, *supra* note 6, at 1380–82.

victim of the discrimination but not for the other members of the same race.¹⁸³ The Court has denied standing when a plaintiff seeks information required to be provided under the Constitution¹⁸⁴ but found standing when a plaintiff seeks information required by statute.¹⁸⁵ The Court has said that a plaintiff cannot base standing on psychological injury caused by the government's failure to obey the Establishment Clause,¹⁸⁶ but can base it on the psychological injury resulting from the government's violation of the Privacy Act.¹⁸⁷ Moreover, although purporting to demand a "concrete" and "palpable" injury, the Court has found standing based on such abstract injuries as the loss of an opportunity to compete for a benefit that may have been denied anyway¹⁸⁸ or the possibility that a representative might not wholly reflect the plaintiff's views.¹⁸⁹ These examples are far from exhaustive, but they illustrate the strange consequences of the Court's standing doctrine.

2. *The Role of Cognizability*

According to the Court, a "legally and judicially cognizable" injury requires "an invasion of a legally protected interest which is . . . concrete and particularized."¹⁹⁰ In *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, the Court stated that this "interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right."¹⁹¹ On its face, by requiring the invasion of a "legally protected right," the cognizability requirement seems to be a reincarnation of the legal-interest test discarded in *Data Processing*.¹⁹² And

¹⁸³ See *Allen v. Wright*, 468 U.S. 737, 755–56 (1984).

¹⁸⁴ See *United States v. Richardson*, 418 U.S. 166, 179–80 (1974).

¹⁸⁵ See *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20–21 (1998); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989).

¹⁸⁶ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485–86 (1982).

¹⁸⁷ See *Doe v. Chao*, 540 U.S. 614, 624–25 (2004).

¹⁸⁸ See *supra* text accompanying notes 175–81.

¹⁸⁹ See *United States v. Hays*, 515 U.S. 737, 744 (1995) (granting standing when, because of redistricting designed to benefit one racial group, "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole" (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993))).

¹⁹⁰ See *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (omission in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

¹⁹¹ 529 U.S. 765, 772–73 (2000).

¹⁹² *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). This also means that the cognizability inquiry considers who is asserting the interest as well as what that interest is. Thus, for example, the government has a cognizable interest in the enforcement of criminal laws while a private individual does not. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another . . ."); see also *Diamond v. Charles*, 476 U.S. 54, 67 (1986) ("Only the State may invoke regulatory measures to protect [the] interest [of an unborn fetus], and only the State may invoke the power of the courts when those regula-

the Court has occasionally applied it that way, such as in *Lewis v. Casey*.¹⁹³ There, inmates filed an action for injunctive relief against various prisons, claiming that the prisons' failure to provide adequate libraries and access to legal assistance had deprived them of their constitutional right of access to the courts.¹⁹⁴ Although the denial of library access and legal assistance are factual injuries, the Supreme Court denied standing to the majority of the inmates on the ground that their injury was not cognizable because it did not involve the violation of a right.¹⁹⁵ The Court explained that the Constitution does not provide a right to a law library but provides only the narrower right of access to the courts.¹⁹⁶ Therefore, the Court limited standing to those inmates who demonstrated that the prison's failure to provide library access resulted in their not being able to pursue claims.¹⁹⁷

This definition of cognizability creates a disconnect between the cognizability requirement and the injury-in-fact requirement in cases involving private rights. Injury in fact asks whether the plaintiff suffered a factual injury, such as pain, the loss of money, or some other harm.¹⁹⁸ The cognizability inquiry, on the other hand, asks whether the conduct leading to that factual injury involved the invasion of a legally protected interest.¹⁹⁹ The example of *A* punching *B* in the nose illustrates this disconnect. The factual injury is the bloody nose resulting from the punch. But *B* does not have a right against a bloody nose or the pain associated with it. *B*'s right is not to be touched in a way that leads to harm. The same point applies to consti-

tory measures are subject to challenge."); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) ("[P]rivate persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws by the INS.").

¹⁹³ 518 U.S. 343 (1996).

¹⁹⁴ See *id.* at 346–47.

¹⁹⁵ See *id.* at 356–57.

¹⁹⁶ See *id.* at 350–51.

¹⁹⁷ See *id.* at 356–57. Another example is *Silveira v. Lockyer*, which involved a Second Amendment challenge to the California Assault Weapons Control Act. See 312 F.3d 1052, 1066 (9th Cir. 2002). Although the plaintiffs suffered factual harm by being deprived of guns, the Court denied standing on the ground that the "Second Amendment does not provide an individual right to own or possess guns or other firearms." *Id.* at 1066.

¹⁹⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974) ("We need not define 'actual injury' . . . Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."). The Court has repeatedly stated that the injury must occur "as the result" of the illegal conduct for there to be "injury in fact." See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992); *United States v. Richardson*, 418 U.S. 166, 166–67 (1974).

¹⁹⁹ The distinction between injury and cognizability is clearly illustrated in standing's causation requirement. The Court has explained that standing exists only "when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action'" *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (omission in original) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

tutional rights. The Equal Protection Clause creates an interest in being treated equally, not in avoiding the consequences of disparate treatment. Likewise, the Due Process Clause creates an interest in receiving adequate process before being deprived of life, liberty, or property, not in avoiding such deprivations altogether.

This understanding of the cognizability requirement obviously does not fit well with cases involving public interests. By definition, such cases do not involve the violation of private rights. But the Court generally has not denied standing in public law cases where the plaintiff has alleged injury in fact but has failed to identify the invasion of a legally protected right.²⁰⁰ Instead, in determining cognizability, the Court has asked only whether the injury is “concrete and particularized”²⁰¹ or “distinct and palpable.”²⁰² In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, for example, residents near a river sued the operator of a hazardous waste incinerator under the Clean Water Act for discharging pollutants into the river.²⁰³ Several plaintiffs claimed standing based on their reluctance to boat, swim, and fish in the river because of the pollution.²⁰⁴ Although the plaintiffs had no legal right to use the river, the Court held that the plaintiffs had standing because their concerns about the effects of the discharges “directly affected” their recreational and aesthetic interests.²⁰⁵ Similarly, the Court has stated that standing can be based on interference with the ability to observe animals in other countries, “even for purely aesthetic purposes,” although no one has a legal right to observe those

²⁰⁰ See, e.g., *Lujan*, 504 U.S. at 561. To be sure, there are a few exceptions. In *McConnell v. Federal Election Commission*, voters sought to challenge increases in the “hard-money” limits for funding campaigns, arguing that the increase reduced their ability to influence elections. 540 U.S. 93, 228 (2003). The Court denied standing, stating that there is no legally cognizable right to equal resources to influence elections. See *id.*

²⁰¹ *Lujan*, 504 U.S. at 560.

²⁰² *Warth*, 422 U.S. at 501; accord *Allen v. Wright*, 468 U.S. 737, 751 (1984); see *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998) (“[W]here a harm is concrete, . . . the Court has found ‘injury in fact.’”); Sunstein, *supra* note 3, at 644 (“[A]n injury that is both concrete and generalized is constitutionally cognizable.”).

²⁰³ 528 U.S. 167, 175–76 (2000). The plaintiffs brought suit under 33 U.S.C. § 1365 (2000), which authorizes suit by any “person or persons having an interest which is or may be adversely affected.” See *Laidlaw*, 528 U.S. at 174. The statute does not define or limit the type of interests that must be affected to support an action.

²⁰⁴ See *Laidlaw*, 528 U.S. at 181–82.

²⁰⁵ See *id.* at 183–84. There are many other examples. In *United States v. Students Challenging Regulatory Agency Procedures*, an environmental group based in Washington, D.C. challenged a surcharge on railroad freight rates. See 412 U.S. 669, 675–76 (1973). The group claimed that the increased rates would lead to the increased use of nonrecyclable commodities instead of recyclable goods. See *id.* at 676. This, in turn, would cause recreational and aesthetic injury to the group because it would deplete natural resources around Washington, D.C. and produce more litter in Washington, D.C.’s parks. See *id.* The Court held that these alleged harms were sufficient to support standing even though the group did not have a legally protected interest in preserving those parks. See *id.* at 690.

animals.²⁰⁶ At various times, the Court has found a cognizable injury arising from the potential reduction of water available for irrigation²⁰⁷ and the loss of bargaining power.²⁰⁸ None of those complaints involved the violation of a right,²⁰⁹ yet the Court did not hesitate to grant standing. This list is far from exhaustive.²¹⁰

The only limitation the Court has imposed consistently is that an injury is not cognizable if recognizing the injury would confer standing on any and all persons who might seek to bring suit. The Court has refused to recognize as a cognizable injury the government's failure to observe the law²¹¹ or even mental distress caused by the government's illegal conduct.²¹² Similarly, the Court has refused to recognize standing for third parties experiencing racial stigma resulting from discrimination against another person of the same race.²¹³

The upshot is that the cognizability requirement has a different meaning in cases involving public rights than it does in cases involving private rights. In private rights cases, the cognizability inquiry is whether the plaintiff has alleged the violation of a private right. In public law cases, the inquiry, by and large, is whether the factual injury the plaintiff identifies is a personal, material, quantifiable harm resulting from the government's alleged misconduct.²¹⁴

²⁰⁶ *Lujan*, 504 U.S. at 562–63; see *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (finding “a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected by continued whale harvesting”).

²⁰⁷ See *Bennett v. Spear*, 520 U.S. 154, 160, 166 (1997). In granting standing in *Bennett*, the Court did not mention riparian rights and instead based standing solely on the fact that the plaintiffs would suffer the adverse consequence of less water. See *id.*

²⁰⁸ See *Clinton v. City of N.Y.*, 524 U.S. 417, 433 (1998).

²⁰⁹ See generally *CHEMERINSKY*, *supra* note 7, § 2.3, at 72–74.

²¹⁰ See *Nichol*, *supra* note 3, at 1931 (describing the list of cognizable interests as “literally endless”).

²¹¹ *Allen v. Wright*, 468 U.S. 737, 754 (1984) (denying standing for a claim of “the abstract injury in nonobservance of the Constitution” (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974))).

²¹² See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485–86 (1982); *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1180 (7th Cir. 1998) (“If unease on observing wrongs perpetrated against others were enough to support litigation, all doctrines of standing and justiciability would be out the window.”).

²¹³ See *Allen*, 468 U.S. at 755 (finding that stigma is cognizable only for “those persons who are personally denied equal treatment”).

²¹⁴ This has also been the understanding of the circuit courts. See, e.g., *Sierra Club v. Johnson*, 436 F.3d 1269, 1278 (11th Cir. 2006) (holding that standing may rest on plaintiffs’ “asserted economic, quality of life, and environmental injuries”); *Wabash Valley Power Ass’n v. FERC*, 268 F.3d 1105, 1113 (D.C. Cir. 2001) (“Parties suffer cognizable injury under Article III when an agency lift[s] regulatory restrictions on their competitors or otherwise allow[s] increased competition.” (internal quotation marks omitted)); *Sea-Land Serv., Inc. v. Dep’t of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998).

III

DENIAL OF STANDING IN MODERN PRIVATE RIGHTS CASES

By insisting that injury in fact is a constitutional prerequisite to standing that applies equally to cases involving private rights as to those involving public rights, the Court's standing doctrine potentially precludes plaintiffs who cannot point to a factual injury from vindicating violations of their private rights. Moreover, as the Court constricted the types of injuries that satisfy the injury-in-fact requirement in order to restrain standing in public rights cases, it also constricted standing in private rights cases.

One example is *Lewis v. Casey*, which concerned inmates' right of access to the courts to challenge their confinement.²¹⁵ Although, the Court has said that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances,"²¹⁶ in *Lewis* the Court rejected the notion that any interference with the right of access to the courts was sufficient to support standing.²¹⁷ Instead, the Court concluded that only an inmate who "could demonstrate that a nonfrivolous legal claim" regarding his confinement "had been frustrated or was being impeded" would have the requisite injury for standing.²¹⁸ Thus, the Court in *Lewis* declared that nonfrivolousness was necessary to satisfy the injury-in-fact requirement.²¹⁹ It explained that "[d]epriving someone of an arguable (though not yet established) claim" inflicts the "actual injury" necessary to support standing "because it deprives him of something of value—arguable claims are settled, bought, and sold."²²⁰ The Court reasoned that "[d]epriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions."²²¹ In so holding, the Court did not dispute Justice Stevens's argument in dissent that preventing a prisoner from filing any claim would be a violation of his right of access to the courts.²²² Instead, the Court disagreed with Jus-

²¹⁵ See 518 U.S. 343, 346 (1996).

²¹⁶ *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

²¹⁷ See *Lewis*, 518 U.S. at 351–53.

²¹⁸ *Id.* at 353.

²¹⁹ See *id.* at 353 n.3.

²²⁰ *Id.*

²²¹ *Id.*

²²² See *id.* at 408 (Stevens, J. dissenting) ("There is a constitutional right to effective access, and if a prisoner alleges that he personally has been denied that right, he has standing to sue."). Although several courts had concluded that there is no right to file a frivolous claim, see, e.g., *Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989), the Supreme Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), indicated that the right of access to the courts is not conditioned on whether the suit has any merit. See 404 U.S. at 512 ("It is alleged that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' The nature of the views pressed does not, of course, determine whether First Amendment

tice Stevens's contention that the violation of this right sufficed for standing.²²³ According to the Court, the plaintiffs would have standing only if they established that the violation caused them to lose something of "value."²²⁴

One might explain *Lewis* on the ground that the prisoners were not seeking a remedy for a past violation but were only seeking an injunction to prevent future violations by restructuring a public institution's policies.²²⁵ Professor Fallon has argued that courts develop justiciability doctrines in part to avoid imposing such expensive or intrusive remedies, especially when it involves the courts in the legislative function of deciding how to allocate public funds.²²⁶ The most well-known example of this avoidance is *City of Los Angeles v. Lyons*.²²⁷ There, Adolph Lyons brought suit after he was subject to a life-threatening chokehold approved by Los Angeles police policy.²²⁸ The Court held that Lyons had standing to seek damages for the injury,

rights may be invoked . . ."). In any event, *Lewis* appears to have proceeded on the assumption that the right of access to courts does not depend on the merit of the underlying claim and denied standing for lack of factual harm. See *Lewis*, 518 U.S. at 353. Indeed, delineating the scope of the right to access the courts is the sort of merits determination that Justice Scalia, the author of *Lewis*, has insisted is inappropriate until Article III jurisdiction is resolved. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). *Lewis*, however, provided the foundation for the Court later to proclaim that no violation of the right of access occurs when a plaintiff pursues a frivolous claim. See *Christopher v. Harbury*, 536 U.S. 403, 416 (2002).

²²³ See *id.*, 518 U.S. at 358 n.6.

²²⁴ See *id.* at 353 n.3. Another arguable example of the Court denying standing despite the violation of a right is *Laird v. Tatum*, 408 U.S. 1 (1972). There, a group sought to challenge a domestic army surveillance program because it violated their First Amendment rights by chilling their expression. See *id.* at 2. Although acknowledging that the chilling effect of the program might render it unconstitutional, the Court held that the chill was insufficient to confer standing. See *id.* at 12–14; cf. *Meese v. Keene*, 481 U.S. 465, 473 (1987) (finding there was standing to challenge the classification of a film as "political propaganda" on the ground that such classification would not merely cause a "subjective chill" but also would impact reputation). As then-judge Scalia explained in denying standing in a post-*Laird* case, a "[c]hilling effect" is . . . the reason why the governmental imposition is invalid" under the First Amendment "rather than . . . the harm which entitles the plaintiff to challenge it." *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984); see *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 660–61 (6th Cir. 2007) (denying standing to challenge warrantless wiretaps).

²²⁵ See Fallon, *supra* note 3, at 4. Other doctrines, including the "basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief," reflect the reluctance to award equitable relief. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (omission in original) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)).

²²⁶ See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 648 (2006); Fallon, *supra* note 3, at 40.

²²⁷ 461 U.S. 95 (1983).

²²⁸ See *id.* at 97–99.

but he lacked standing to seek an injunction prohibiting the future use of chokeholds because he did not suffer any continuing injury.²²⁹

The Court's opinion in *Lewis* expressly reflects these sentiments. The Court stated that "it is for the political branches . . . to manage prisons in such fashion that official interference with the presentation of claims will not occur" and "for the courts' to remedy . . . official interference with individual inmates' presentation of claims."²³⁰ But *Lewis* differs in an important respect from *Lyons*. In *Lyons*, the Court denied standing to seek equitable relief on the ground that the plaintiff had failed to demonstrate an "immediate" injury.²³¹ By contrast, in *Lewis* the Court decided on the ground that the prisoners did not suffer any "actual injury" if the claims they sought to file with the aid of the prison libraries were frivolous.²³² By denying standing in these circumstances, the Court prevented prisoners from having too much power over the prison. Prisoners can easily file frivolous claims, and it would be unacceptable to revamp a prison system at prisoners' whim. Moreover, it may reflect a logical, if not inevitable, corollary to Fallon's thesis that the judiciary may be especially reluctant to award expensive or intrusive relief when the plaintiff would not materially benefit from a favorable decision.²³³

Although *Lewis* might have been motivated by a desire to avoid the judiciary's exercising oversight over a public institution, the Court's reasoning is not limited to claims for equitable relief. By stating that there is no injury in fact when a person is denied access to the courts unless the claim is nonfrivolous, the Court equally limited

²²⁹ See *id.* at 105–06. Another example is *Rizzo v. Goode*, 423 U.S. 362 (1976), in which the Court denied standing to Philadelphia residents who sought an injunction after being exposed to a pattern of illegal police conduct, stating that the plaintiffs had failed to demonstrate a threat of future injury that would warrant the requested "overhauling" of police procedures. See *id.* at 372–73.

²³⁰ *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Professor Pierce has noted that the decision in *Lewis* also furthers the goal of protecting "administrators from the potential excesses of activist judges." Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1770 (1999).

²³¹ See *Lyons*, 461 U.S. at 105–06.

²³² See *Lewis*, 518 U.S. at 353 n.3.

²³³ Similar concerns may have been at play in *Laird*, in which the Court found that "[a]llegations of a subjective 'chill,'" although perhaps constituting a violation of the First Amendment, "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). If a subjective chill caused by government conduct was sufficient for standing, anyone who felt that the government conduct threatened them would be able to interfere with that conduct, even if that conduct was not directed at the plaintiff or the plaintiff's speech—a plainly unacceptable result. Cf. Fletcher, *supra* note 3, at 229 (describing *Laird* as an instance of the Court avoiding deciding the appropriate limits of Army surveillance).

claims for damages based on denial of access to the courts, as subsequent decisions make clear.²³⁴

Beyond merely requiring a plaintiff alleging a violation of a private right to demonstrate factual injury, the Court has also on occasion required such a plaintiff to satisfy the cognizability requirement applied in public rights cases—the plaintiff must demonstrate that the injury is material and tangible. In *Texas v. Lesage*,²³⁵ Lesage, a Caucasian, sued for damages after the University of Texas Ph.D. program rejected him.²³⁶ Lesage argued that the school denied him equal protection by maintaining an affirmative action program.²³⁷ On Texas's motion for summary judgment, the district court dismissed the action based on the unrefuted evidence that the school would have denied Lesage admission regardless of his race.²³⁸ The Supreme Court agreed in a per curiam opinion, stating that “where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief.”²³⁹ Although the Court did not expressly state that its disposition rested on standing, the Court's description of Lesage's claim as not presenting a “cognizable injury” and the Court's efforts to distinguish cases finding standing for claims for prospective relief reveals that the Court's disposition was jurisdictional. And that is how lower courts and commentators have understood the decision.²⁴⁰ Why did the Court deny standing? As noted earlier, in *Bakke*, *North-eastern*, and *Adarand*, the Court held that denying an opportunity to compete on an equal footing constitutes injury sufficient to support standing,²⁴¹ and Lesage appears to have suffered an equivalent injury in fact. Moreover, that injury certainly involved the invasion of a legal interest. The Equal Protection Clause provides a personal right

²³⁴ See *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (stating that “we have been given no reason to treat backward-looking access claims any differently” than forward looking claims); *Taylor v. Dretke*, No. 05-41738, 2007 WL 1860252, at *1 (5th Cir. June 28, 2007) (per curiam) (affirming the dismissal of a § 1983 action alleging the violation of right of access to the courts on the ground that the plaintiff failed to establish an underlying meritorious claim); *Anderson v. Turner*, No. 06-41375, 2007 WL 1806832, at *1 (5th Cir. June 19, 2007) (per curiam) (dismissing as frivolous an appeal from the district court's dismissal of a § 1983 action because the plaintiff did not suffer any actual injury).

²³⁵ 528 U.S. 18 (1999).

²³⁶ See *id.* at 19.

²³⁷ See *id.*

²³⁸ See *id.* at 20.

²³⁹ *Id.* at 21.

²⁴⁰ See, e.g., *Donahue v. City of Boston*, 304 F.3d 110, 116 (1st Cir. 2002); *Aiken v. Hackett*, 281 F.3d 516, 519 (6th Cir. 2002); *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1277 (11th Cir. 2001); *Ashutosh Bhagwat, Injury Without Harm: Texas v. Lesage and the Strange World of Article III Injuries*, 28 *HASTINGS CONST. L.Q.* 445, 452 (2001) (concluding that *Lesage* is a standing decision).

²⁴¹ See *supra* notes 175–81 and accompanying text.

against discrimination²⁴² and Lesage's equal protection right was clearly violated.

The Court based its conclusion that Lesage's injury was not cognizable on its decision in *Mt. Healthy City School District Board of Education v. Doyle*.²⁴³ But *Mt. Healthy* had nothing to do with standing. In that case, a teacher sued a local Board of Education, claiming that the Board's refusal to renew his contract was a violation of his First and Fourteenth Amendment rights.²⁴⁴ The Court held that "remedial action" was unjustified even if the Board had refused to renew the contract for unconstitutional reasons, provided that the Board could establish that it would have refused to renew the contract anyway.²⁴⁵ In *Carey*, the Court clarified that *Mt. Healthy* established only that compensatory damages cannot be awarded for harms that would have resulted without the constitutional violation.²⁴⁶ *Carey* went on to hold that, despite *Mt. Healthy*, nominal damages would lie to redress the violation of the right alone.²⁴⁷

In finding the injuries not cognizable, the *Lesage* Court distinguished *Bakke*, *Northeastern*, and *Adarand* on the ground that those plaintiffs sought prospective, equitable relief. Why that should matter to cognizability is unclear. Neither § 1983 nor the Equal Protection Clause distinguish between injuries warranting injunctive relief and those warranting damages.²⁴⁸ The only difference is that the Court in *Bakke* could grant more meaningful relief by requiring the government to redo its decision, while in *Lesage* the claim had less value because compensatory damages were unavailable.²⁴⁹

The upshot of *Lesage* is that a claim for damages to remedy the violation of a right is "cognizable" only if the plaintiff demonstrates

²⁴² See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (referring to the "personal right to equal protection of the laws"); *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) ("At stake is the personal interest of the plaintiffs in admission to public schools . . . on a non-discriminatory basis.").

²⁴³ 429 U.S. 274 (1977).

²⁴⁴ See *id.* at 276.

²⁴⁵ See *id.* at 285.

²⁴⁶ *Carey v. Phipus*, 435 U.S. 247, 260 (1978).

²⁴⁷ See *id.* at 266. *Lesage* cited two other cases, *Crawford-El v. Britton*, 523 U.S. 574 (1998), and *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), to support its conclusion. But neither case purported to overturn *Carey*. Each case merely described in dicta *Mt. Healthy*'s rule that the government can avoid liability by proving it would have taken the same action even without the illegal motive. See *Crawford-El*, 523 U.S. at 593; *Umbehr*, 518 U.S. at 669.

²⁴⁸ The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 1983 authorizes a citizen to bring "an action at law, suit in equity, or other proper proceeding for redress" for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000).

²⁴⁹ It is important to stress that the Court itself did not find that there was no actual injury, but that the injury was not cognizable.

having suffered a loss that can be compensated under traditional measures of damages. Like *Lewis*, *Lesage* was decided on the ground that the plaintiff failed to show a loss of anything of value.²⁵⁰ Although *Lesage* concerned equal protection claims, nothing precludes its reasoning from applying to other rights. *Lesage* itself reached the conclusion that the plaintiff had suffered no cognizable injury based on a line of First Amendment cases in which the Court held that an action alleging illegal retaliation would not lie if the government demonstrated that it would have made the same decision without the impermissible motive.²⁵¹ Although those cases were dismissals on the merits,²⁵² *Lesage* bootstrapped them into a basis for denying standing, and *Lesage* itself may serve as a bootstrap to resolve on jurisdictional grounds future cases that would have been decided on the merits.

Lesage's reasoning would seem to foreclose suit in the historic cases *Ashby v. White* and *Watling v. Wells*.²⁵³ As in *Lesage*, in both cases the plaintiff claimed the violation of a right (in *Ashby*, the right to vote; in *Watling*, the right to graze sheep on the common), and in neither case did the deprivation of the right have any factual consequence: *Ashby's* candidate was elected, and *Watling* never sought to graze his sheep.

Lesage's reasoning also calls into doubt the doctrine of *Carey* and its progeny, which hold that a plaintiff who suffers the violation of a constitutional right but no additional harm is entitled to nominal damages.²⁵⁴ In *Carey*, the school would have suspended the students regardless of the amount of process it afforded them. Under *Lesage's* reasoning, the students would not have had standing because they, like *Lesage*, would have been denied the benefit (the interest in staying in school) regardless of whether the government complied with the Constitution.

Indeed, despite *Lesage* courts and commentators have generally concluded that a claim for nominal damages is justiciable.²⁵⁵ But it is difficult to see how those conclusions could be correct under current standing doctrine. Nominal damages are appropriate when the plaintiff has suffered the violation of a right but has failed to establish "ac-

²⁵⁰ See *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

²⁵¹ See *Crawford-El*, 523 U.S. at 593; *Umbehr*, 518 U.S. at 669.

²⁵² See *supra* note 247 and accompanying text.

²⁵³ See *supra* notes 31–43 and accompanying text.

²⁵⁴ See Christina B. Whitman, *An Essay on Texas v. Lesage*, 51 MERCER L. REV. 621, 634–35 (2000) (noting tension between *Lesage* and *Carey*).

²⁵⁵ See *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005); *Lynch v. Leis*, 382 F.3d 642, 646 n.2 (6th Cir. 2004) (“[A] claim for nominal damages, . . . is normally sufficient to establish standing”); *Yniguez v. Arizona*, 975 F.2d 646, 647 (9th Cir. 1992) (per curiam); cf. 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 266 (2d ed. 1984) (“A valid claim for nominal damages should avoid mootness.”).

tual injury.”²⁵⁶ They are, in other words, a type of remedy—a civil penalty imposed for the violation of a right. If injury in fact is a constitutional requirement, a plaintiff who has not suffered an injury has no standing regardless of the available remedy. This is the teaching of the Court’s decision in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*.²⁵⁷ There, the Court explained that the availability of a statutory bounty in a qui tam action does not satisfy the injury-in-fact requirement because injury in fact is required at the time suit is filed yet the plaintiff has no entitlement to the bounty until after having prevailed.²⁵⁸

Indeed, for these reasons, some judges have recently concluded that a claim for nominal damages brought solely to vindicate the violation of a right is not justiciable.²⁵⁹ In their view, a claim for nominal damages is justiciable only if the violation of the right resulted in some factual injury (such as a damaged reputation) or has the potential to cause factual injury in the future (such as the loss of land through eminent domain).²⁶⁰

Moreover, it is unclear why the violation of a right cannot itself constitute an injury in fact. Rights have value. Property, for example, is the right to exclude others.²⁶¹ That right—access to land—is fre-

²⁵⁶ See *Searles v. Van Bebber*, 251 F.3d 869, 878 (10th Cir. 2001).

²⁵⁷ 529 U.S. 765, 772 (2000).

²⁵⁸ See *id.* This argument commanded the vote of four Justices in *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 421 (1980) (5-4 decision) (Powell, J., dissenting) (“[T]he ‘private attorney general concept’ cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules.”).

²⁵⁹ See *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257–58 (10th Cir. 2004) (McConnell, J., concurring). Judge McConnell’s analysis in *Utah Animal Rights Coalition* is particularly revealing. There, the Utah Animal Rights Coalition brought suit alleging that Salt Lake City violated its right to procedural due process by not promptly acting on an application to stage a protest at the winter Olympics. See *id.* at 1250 (majority opinion). The Animal Rights Coalition sought, inter alia, nominal damages. See *id.* at 1254. While the suit was pending, the City denied the application and the Coalition filed a new application which was granted; the City also enacted an ordinance requiring action on permit applications within twenty-eight days. See *id.* at 1253. Judge McConnell concluded that these events rendered the claim for nominal damages moot, stating that the award would “accomplish[] little beyond giving [plaintiffs] the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated.” *Id.* at 1265 (McConnell, J., concurring) (alteration in original) (internal quotation marks omitted) (quoting *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)).

²⁶⁰ Although made in the mootness context, Judge McConnell’s arguments apply equally to standing. A case becomes moot only if the plaintiff loses the interest that confers standing itself; if an interest is insufficient to ward off mootness, it is also insufficient to confer standing. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191–92 & n.5 (2000) (stating that the interest for standing must be greater than that necessary to avoid mootness).

²⁶¹ See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 22 (1913) (drawing the distinction between property, which is a set of rights, and land, which is an object of those rights).

quently bought and sold, and trespass deprives the owner of the value. A similar point may be made with respect to the right of prisoners' to access the courts. That right—in contradistinction to the ends to be achieved in court—has value for the prisoner. The government often “pays” prisoners in exchange for their not filing an action challenging their conviction by offering them a plea bargain. The value of the right is not necessarily tied to the value of a particular claim. The government may strike the bargain before it can be sure whether a prisoner has a meritorious claim or even whether the prisoner plans to file suit at all. Likewise with the right to equal protection: a government that treats a person differently on the basis of race puts some value on its ability to do so. The rights afforded by the Equal Protection Clause therefore have value, and thus a government takes something of value each time it violates those rights.

IV

ADDRESSING THE ARGUMENTS IN FAVOR OF LIMITING PRIVATE RIGHTS CASES

Although the injury-in-fact requirement is a poor proxy for ensuring that plaintiffs raise only their own private rights, this does not necessarily mean that the injury-in-fact requirement does not further the goals of separation of powers. Moreover, there might be other reasons to require injury in fact, such as ensuring a better decision or producing the best allocation of limited judicial resources. This Part examines those arguments.

A. Separation of Powers

The Court has explained that it is the business of the political branches, and not the judiciary, to resolve abstract or generalized grievances, and injury in fact ensures that a suit involves a particularized, concrete grievance.²⁶² Several commentators have endorsed this view.²⁶³ In his article on the topic, then-judge Antonin Scalia argued that standing confines courts to their “traditional . . . role of protecting individuals and minorities” from majority rule and that injury in fact is necessary to “separate the plaintiff from all the rest of us . . . [and] entitle him” to invoke the courts for “special protection.”²⁶⁴

²⁶² See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992).

²⁶³ See, for example, C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 868–69 (1985), and James Leonard & Joanne C. Brant, *The Half Open Door: Article III, The Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 89 (2001), for the argument that injury in fact is beneficial and appropriate because it achieves the Framers' goal of limiting judicial review.

²⁶⁴ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–95 (1983). For a criticism of this view, see Sunstein, *supra* note 3, who argues that the “basic difficulty” with Justice Scalia's argument “is that

Other commentators, however, have argued that injury in fact is irrelevant to the separation of powers. They contend that the purpose of the judiciary is to correct unlawful conduct by the executive and legislature,²⁶⁵ and that in doing so the judiciary does not impermissibly interfere with the function of those branches because those branches have no authority to engage in unlawful acts.²⁶⁶ Under their view, the only separation of powers requirement for standing is that the law authorize the cause of action.²⁶⁷

Whatever its merits in the public rights context, this debate has no place in the private rights context. In private rights cases, the plaintiff is not alleging a grievance suffered generally by the public, but rather the personal violation of an individual right.²⁶⁸ Such plaintiffs represent their own interests, not those of the public.²⁶⁹ To paraphrase Justice Scalia, the plaintiff is invoking the courts not to vindicate the rights of the majority, but to vindicate the plaintiff's personal rights from the imposition of the majority.²⁷⁰

More fundamentally, invoking separation of powers to restrict standing in private rights cases turns the separation of powers doctrine on its head. Despite the Court's insistence to the contrary in its standing decisions,²⁷¹ separation of powers is not simply a device to promote the institutional interests of each branch.²⁷² The principal

Congress has, by hypothesis, concluded that the agency (or private defendant) is not entirely reliable on its own and that relevant people should have access to the courts in order to ensure that the (democratically enacted) law is enforced." *See id.* at 647.

²⁶⁵ *See* Monaghan, *supra* note 6, at 1370–71; Pushaw, *supra* note 3, at 411, 451.

²⁶⁶ Berger, *supra* note 141, at 828–30. The Court reflects this view in part in its statement in *Marbury v. Madison* that it will not enforce an unconstitutional law. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

²⁶⁷ *See* Pushaw, *supra* note 3, at 481.

²⁶⁸ Indeed, such suits often arise because the government (or another defendant) targeted the plaintiff. *See* Scalia, *supra* note 264, at 895 (observing that a "concrete injury" to the plaintiff alone is necessary to create individual standing against the government).

²⁶⁹ *See* Jaffe, *supra* note 107, at 286 ("If he has a 'legally protected interest,' he represents not 'the public,' but himself and is entitled to the remedy."). Justice Stewart made a similar point. In his view, "the duty," correlative with the right, "running as it does from the defendant to the plaintiff, provides fully adequate assurance that the plaintiff is not seeking to 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" *United States v. Richardson*, 418 U.S. 166, 203–04 (1974) (Stewart, J., dissenting) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

²⁷⁰ *See* Scalia, *supra* note 264, at 894.

²⁷¹ *See* *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1860–61 (2006) (stating that standing is necessary to "ensur[e] that the Federal Judiciary respects the 'proper—and properly limited—role of the courts in a democratic society'" (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984))); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–77 (1992) (arguing that standing is necessary to avoid interfering with "the function of Congress and the Chief Executive").

²⁷² *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1518–20, 1544–48 (1991) (providing examples of other cases in which the Court focused on institutional interests and chastising the Court for doing so).

reason for dividing powers among the three branches is to prevent tyranny and unwarranted government intrusion on individual rights.²⁷³ Separation of powers concerns arise when a branch of government exceeds its area of authority and enters the area of another branch of government.²⁷⁴ Remedying violations of private rights does not present that problem. The core duty of the judiciary is to remedy private legal wrongs by awarding relief when there has been a violation of a private right.²⁷⁵ As one nineteenth-century treatise explains, the power of the court is “the authority to determine the rights of persons or property, by arbitrating between adversaries, in specific controversies, at the instance of a party thereto.”²⁷⁶ This is what Chief Justice Marshall meant when he said that “the province of the court is, solely, to decide on the rights of individuals.”²⁷⁷ Thus, while the Court may (or may not) be correct that separation of powers restricts the judiciary to deciding cases involving private rights, separation of powers is certainly not a basis for precluding the judiciary from resolving claims of private rights, regardless of injury.

Those who forget the reason for a rule are apt to misapply it. By requiring injury in fact in private rights cases, the Court has ignored why it requires injury in fact—to ensure that a case involves a private dispute involving individual rights.²⁷⁸ Indeed, the Court has stated

²⁷³ See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“[T]he separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”); THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”); *id.* at 302 (“There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates” (quoting Montesquieu)); Brown, *supra* note 272, at 1518–19; Pushaw, *supra* note 3, at 403–04 (noting that the justifications for separation of powers include preventing the arbitrary application of the law). Of course, there are more functional reasons to divide powers among different entities. Legislatures, for example, are deliberative and cannot act with the celerity sometimes necessary. See William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 718–20 (1984).

²⁷⁴ See Pushaw, *supra* note 3, at 418.

²⁷⁵ See Richard H. Fallon, Jr., *Marbury and the Constitutional Mind*, 91 CAL. L. REV. 1, 21 (2003); Louis Jaffe, *The Citizen as Litigant in Public Actions*, 116 U. PA. L. REV. 1033, 1034 (1968) (“[T]he central function of the courts is the determination of the individual’s claim to ‘just’ treatment. . . . [w]here the citizen is demanding his legally prescribed due”).

²⁷⁶ SAMUEL T. SPEAR, THE LAW OF THE FEDERAL JUDICIARY 3 (New York, Baker, Voorhis & Co. 1883) (citation omitted).

²⁷⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

²⁷⁸ Before joining the Court, then-Judge Scalia agreed that the violation of a right alone suffices for standing. See Scalia, *supra* note 264, at 894 (stating that when an individual is the object of law or government conduct, “he always has standing” to challenge it). But when writing for the Court in *Lujan* ten years later, he changed his position, stating that such an individual only “ordinarily” has standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). Robert Pushaw has argued that “[r]estricting standing to injured individuals makes sense when the plaintiff alleges invasion of an individual constitutional right” because it leaves the decision whether to sue in the hands of the victim of

that redressing violations of private rights is the judiciary's core function,²⁷⁹ yet it has inhibited courts from performing this core function by demanding factual injury in private rights cases.

Far from being necessary to preserve the separation of powers, requiring injury in fact in private rights suits directly undermines the balance of powers. One of the principal functions of the judiciary is to serve as a check on the other branches by ensuring that the other branches do not violate the rights of the people.²⁸⁰ Alexander Hamilton stressed that the courts were "to guard the Constitution and the rights of individuals"²⁸¹ and that without a judicial check "the reservations of particular rights or privileges would amount to nothing."²⁸² The Supreme Court has made a similar point in a number of cases, most explicitly in *Kendall v. U.S. ex rel. Stokes*, where it observed that "it is a sound principle, that in every well organized government the judicial power should be coextensive with the legislative, so far at least as private rights are to be enforced by judicial proceedings."²⁸³

In addition, restricting standing does not simply confine judicial power, as the Court would have it. It also limits Congress's power. The Constitution charges Congress with enacting laws. The injury-in-fact requirement, however, restricts Congress's power to create rights because a right is only judicially recognized when it involves a factual injury.²⁸⁴ Moreover, the injury-in-fact requirement functionally redefines both legislative and constitutional rights. Rights have practical meaning only to the extent that they can be vindicated.²⁸⁵ Rights are not limited in their scope to harms, but also protect against conduct

the violation. Pushaw, *supra* note 3, at 486. I understand Professor Pushaw to be saying only that the victim of a violation should have standing to sue, not that some additional factual injury is required.

²⁷⁹ See *Lujan*, 504 U.S. at 576 ("The province of the court, . . . is, solely, to decide on the rights of individuals.") (quoting *Marbury*, 5 U.S. (1 Cranch.) at 170)).

²⁸⁰ See Fallon, *supra* note 275, at 14 ("If other branches of government, especially Congress, could exceed constitutional bounds without being subject to judicial check, then the restraining function of a written constitution would be obliterated.")

²⁸¹ THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁸² *Id.* at 466; see Pushaw, *supra* note 3, at 423 & n.145.

²⁸³ 37 U.S. 524, 619 (1838). Other courts shared this view. See, e.g., *Davis v. Ballard*, 24 Ky. 563, 566 (1829) ("Whenever, through the haste or inadvertence, or design of the legislature, it shall occur, that the right of the citizen has been invaded, contrary to the constitution, it is the duty of the judiciary to shield him from oppression.").

²⁸⁴ See Fletcher, *supra* note 3, at 233–34 (arguing that the Court's injury-in-fact requirement restricts Congress's power to create causes of action).

²⁸⁵ As Justice Holmes stated, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922); see also *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941, 943 (2d Cir. 1930) (Hand, J.) ("[A] right without any remedy is a meaningless scholasticism . . ."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (arguing that rights exist only to the extent that they are enforced).

that *might* lead to harm.²⁸⁶ Yet, under the Court's standing doctrine, rights protect only against harms actually arising from conduct.²⁸⁷ The Court's standing doctrine thus prevents Congress from exercising the full extent of its power to create rights that private individuals may seek to vindicate in the courts.

B. Other Possible Reasons for Requiring Injury in Fact

This is not to say that there are no reasons to require injury in fact. Some have argued that the presence of injury increases the quality of the decision-making process. Courts and commentators often state, for example, that a factual injury provides context for a court's decision,²⁸⁸ both making the case more "real" and increasing the chance of a sound decision by forcing the court to be aware of the impact of its decision.²⁸⁹ The Court has also said that requiring a material injury increases the incentive to litigate effectively, which in turn aids the court by leading to a better presentation of the issues.²⁹⁰

But, it is not clear how desirable or necessary the context provided by a factual injury is. The salient facts for determining whether a violation of law occurred are those constituting the violation of law itself. The law, for example, protects against all battery, whether it results in a broken nose or only a bruise. The presence and degree of consequential injury are not, as a general matter, critical until the remedy phase of the case. In most cases, the dispute is whether the defendant's conduct that led to the injury was illegal. The arguments predominantly focus on prior cases, the language of a statute, or the

²⁸⁶ See Levinson, *supra* note 285, at 884–89 (discussing examples of how the Court, when it creates constitutional rights, often creates a prophylactic rule designed to prevent conduct which violates that right).

²⁸⁷ This phenomenon is present with respect to the right of access to the courts. Following *Lewis*, the Court held that no violation of the right of access occurs when a plaintiff pursues a frivolous claim. See *Christopher v. Harbury*, 536 U.S. 403, 416 (2002); see also *Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir. 1998) ("In the case of a denial of access to the courts, the right infringed is so purely instrumental to the use of the courts to obtain legal relief—so entirely lacking in intrinsic value—that if the denial has had no effect on the legal relief sought by the plaintiff, no right has been violated." (citing *Lewis v. Casey*, 518 U.S. 343, 349–53 (1996))).

²⁸⁸ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1981); Nichol, *supra* note 3, at 1927; Monaghan, *supra* note 6, at 1373; see also Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924) ("[A]dvisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting.").

²⁸⁹ See Fallon, *supra* note 3, at 14; Nichol, *supra* note 3, at 1927 ("Examination of these effects serves to fine tune the judicial decisionmaking process since abstract rulings based on hypothetical impacts are more apt to be unwise ones.").

²⁹⁰ *Valley Forge*, 454 U.S. at 472.

text of the Constitution.²⁹¹ The injury resulting from that violation is usually no more than evidence that the illegal conduct occurred.²⁹² Moreover, when a rule of law is already plainly established and the parties are not calling for a revision of that rule, injury adds nothing on this score.

In some instances, the consequences of the defendant's actions are surely relevant to the merits. For example, the amount of procedural due process required depends on a balance of the plaintiff's interest against the risk of error and the cost of additional procedures.²⁹³ But in those situations, the threat of factual injury to the plaintiff does not merely provide context. Rather, the right is defined in terms of what is at stake.

There are also occasions when factual injuries have driven a decision. Sometimes the resulting law is sound, as in *Brown v. Board of Education*.²⁹⁴ But, as the aphorism that "hard cases make bad law" reflects,²⁹⁵ that may be more the exception than the rule. Focusing on consequential injury may lead a court to fashion the law in order to ensure justice in that particular case.²⁹⁶ The consequence may be that the law will develop in a way that is ill suited to the average case.²⁹⁷ However, if we think that injury should provide context at all, we should expect this to occur since no case is itself average.

Nor is it clear that injury in fact is necessary to provide incentives to litigate effectively. Litigants fighting over millions of dollars are apt to spend more resources litigating the case than those fighting over thousands of dollars. But this concern has never stopped courts from exercising jurisdiction over claims involving paltry sums.²⁹⁸ And the argument loses force when the stakes of a suit are so low that the return is unlikely to exceed the investment, as in a suit for nominal dam-

²⁹¹ See, e.g., *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 622–27 (1990) (plurality opinion) (arguing that when making a decision, judges should rely on established principles of law, not on the specific facts of a given case).

²⁹² See Jaffe, *supra* note 107, at 286 ("If there has been a violation of a 'legally protected interest,' a precise showing of degree of injury is not necessary.").

²⁹³ See *Mathews v. Eldridge*, 424 U.S. 319, 341–47 (1976).

²⁹⁴ 349 U.S. 284 (1955).

²⁹⁵ *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

²⁹⁶ Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 *CONN. L. REV.* 961, 965–66 (1998) (exploring the adage); see also Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. CHI. L. REV.* 883 (2006) (suggesting that the common-law method in general may lead to bad law because the facts of each case influence the development of law).

²⁹⁷ Professor Driesen has made a similar point with respect to public law cases. See Driesen, *supra* note 121, at 868.

²⁹⁸ See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (holding poll tax of \$1.50 unconstitutional).

ages.²⁹⁹ A litigant investing in such a suit is driven by principle, and the desire to vindicate that principle is likely to provide adequate motivation to litigate effectively.³⁰⁰ In any event, the courts have developed prudential devices to handle inadequate litigating—for example, by deeming an insufficiently made argument waived.³⁰¹

Efficient allocation of resources is another reason to require injury in fact. Litigation is expensive both for the litigants and for the judiciary, and the volume of civil litigation is ever increasing. Refusing to grant standing in private rights cases absent factual injury may reflect a decision not to allocate resources to those cases in which nothing but a principle is at stake and where the outcome of the litigation will have little impact. By confining standing to those cases where a plaintiff can demonstrate injury, courts ensure that resources will be spent only when substantial money or the possibility of real, factual harm is at stake.³⁰² The response, of course, is that courts are not the appropriate body to determine how to allocate their resources—determining when resources should be spent on enforcement is a traditional function of Congress.

²⁹⁹ See, e.g., *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978). Moreover, a suit for merely nominal damages may reflect that the parties do not actually have a dispute but are in a collusive or feigned proceeding. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997). In such suits, the parties have not turned to the court to obtain a judgment to resolve a dispute; instead, they seek only the court’s pronouncement on a question of law. The business of the courts is to render judgments, not to opine on laws in the abstract, and the Court has long held that it is inappropriate for the judiciary to resolve such feigned proceedings. See, e.g., *United States v. Johnson*, 319 U.S. 302, 305 (1943) (per curiam); *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892); *Lord v. Veazie*, 49 U.S. (8 How.) 251, 254–56 (1850) (“It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves,—and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.”). But the threat of sanctions for abuse of the judicial process should avoid most such suits, and courts can weed out the rest through a simple inquiry.

³⁰⁰ See *Bandes*, *supra* note 3, at 266 n.251; *Driesen*, *supra* note 121, at 819 & n.77; *Jaffe*, *supra* note 275, at 1037–38 (“[T]he very fact of investing money in a lawsuit from which one is to acquire no further monetary profit argues, to my mind, a quite exceptional kind of interest, and one peculiarly indicative of a desire to say all that can be said in the support of one’s contention.”).

³⁰¹ See, e.g., *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

³⁰² Indeed, it has long been the rule that a party held liable for nominal damages is not even permitted to appeal unless the judgment has some collateral consequence such as assigning costs or establishing title to land. See 5 C.J.S. *Appeal and Error* § 1071 (2007) (collecting cases).

CONCLUSION

Concerns about the traditional role of courts and their relationship with the other branches of government motivated the Supreme Court to develop the injury-in-fact requirement to limit private individuals' ability to enforce public rights. The Court, however, has not limited this requirement to public litigation. Instead, the Court has decreed that injury in fact is a core constitutional requirement for invoking the judiciary in every case, including suits alleging violations of private rights.

Whatever the virtues of the injury-in-fact requirement in public law cases, it has no place in private right suits. History refutes the Court's decision to limit standing to plaintiffs who demonstrate a factual injury above and beyond the violation of a private right. Historically, courts did not require proof of a separate factual injury in cases involving the violation of a private right because the violation implied that an injury had occurred. Nor does the requirement enforce the separation of power in private rights cases; to the contrary, it affirmatively undermines principles of separation of powers.³⁰³

In conditioning justiciability of all claims on the presence of an actual, quantifiable injury in fact, the Court has unjustifiably limited the power of the judiciary and of Congress and has undermined the rule of law. It has also sapped the injury-in-fact requirement of content, as the Court has needed to recognize new species of factual injuries in order to ensure vindication of rights it deems important.

The Court's failure to distinguish between cases involving private and public rights may suggest that injury in fact is not a constitutional requirement for any case. Indeed, several commentators have called for the abandonment of the injury-in-fact requirement altogether.³⁰⁴ But the Court is unlikely to do away with the injury-in-fact requirement wholesale. Decades of cases have firmly entrenched the idea that the judiciary cannot vindicate public interests at the request of

³⁰³ This is not to say that the Constitution freezes the judicial power to those actions recognizable at common law. Doing so would threaten rendering the Constitution, or at least the judiciary, incapable of responding to future developments in the law without necessarily coinciding with a reduction in the power of the other branches—a result that the Framers almost certainly would not have countenanced. Moreover, prior efforts to read nontextual limits into constitutional provisions, as in the context of the Commerce and Due Process Clauses, have failed because of the difficulty in drawing coherent, principled lines. If for nothing else besides ensuring the balance of power, Article III should be read through the same lens as the other structural provisions of the Constitution. Thus, given that the Court has read the grants of power to Congress broadly, *see, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 16–22 (2005) (commerce power), it should similarly read Article III broadly to ensure parity.

³⁰⁴ *See, e.g.,* Nichol, *supra* note 3, at 1949; Sunstein, *supra* note 5, at 235–36 (arguing that standing in general should “depend [] on whether any source of law has created a cause of action”).

any private individual and that injury in fact is necessary to enforce that limitation.

However, the Court may be more receptive to abandoning injury in fact in private rights cases. In those cases, the requirement is not necessary to ensure that the plaintiff has a private interest because the violation itself serves that function. Courts have retained the injury requirement simply for consistency.

When a plaintiff alleges the violation of a private right—whether conferred by the common law, statute, or Constitution—the only standing inquiry should be whether the facts alleged by the plaintiff establish a violation of that right.³⁰⁵ If they do, the plaintiff has standing; if not, the plaintiff does not have standing. Using this inquiry should have little effect on the outcome of the litigation. If the plaintiff's complaint fails to allege the facts necessary to make out a violation of private rights, the court will dismiss it under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim for which relief may be granted.³⁰⁶

One might argue that it is difficult to determine which constitutional provisions establish individual rights and which establish prohibitions that protect the public interest.³⁰⁷ But the difficulty of resolving this question does not justify the courts abdicating their responsibility to protect rights by imposing the additional requirement of injury in fact. There is no reason to think that it is easier for a court to determine whether adequate injury has been alleged than to determine whether a right is at stake. Judges are experts at resolving legal questions, not at identifying injuries. In any event, courts already must determine which statutes and provisions of the Constitution confer individual rights—and indeed have already made that determination—in other contexts, such as in § 1983 actions.³⁰⁸

To be sure, it is doubtful that the injury-in-fact requirement has resulted in myriad cases involving courts dismissing rights for lack of

³⁰⁵ Others have made a similar point. See, e.g., Fletcher, *supra* note 3, at 232, 246, 253 (arguing that standing should depend on whether the plaintiff has alleged the violation of a right). Professor Sunstein has argued that “[a]s a general rule, the question for standing is whether Congress has created a cause of action.” Sunstein, *supra* note 6, at 1461. But, this seems too narrow. Although Congress can certainly create rights which confer standing, other sources of law, such as the Constitution, can also confer such rights. Indeed, Sunstein himself seems to acknowledge this point elsewhere. See Sunstein, *supra* note 3, at 642–43 (“[T]he principal question . . . for purposes of ‘injury in fact,’ is whether Congress or any other source of law gives the litigant a right to bring suit.”).

³⁰⁶ See FED. R. CIV. P. 12(b)(6).

³⁰⁷ Justice Powell raised this concern in his concurrence in *Richardson* when responding to Justice Stewart's argument that the violation of a constitutional right alone should suffice for standing. See *United States v. Richardson*, 418 U.S. 166, 187 n.6 (1974) (Powell, J., concurring); see also Fletcher, *supra* note 3, at 265 (expressing similar fears).

³⁰⁸ See *supra* notes 66–79 and accompanying text.

standing. The reports are not filled with cases denying standing to individuals whose rights have been violated on the ground that the violation did not result in factual harm. The most likely explanation is that most individuals who experience the violation of a right are unlikely to sue if the violation does not result in substantial harm. Lawsuits are expensive and time consuming, and therefore most individuals will not bring a suit that has little or no potential for a damages award.³⁰⁹

But the dearth of such cases does not mean that there should be a rule prohibiting them. For one thing, insistence on factual injury has left the injury-in-fact requirement bereft of meaning. The Court has often recognized bizarre, nontraditional injuries in order to find standing where important rights are at stake.³¹⁰ For another thing, our government is built on the rule of law.³¹¹ Limiting standing in private rights cases is simply irreconcilable with that premise. The threat of civil liability deters violations of rights, even if the potential recovery is only nominal damages. Just last term, the Court explicitly made this point in *Hudson v. Michigan*.³¹² There, the Court refused to extend the exclusionary rule to evidence obtained in violation of the knock-and-announce rule, concluding that the purpose of the exclusionary rule is to deter unlawful conduct and that the availability of civil actions provided adequate deterrence.³¹³ Although the Court acknowledged that every civil action for a violation of the knock-and-announce rule had resulted only in nominal damages, it also concluded that the threat of these damages sufficiently deterred police misconduct.³¹⁴

³⁰⁹ Moreover, there is a limited set of rights that can support federal jurisdiction if not accompanied by a factual harm. Federal question jurisdiction allows federal courts to hear cases involving harmless violations of rights that arise under federal law or the Constitution. See 28 U.S.C. § 1331 (2000). Undoubtedly, countless instances of harmless violations of state law rights occur everyday. But federal courts ordinarily do not have jurisdiction to hear such claims because those claims do not meet the \$75,000 threshold for diversity jurisdiction. Cf. *id.* § 1332.

³¹⁰ See *supra* text accompanying notes 175–81.

³¹¹ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 199 (Phila., Philip H. Nicklin 2d ed. 1829) (“[The judiciary is] required at times to control the executive, and what it decides to be unlawful, the executive cannot perform.”).

³¹² 126 S. Ct. 2159 (2006).

³¹³ See *id.* at 2168–70.

³¹⁴ See *id.* at 2167 (“Even if we thought that only large damages would deter police misconduct . . . , we do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury.”). But see *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (noting that nominal damages “accomplish[] little beyond giving [plaintiffs] ‘the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated’” (alteration in original)); *Snepp v. United States*, 444 U.S. 507, 514 (1980) (per curiam) (“Nominal damages are a hollow alternative, certain to deter no one.”).

Several justiciability doctrines recognize the value of deterrence. One example is the “capable of repetition, yet evading review” exception to mootness.³¹⁵ Under that exception, a court will not dismiss a claim that is otherwise moot if there is a reasonable probability that the defendant will again engage in the complained-of conduct.³¹⁶ Given that the plaintiff in such cases receives no tangible relief, it is the desire to enforce law and deter future violations that drives those decisions.³¹⁷ Requiring injury in fact undermines the deterrent effect of the threat of litigation. Individuals who know that they are subject to suit are more likely to conform their conduct to the law than those who know they will face no repercussions as long as they take care to cause no factual harm.³¹⁸ Although the victim may seek recourse in the state courts, the jurisdictional requirements of some state courts may limit access.

Requiring injury in fact in private rights cases has not simply resulted in the denial of standing to plaintiffs alleging the violation of private rights. It has also injected an illogical step into the law that has led to bad doctrine and disjunctive decisions that are difficult to reconcile. But most important, it presents the threat of limiting jurisdiction in future cases.

³¹⁵ A case becomes moot and must be dismissed for lack of jurisdiction if a plaintiff loses his interest in the case after it has been filed. See *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (“[T]hroughout the litigation, the plaintiff ‘must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.’” (citation omitted)). Mootness, like standing, is a doctrine of justiciability under Article III. See *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1858 (2006) (“The doctrines of mootness, ripeness, and political question all originate in Article III’s ‘case’ or ‘controversy’ language, no less than standing does.”).

³¹⁶ See *Spencer*, 523 U.S. at 17 (finding that the “capable of repetition, yet evading review” doctrine applies when “the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration” and “there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again” (alteration in original) (citation omitted) (internal quotation marks omitted)). Although the Court has often described the exception as applying when the particular plaintiff might reasonably again experience the threatened conduct, see *id.*, in several cases the Court has applied the exception without regard to whether the issue would arise again between the same parties. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 187 (1973); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

³¹⁷ See Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 302–03 (1988).

³¹⁸ To be sure, exposing public officials to personal liability can lead to overdeterrence. See Fallon & Meltzer, *supra* note 49, at 1792. But it is not overdeterrence to subject an official to suit for knowingly violating the law; rather, it is appropriate deterrence.

