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THE STANDING OF THE UNITED STATES: HOW CRIMINAL PROSECUTIONS SHOW THAT STANDING DOCTRINE IS LOOKING FOR ANSWERS IN ALL THE WRONG PLACES

*Edward A. Hartnett**

I. BACKGROUND TO A PUZZLE

The Supreme Court insists that Article III of the Constitution requires a litigant to have standing in order for her request for judicial intervention to constitute a “case” or “controversy” within the jurisdiction of a federal court; it also insists that the “irreducible constitutional minimum” of standing requires (1) that the litigant suffer an “injury in fact”; (2) that the person against whom the judicial intervention is sought have caused the injury; and (3) that the requested judicial intervention redress the injury.¹ The requisite injury in fact, the Court repeatedly declares, must be “personal,”² “concrete and particularized,”³ and “actual or imminent, not conjectural or hypothetical.”⁴

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1. See, e.g., *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 772 (1999); *Federal Election Commn. v. Akins*, 118 S. Ct. 1777, 1784-87 (1998); *Steel Co. v. Citizens for a Better Env't.*, 118 S. Ct. 1003, 1008 (1998); *Bennett v. Spear*, 520 U.S. 154, 160-62 (1997); *United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 551 (1996); *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542 (1986); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-72 (1982) (citations omitted for all sources).

2. See, e.g., *Department of Commerce*, 119 S. Ct. at 772; *Clinton v. City of New York*, 118 S. Ct. 2091, 2099 (1998); *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997); *Lujan*, 504 U.S. at 560 & n.1; *Allen*, 468 U.S. at 751; see also *Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting that the “gist of the question of standing” is whether the litigant has “a personal stake in the outcome”) (citations omitted for all sources).

3. See, e.g., *Raines*, 117 S. Ct. at 2317; *United States v. Hays*, 515 U.S. 737, 742 (1995); *Associated Gen. Contractors*, 508 U.S. at 663; *Lujan*, 504 U.S. at 560 (citations omitted for all sources).

4. See, e.g., *Hays*, 515 U.S. at 743; *Associated Gen. Contractors*, 508 U.S. at 663; *Lujan*, 504 U.S. at 560 (citations omitted for all sources).

In addition, the injury must be more than an "injury to the interest in seeing that the law is obeyed."⁵ This requirement has its foundation in the bar against standing to litigate a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens."⁶ For a time, the bar on "'generalized grievance[s]'" was viewed as merely a "prudential rule[]," not required by Article III and therefore subject to displacement by Congress.⁷ The Supreme Court's 1992 decision in *Lujan*, however, treated it as a gloss on the injury requirement and rooted in the case or controversy language of Article III.⁸ The Court insisted, as an Article III matter, that the injury must be to something more than "every citizen's interest in the proper application of the Constitution and laws," and the litigant must not be "seeking relief that no more directly and tangibly benefits him than it does the public at large."⁹

Last year, the Court acknowledged that this bar on generalized grievances has been treated sometimes as a constitutional limit and sometimes as a prudential limit on standing.¹⁰ Significantly, it did not choose between characterizations, but instead subdivided the bar on generalized grievances into a prudential rule and a constitutional rule. The prudential rule counsels hesitation before finding standing because "a political forum may be more readily available where an injury is widely shared."¹¹ The constitutional rule requires that the injury not be "of an abstract and indefinite nature — for example, harm to the 'common concern for obedience to

5. *Akins*, 118 S. Ct. at 1786.

6. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (describing bar on standing "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens" as a "prudential rule[]") (citations omitted); *see also Allen*, 468 U.S. at 751.

7. *Warth*, 422 U.S. at 499-500; *Allen*, 468 U.S. at 751.

8. *Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy."). Justice Kennedy's concurrence specifically noted:

The Court's holding . . . is a direct and necessary consequence of the case and controversy limitations found in Article III. [I]t would exceed those limitations if . . . in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.

Lujan, 504 U.S. at 580-81 (Kennedy, J., concurring).

9. *Lujan*, 504 U.S. at 573-74.

10. *See Akins*, 118 S. Ct. at 1785 ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance.").

11. *Akins*, 118 S. Ct. at 1786 (noting that the availability of a political forum to redress widely shared injuries "counsel[s] against, say, interpreting a statute as conferring standing").

law.”¹² Later in the same passage, the Court purported to provide another “example” of such an “abstract” harm, but instead simply repeated that the harm cannot be “injury to the interest in seeing that the law is obeyed.”¹³

Numerous scholars have demonstrated that insistence on a personal injury in fact as a requirement of Article III is a relatively recent invention.¹⁴ They point to a long history in English courts, in the courts of the several states, and in the federal courts themselves of judicial proceedings brought by those who have not suffered any such individualized injury in fact. For example, the prerogative writs of mandamus, prohibition, and certiorari, as well as qui tam, relator, and informer actions, could all be brought by litigants who had suffered no injury in fact.¹⁵

12. *Akins*, 118 S. Ct. at 1785 (internal quotation marks and citation omitted). See also Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 617 (1999) (noting that the Court in *Akins* “made clear, for the first time, that Congress can grant standing to someone who suffers a quite generalized injury”); *id.* at 636 (describing the Court’s “key step” as distinguishing between injuries that are “widely shared” and “injuries that are ‘abstract and indefinite,’ . . . such as an injury ‘to the interest in seeing that the law is obeyed’”); *The Supreme Court 1997 Term, Leading Cases, Federal Jurisdiction & Procedure*, 112 HARV. L. REV. 253, 260 (1998) [hereinafter *Leading Cases*] (suggesting that *Akins* can be read “as embracing a definition of injury distinctly broader and more accommodating than that in *Lujan* — a definition that distinguishes between widely shared ‘concrete’ injuries . . . that are sufficient to confer standing and widely shared ‘abstract’ injuries that are not”).

13. *Akins*, 118 S. Ct. at 1786.

14. See, e.g., Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-25 (1988); Louis L. Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988) [hereinafter Sunstein, *Public Law*]; Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 166 (1992) [hereinafter Sunstein, *What’s Standing*] (standing doctrine is “essentially an invention of federal judges, and recent ones at that”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

15. See, e.g., Berger, *supra* note 14, at 819 (prohibition), 820 (certiorari), 823 (quo warranto), 825-26 (informer or qui tam); Jaffe, *supra* note 14, at 1035 (prohibition, certiorari, mandamus); Sunstein, *What’s Standing*, *supra* note 14, at 170-79; Winter, *supra* note 14, at 1396 (mandamus, prohibition, certiorari), 1404 (mandamus in federal court), 1406-09 (informer or qui tam). But see Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1008 (1997) (arguing that “a ‘personal stake’ or standing was indeed necessary to invoke the power of English courts in prerogative proceedings during the eighteenth century”). In reaching this conclusion, however, Clanton frequently observes that such actions “were brought by a relator in the name of the king” and were “understood to be the king’s suit.” *Id.* at 1033; see also *id.* at 1037 (contending that “fatal flaw” in Berger’s argument is that quo warranto information, as a relator action, “was understood to be the suit of the king”); *id.* at 1041 (noting that “relator actions . . . were understood to be the king’s actions”). In such circumstances, Clanton simply deems the relator’s standing to be “irrelevant.” *Id.* at 1037-38; 1042. This declaration does nothing to undermine the idea that the relators could initiate such actions without themselves having suffered an injury.

Most scholars reach the same conclusion from this history as Justice Harlan did in his dissent in *Flast v. Cohen*.¹⁶ there is nothing in the "judicial power," or "cases" and "controversies" language that requires the person bringing the action to suffer an injury in fact.¹⁷ For better or worse, however, the judges of the "inferior" federal courts do not feel so free to disregard Supreme Court precedent.¹⁸ Their difficulty in following this precedent has been acute in cases where the ancient forms persist, particularly *qui tam* actions.

In a *qui tam* action, an individual who has herself suffered no harm brings an action on her own behalf as well as on behalf of the government. Indeed, the term *qui tam* is short for "*qui tam pro domino rege quam pro se ipso sequitur*" — "who as well for the lord the king as for himself sues."¹⁹ The individual bringing the action is typically called an "informer" or a "relator."²⁰ As the Supreme Court explained in 1905:

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government. The right to recover the penalty or forfeiture granted by the statute is fre-

16. 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (pointing, in part, to the history of *qui tam* actions, and noting that "[t]his and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as 'representatives of the public interest'" and that it is "clear that non-Hohfeldian plaintiffs . . . are not constitutionally excluded from the federal courts" (quoting *Scripps-Howard Radio v. Commn.*, 316 U.S. 4, 14 (1942))). See also *Flast*, 392 U.S. at 130 (concluding that public actions are "within the jurisdiction conferred upon the federal courts by Article III . . .").

17. See, e.g., Berger, *supra* note 14, at 840 ("In sum, the notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action is historically unfounded. . . . There may well be policy arguments in favor of a 'personal interest' limitation on standing, but they cannot rest on historically-derived constitutional compulsions."); Jaffe, *supra* note 14, at 1043 ("The burden of my argument . . . has been that there are no compelling constitutional reasons for denying jurisdiction of citizen and taxpayer actions. It is almost impossible any longer to contend that a Hohfeldian plaintiff is a necessary element of a case or controversy."); Sunstein, *Public Law*, *supra* note 14, at 1478-79 (presenting view that Article III requires an injury in fact is "misguided"); Winter, *supra* note 14, at 1374 ("A fuller account of our history shows that article III was not limited to the kinds of private disputes characterized by standing."). See also Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 385 (1993) (noting that "a standing doctrine that is rooted in the requirement of injury in fact lacks intellectual coherence").

18. See generally Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

19. OXFORD ENGLISH DICTIONARY (2d ed. 1989); see also 3 BLACKSTONE'S COMMENTARIES 160 (facsimile of first edition 1768) (U. Chi. Press 1979) (giving full Latin as "*qui tam pro domino rege, &c., pro seipso in hac parte sequitur*," thus indicating that the action was brought only "in part" ("in hac parte") for himself but also for the king and the rest ("&c.") — presumably the rest of the community); cf. Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341 n.1 (1989) (providing a slightly different version).

20. See Caminker, *supra* note 19, at 341-42 n.1.

quently given to the first common informer who brings the action, although he has no interest in the matter except as informer.²¹

Although *qui tam* statutes have been part of federal law from the first Congress,²² the major such statute in current use is the False Claims Act.²³ The False Claims Act permits any person to sue a defendant accused of defrauding the government and, if successful, to keep a percentage of the amount recovered.²⁴

Current standing doctrine and deeply rooted *qui tam* practice are on a collision course. It is not surprising that *qui tam* defendants have argued that current standing doctrine renders the *qui tam* provision of the False Claims Act unconstitutional. Nor is it surprising that federal courts have almost universally rebuffed the challenges to such a long-standing practice. Indeed, courts frequently use the argument of historical pedigree to uphold the constitutionality of *qui tam* actions.²⁵ As one court put it, "The concept of *qui tam* is so deeply rooted in the nation's history that it is most improbable that any court today could divine some infirmity of constitutional magnitude which would not have been equally apparent many decades, if not centuries, ago."²⁶

One bold district court held the *qui tam* provision of the False Claims Act unconstitutional, brushing aside its historical roots by candidly noting that the Supreme Court's current standing doctrine is a recent invention.²⁷ But other courts, seeking to reconcile the

21. See *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (rejecting a constitutional attack on a state statute because to accept it "would be in effect to hold invalid all legislation providing for proceedings in the nature of *qui tam* actions"); see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (rejecting an argument that *qui tam* statutes are judicially disfavored and should be strictly construed, and noting that "[q]ui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts" (footnotes omitted)).

22. See *Caminker*, *supra* note 19, at 342-43.

23. 31 U.S.C. §§ 3729-3733 (1994).

24. See 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government."). In general, if the executive branch of the United States intervenes in the action, the relator's recovery ranges from 15 to 25 percent; if it does not intervene, the range is 25 to 30 percent. See 31 U.S.C. § 3730(d).

25. See, e.g., *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992); see also *United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1212-13 (7th Cir. 1995) (upholding standing to bring a *qui tam* action under 25 U.S.C. §§ 81 & 201).

26. *United States ex rel. Rudd v. Gen. Contractors*, No. C-89- 397-RJM, at 4 (E.D. Wash. Dec. 4, 1990), *quoted in United States ex rel. Burch v. Piqua Engineering*, 803 F. Supp. 115, 117 n.2 (S.D. Ohio 1992).

27. See *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261, 1267 (S.D. Tex. 1997) ("The Court's modern conception of standing, as an Article III requirement, did not come into being until relatively recently." (citing James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL. 701, 721-22 (1993))); see also Blanch, *supra*, at 723 ("To point at history and argue that standing doctrine cannot screen out *qui tam* actions is to ignore the fact that at one time Article III had an entirely different screening mechanism than it has now."); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 549 (1990).

history of *qui tam* actions with current standing doctrine, bend over backwards (indeed, so far as to create a circle) in their eagerness to find an injury in fact. Some conclude that the bounty provided to a *qui tam* relator somehow constitutes an injury in fact.²⁸ Although the Supreme Court itself may have encouraged such an approach by distinguishing *qui tam* actions from "citizen suits" along these lines,²⁹ it has aptly been described by one district judge as "put[ting] the cart before the horse."³⁰ Ironically, that same judge traced a different circle to find an injury in fact, reasoning that a *qui tam* relator is injured because she runs the risk of retaliation for filing the *qui tam* action itself.³¹

The most interesting approach taken by some courts (or at least the one of most significance for this article) is not to look for an injury in fact to the *qui tam* relator, but instead to look for an injury in fact to the United States and treat the relator as either a representative or an assignee of the United States.³² In the cases covered

("Standing is a modern game, and courts that uphold *qui tam* on historical grounds are playing by archaic rules.").

28. See, e.g., *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1098-99 (C.D. Cal. 1989) (concluding that the bounty is enough to create an injury in fact); *Public Interest Bounty Hunters v. Board of Governors*, 548 F. Supp. 157, 161 (N.D. Ga. 1982) (concluding that because of bounty, *qui tam* plaintiff "has suffered 'injury' of the constitutional magnitude required").

29. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (distinguishing from citizen suits "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff").

30. *Burch*, 803 F. Supp. at 118. Such a legislatively-created bounty can be (and may have been) understood to give the informer a property interest, see *Clanton*, *supra* note 15, at 1040, but it is circular to count such a bounty as itself an "injury."

31. See, e.g., *Burch*, 803 F. Supp. at 119 (finding standing based on "potential ramifications to their employment status by initiating an action under the FCA").

32. See, e.g., *United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1213 (1995) (noting "that the United States is the real plaintiff in *qui tam* actions" and treating the relator as the government's representative); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) ("[T]he FCA effectively assigns the government's claims to *qui tam* plaintiffs . . ."); *Stillwell*, 714 F. Supp. at 1097 (observing that the "private plaintiff" is "in effect, suing on the injury to the United States"); *United States ex rel. Amin v. George Washington University*, 26 F. Supp. 2d 162, 168 n.1 (D.D.C. 1998) ("The relator merely acts as the United States' agent in pursuing the claim."). See generally *Caminker*, *supra* note 19, at 381-83 (treating *qui tam* relator as representative of United States and analogous to a partial assignment); *Lee*, *supra* note 27, at 563-68 (treating *qui tam* relator as government's assignee).

One result of this approach is that it seems to authorize *qui tam* actions against states, despite the Eleventh Amendment. See, e.g., *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998) (holding that *qui tam* suit is not barred by Eleventh Amendment), *cert. granted*, 119 S.Ct. 2391 (1999). But see *United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279 (5th Cir. 1999) (holding that state retained Eleventh Amendment immunity against *qui tam* relator); *Stevens*, 162 F.3d at 224 (Weinstein, J., dissenting) (arguing that "[w]hile the notion of a *qui tam* relator 'standing in the shoes of' the United States may be sufficient to confer standing, it is not sufficient to effect a transfer of the federal government's exemption from state sovereign immunity"). Cf. *United States ex rel. Long v. SCS Business & Tech. Inst.*, 173 F.3d 870 (D.C. Cir. 1999) (holding that states

by the *qui tam* provisions of the False Claims Act, the injury to the United States is easy to see: if it has been defrauded, it has lost money — a classic injury in fact.³³

Notice the assumption of this approach: the United States, no less than any other litigant, must have suffered an injury in fact in order for litigation brought on its behalf to constitute a case or controversy within the federal judicial power.³⁴ Of course, this seems a reasonable assumption for a lower federal court to make. After all, the Supreme Court has repeatedly insisted that the words “case” or “controversy” in Article III require an injury in fact.³⁵ And nothing in Article III remotely suggests that the United States can litigate something other than a “case” or “controversy” in an Article III court.

Despite its apparent reasonableness under current Supreme Court doctrine, I submit that no federal judge, if pressed, would seriously contend that Article III requires that the United States must suffer an injury in fact that is “personal,” “concrete and particularized,” and “actual or imminent, not conjectural or hypothetical” before litigation on its behalf can be brought in federal court. And no federal judge would contend that injury to the United States be more than an “abstract . . . injury to the interest in seeing that the law is obeyed”³⁶ My point of pressure is a federal criminal prosecution. That is, while Akhil Amar has argued that “too few of those who write in criminal procedure do serious, sustained scholarship in constitutional law generally, or in fields like federal jurisdic-

are not “persons” within meaning of the False Claims Act). See generally Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEXAS L. REV. 539 (1995) (relying on *qui tam* history to argue that Congress can abrogate state sovereign immunity by authorizing private persons to bring suit in the name of the United States). The Court's recent decision in *Alden v. Maine*, 119 S. Ct. 2240 (1999), suggests that it is not likely to regard *qui tam* suits as sufficient to abrogate a state's sovereign immunity for reasons rooted in Article II. See *Alden*, 119 S. Ct. at 2267 (distinguishing individual action from one “commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to ‘take Care that the Laws be faithfully executed,’ U.S. CONST. art. II § 3”).

33. For a discussion of the Article II implications of treating the relator as a representative of the United States, see *infra* text accompanying notes 92-97.

34. See, e.g., *Hall*, 49 F.3d at 1213 (“[I]t is enough that the United States, as the represented party, has been injured.”); *Kelly*, 9 F.3d at 748 ([*Q*]ui tam plaintiffs “may sue based upon an injury to the federal treasury.”); *United States ex rel. Kreindler v. United Technologies*, 985 F.2d 1148, 1154 (2nd Cir. 1993) (plaintiff in *qui tam* action “invokes the standing of the government resulting from the fraud injury”); *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992) (“The government, and not the relator, must have suffered the ‘injury in fact’ required for Article III standing.”); *Amin*, 26 F. Supp. at 168 n.1 (“In a *qui tam* action, the United States suffers the injury and remains the true plaintiff, the party whose standing is at issue”). But see *Lee*, *supra* note 27, at 570 (claiming that standing doctrine makes an “exception” to the injury requirement “where the government itself acts as plaintiff”).

35. For examples, see the cases cited *supra* in notes 1-3.

36. *Federal Election Comm'n. v. Akins*, 118 S. Ct. 1777, 1786 (1998).

tion and remedies,"³⁷ I suggest that constitutional law, federal jurisdiction, and remedies might learn something from criminal procedure. By focusing in Part II on criminal prosecutions, a commonplace legal proceeding familiar to today's lawyers and judges, my hope is that those who have been unmoved by the history of prerogative writs and *qui tam* actions will see that Article III cannot require an injury in fact.³⁸ Similarly, I use criminal procedure to show in Part III that the separation of powers issues now treated under the rubric of Article III standing are better understood as issues of Article I and Article II.

II. CRIMINAL CASES AND THE NONSENSE OF REQUIRING INJURY IN FACT UNDER ARTICLE III

Suppose a new assistant federal defender, steeped in the Supreme Court's modern standing doctrine, moves to dismiss each of the prosecutions brought against her clients on the grounds that the United States lacks standing. She argues that the United States lacks a personal, concrete, and particularized injury in fact and therefore there is no case or controversy within the jurisdiction of the federal courts.

I suppose that the first reaction would be the one I received as a new assistant federal defender when, at my first court appearance, I argued that my client — a previously deported alien charged with illegal reentry into the United States with whom I had little or no time to speak beforehand — was not a flight risk because the actions of which he was accused demonstrated that he really wanted to be in this country.³⁹ But after the laughter subsided, what would the prosecutor and the judge say? What is the "concrete and particularized" injury in fact suffered by the United States that gives it standing to bring a criminal prosecution?

Some crimes, of course, cause an actual, concrete, particularized injury to the United States. For example, when someone steals property belonging to the United States,⁴⁰ the United States suffers such an injury — just as some courts in *qui tam* cases observe that the United States suffers such an injury when it is defrauded of money. But in the vast majority of criminal prosecutions, the

37. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 115 (1997).

38. Cf. Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PENN. L. REV. 309, 446 (1995) (treating standing of criminal defendants as "core" example of cases in which litigants are "interested in seeking relief on their own with no larger agenda").

39. The Bail Reform Act of 1984 provides for the temporary detention of anyone "not a citizen of the United States or lawfully admitted for permanent residence" who "may flee," 18 U.S.C. § 3142(d) (1994), so there was little hope of success with more conventional arguments at this first judicial appearance.

40. See 18 U.S.C. § 641 ("Whoever . . . steals . . . any record, voucher, money, or thing of value of the United States" shall be fined and imprisoned.).

United States is not seeking redress for this kind of an injury to itself.

Perhaps one might be tempted to say that the injury in fact required by Article III is the one suffered by the victim of the crime: for example, the person who was kidnapped and taken across state lines⁴¹ or the person who was defrauded by a pyramid scheme using the U.S. Mails.⁴² On this theory, the United States has a form of third-party standing allowing it to redress the injuries suffered by others. But this approach is deeply flawed. If the United States had third-party standing, one would expect the "first-party" — the victim — to have standing. But our long-standing practice (albeit one not required by Article III) is that the victim of the crime may not bring a federal criminal prosecution.⁴³ And criminal punishments such as probation, incarceration, and fines payable to the United States do little to redress injuries suffered by the victim.⁴⁴ Moreover, in the most common federal prosecution — possession and sale of illegal drugs⁴⁵ — there is no identifiable victim at all.

Alternatively, although this may not come with good grace from a prosecutor, one might try to shift the focus to the defendant and contend that the relevant injury is the one that the government is seeking to impose on the defendant.⁴⁶ This dodge cannot succeed

41. See 18 U.S.C. § 1201 ("Whoever unlawfully . . . kidnaps . . . any person . . . when the person is willfully transported in interstate or foreign commerce" shall be punished by imprisonment.).

42. See 18 U.S.C. § 1341 ("Whoever, having devised . . . a scheme or artifice to defraud . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter, any matter or thing whatever" shall be fined and imprisoned.).

43. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 293 (noting that Judiciary Act of 1789 "implicitly vested the district attorneys with exclusive authority to prosecute all federal crimes within their jurisdiction"); *id.* at 292, 296 (noting that "Congress never vested victims with a general right to prosecute defendants under federal criminal provisions" and that although "citizens in the first years under the Constitution evidently presented evidence of crimes directly to the grand jury," even if the grand jury indicted, the district attorney retained control and could drop the prosecution). Krent also argues that *qui tam* actions were considered "quasi-criminal." *Id.* at 296-303.

44. *Cf.* *Steel Co. v. Citizens for a Better Env't.*, 118 S. Ct. 1003, 1019 (1998) ("[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."). *But see Steel Co.*, 118 S. Ct. at 1029 (Stevens, J., dissenting) (arguing that "imposing a sanction on the wrongdoer . . . minimize[s] the risk that harm-causing conduct will be repeated").

45. See 21 U.S.C. § 841. "Drug cases . . . now occupy one-third of the federal court caseload" of crimes. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, *THE FEDERALIZATION OF CRIMINAL LAW* 20 (1998). In the federal criminal cases closed in 1997, more than 35% of defendants were charged with drug offenses, double the next highest category. *Id.* at 89 (table indicating 35.3% for drug laws and 17.1% for fraud).

46. *Cf.* Stearns, *supra* note 38, at 441-42 (noting that a criminal defendant has standing to challenge his conviction and that "[u]nless the courts address the claims on the merits, the

without destroying the doctrine, however, because *any* defendant in *any* litigation — including Secretary Lujan — is threatened with an injury to liberty or property by an adverse judgment. If the injury threatened to a *defendant* by the litigation itself suffices to establish the *plaintiff's* standing to bring the action, then the standing requirement is truly an empty one.

At this point, even a patient judge (or reader) might be ready to throw up her hands and say, "The United States isn't any ordinary litigant. A federal criminal prosecution is not designed to remedy the injury to any particular victim, but rather to remedy an injury done to the community. It is wrong to try to shoehorn the United States in the mold of a common law private litigant. It is the sovereign, seeking to vindicate the general public interest in compliance with the law."⁴⁷

I agree, but it still does not solve the problem under current standing doctrine.⁴⁸ For the very point of the current doctrine is to *exclude* from federal court those who seek to vindicate the general public interest in compliance with the law, to treat an injury to "every citizen's interest in the proper application of the Constitution and the laws" as insufficient to invoke federal judicial power, and to insist that Article III prevents Congress from authorizing litigation where the "harm at issue is . . . of an abstract and indefinite nature — for example, harm to the common concern for obedience to law."⁴⁹ In short, if current standing doctrine is correct, then the vast majority of federal criminal prosecutions are not "cases" or "controversies" and the United States lacks standing to initiate them.

convicted criminal will incur the most severe consequences that the state or federal government can impose").

47. See *Lee*, *supra* note 27, at 569 ("The government certainly has standing in criminal cases . . ."); Siegel, *supra* note 32, at 554 ("The United States is generally a proper party to bring suit to enforce federal law . . ."); cf. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 392 (1995) (noting that when a state "prosecutes criminal and civil actions under its own laws in its own courts, no issue ordinarily arises as to its standing").

A closely related argument would posit certain "personal" interests unique to the sovereign. While perhaps this might have some force in a monarchy in which sovereignty is personified in the king, cf. Clanton, *supra* note 15, at 1038 ("[T]he king was clearly the most interested party in executing the criminal laws."), it is not persuasive in a nation established on the principle that governments "deriv[e] their just power from the consent of the governed," DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), and whose constitution is made in the name of "We the People." U.S. CONST. preamble.

48. Cf. *Lee*, *supra* note 27, at 570 (contending that the government has "special constitutional status as plaintiff . . . and it need not show a particularized injury as a predicate to sue."); Larry W. Yackle, *Worthy Champions of Fourteenth Amendment Rights: The United States As Parens Patriae*, 92 NW. L. REV. 111, 135-37 (1997) (suggesting that since modern standing doctrine was created to protect the executive, it "makes little sense, then, to turn standing doctrine *against* the Executive . . .").

49. Federal Election Commn. v. Akins, 118 S. Ct. 1777, 1785 (1998) (internal quotation marks and citation omitted).

Of course, this is an absurd result. Article III cannot sensibly be read to prohibit the United States from vindicating its sovereign interests in its own courts. Removed from its context and recast as a general principle, then, Chief Justice Marshall's assertion that "[t]he province of the judiciary is, solely, to decide on the rights of individuals" is simply wrong.⁵⁰ So, too, is Justice Scalia's assertion that "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive,"⁵¹ with courts restricted to "protecting individuals and minorities against impositions of the majority . . ."⁵²

Courts do not exist solely to resolve private disputes or to resolve claims by injured individuals against the government or government officials. Instead, as criminal prosecutions attest, a significant role of courts is simply to enforce the sovereign's law in particular cases.⁵³

One caveat is in order. Article III extends the judicial power of the United States to certain "cases"⁵⁴ as well as certain "controversies."⁵⁵ A number of scholars suggest that the term "cases" in Article III includes criminal prosecutions, while the term "controversies" does not.⁵⁶ If they are right, then the foregoing critique, relying as it does on the example of criminal prosecutions, shows only that the word "case" in Article III cannot reasonably be understood to require a personal, concrete, and particularized injury

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

51. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

52. Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

53. See Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (noting that "government cannot be run without the use of courts for the enforcement of coercive sanctions").

54. U.S. CONST. art. III, § 2 ("The judicial power shall extend to all cases . . . arising under this Constitution, the Law of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction.").

55. U.S. CONST. art. III, § 2 ("The judicial power shall extend to . . . Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subject.").

56. See, e.g., William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 266 (1990) (suggesting that this explanation of the difference between "cases" and "controversies" "seems conclusive"); John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 210, 220-47 (1997) ("Cases include all legal actions, civil and criminal, while controversies include only civil proceedings."); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1575-76 (1990) (supporting this distinction and noting its consistency with the Judiciary Act of 1789); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 605 (1994) (noting that "the term 'cases' includes both criminal and civil proceedings, whereas the term 'controversies' embraces only matters of a civil nature"); Sunstein, *What's Standing*, *supra* note 14, at 168.

in fact. It tells us nothing about whether the word "controversy" in Article III can be understood to require this kind of injury.

Professor Robert Pushaw draws a different distinction between "cases" and "controversies." He contends that the key difference is that the primary judicial role in "controversies" is the resolution of particular disputes while the primary judicial role in "cases" is the exposition of legal norms.⁵⁷ Although there is some ambiguity in Pushaw's use of the term, he views "exposition" — the claimed judicial role in "cases" — as simply the interpretation and application of the law to particular facts, regardless of the existence of any pre-existing private dispute, in order to secure the enforcement of that law.⁵⁸

57. See Robert J. Pushaw, *Article III's Case/Controversy Distinction and the Dual Function of Federal Courts*, 69 NOTRE DAME L. REV. 447, 494 (1994) ("[T]he federal judiciary's primary role was to be exposition in 'Cases,' with a lesser function of resolving disputes in 'Controversies.'"). This distinction may be helpful in understanding why some heads of federal jurisdiction are defined by legal subject and some are defined by party status. In Pushaw's view, current standing doctrine takes concepts that make some sense as applied to "controversies" and erroneously applies them in "cases" as well. *Id.* at 519 ("The Court's basic problem lies in applying [justiciability doctrines such as standing] — and their underlying dispute resolution model of adjudication — exclusively to 'Cases' . . . which primarily involve federal law declaration. Conversely, justiciability doctrines are not used where they would make the most sense: to limit the 'Controversies' (i.e., disputes) federal courts must resolve.").

58. See, e.g., Robert Pushaw, *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 851 (parenthetically defining exposition to be "interpret[ing] and apply[ing]" the law) [hereinafter Pushaw, *Congressional Power*]; Pushaw, *supra* note 57, at 474 (defining exposition as "the process of determining, construing, and applying legal rules"); cf. Robert Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORN. L. REV. 393, 399 (1996) (parenthetically defining "judicial power" as "the interpretation and application of pre-existing legal rules to particular facts"). Pushaw treats "exposition" and "expound" as cognates; definition 3 of the word "expound" in THE OXFORD ENGLISH DICTIONARY (2d ed. 1989), is "to give a particular interpretation to," a usage it describes as "now chiefly in law."

Pushaw might be read, however, to suggest that the judicial role in cases is not so much the enforcement of law through the issuance of judgments, but the explanation and elaboration of legal norms, ideally in published opinions. See, e.g., Pushaw, *supra* note 57, at 449 (claiming that a judge's "primary role" in a "case" is to "answer the legal question presented" and that a court's "main function" in "cases" is "to declare the law in matters of national and international importance"); *id.* at 517 ("The expository function could be exercised solely in a public judicial proceeding, culminating in a published opinion."). Such a view of the judicial role would be wrong, see Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999) ("The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment."), and in a letter commenting on a prior draft of this article, Pushaw has stated that the interpretation of "exposition" contained in the text is the one he intended. Letter from Robert Pushaw to author, March 25, 1999, at 4; see also Pushaw, *Congressional Power*, *supra*, at 860 (parenthetically defining "judicial power" as "the authority to render a final judgment after applying the law to particular facts"). Moreover, treating the judicial role in cases as enforcement of law rather than explanation of law permits the analysis to extend readily to federal trial courts. As criminal prosecutions illustrate, federal trial courts have a major role in applying the law to particular facts in order to secure the enforcement of the law. Cf. Pushaw, *supra* note 57, at 527 n.377 (conceding that "federal district courts probably have at least as important a role in settling disputes as they do in interpreting federal law" and concluding that "my analysis principally applies to federal appellate courts").

In criminal cases (and perhaps more generally in Article III “cases”), the judiciary is *enforcing* the sovereign’s law rather than umpiring a preexisting dispute.⁵⁹ Thus, criminal prosecutions demonstrate that, at least when exercising jurisdiction over the “cases” enumerated in Article III, nothing in Article III limits the use of the federal judicial power to enforcement of the rights of individuals or prohibits the use of the federal judicial power to enforce the majoritarian sovereign will.

In short, if — as all concede — the United States can prosecute crimes in the federal courts, then a “case” within the meaning of Article III must include litigation that is based on nothing more than the “harm to the common concern for obedience to law,”⁶⁰ and the “abstract . . . injury to the interest in seeing that the law is obeyed.”⁶¹

III. WHAT STANDING IS REALLY ABOUT: THE ARTICLE I AND II ISSUES

If current standing doctrine is so thoroughly wrong, why have so many Supreme Court Justices insisted that it is a fundamental aspect of constitutional separation of powers? I submit that there are separation of powers concerns afoot, but they are more properly considered as arguments primarily about the meaning of Articles I and II, not Article III.

A. *The Article I Issue*

A number of scholars have persuasively argued that the Supreme Court’s efforts to treat standing as a transsubstantive jurisdictional issue are misguided.⁶² They explain that the question of standing is best treated as a question indistinguishable from

59. See Pfander, *supra* note 56, at 616 (noting that a clause that “refers to ‘cases’ . . . thus deals primarily with the enforcement of federal law”); cf. Harrison, *supra* note 56, at 231-32 (noting that “cases” include criminal prosecutions under federal statutes, state prosecutions met by federal defenses, and criminal prosecutions of foreign diplomatic or consular officers, while most “controversies” would be between individuals, so the term underlines the private nature of such disputes).

60. Federal Election Commn. v. Akins, 118 S. Ct. 1777, 1785 (1998) (internal quotation marks and citation omitted).

61. Akins, 118 S. Ct. at 1786. I do not mean to attack all Article III justiciability doctrines; my criticism is limited to current standing doctrine. In particular, I have no quarrel with the ban on advisory opinion or the finality doctrine. See Hartnett, *supra* note 58, at 145-46 (supporting these doctrines and noting that the “central feature that constitutes a ‘case’ or ‘controversy’ is that it results in a judgment”).

62. See, e.g., Fletcher, *supra* note 14, at 233 (injury-in-fact requirement “impedes rather than assists analysis” because question regarding injury “must be seen as part of the question of the nature and scope of the substantive legal right on which the plaintiff relies”); *id.* at 291 (standing “is a question of substantive law”).

whether the party has a right of action.⁶³ Phrased this way, the issue is one of substantive and remedial law, not one of Article III jurisdiction.⁶⁴

Such scholarly efforts to dismantle Article III standing doctrine and redirect attention to the issues of substantive and remedial law, however compelling on their own terms, do not make the separation of powers concerns that judges have forced into that doctrine disappear. Instead, the question becomes whether the judiciary may create rights of action and remedies on its own or whether it must instead wait for legislative action.⁶⁵ Some argue that the creation of rights of action and their accompanying remedies are (unless constitutionally required⁶⁶) legislative questions left to Congress

63. See, e.g., Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 450-56 (1974) (standing question is whether there is private right of action); Fletcher, *supra* note 14, at 239 ("The essence of a standing inquiry is the meaning of the specific statute or constitutional provision upon which the plaintiff relies . . ."); Sunstein, *Public Law*, *supra* note 14, at 1475 ("[T]he existence of standing and the existence of a cause of action present the same basic question."); Sunstein, *What's Standing*, *supra* note 14, at 166 ("The relevant question is instead whether the law — governing statutes, the Constitution, or federal common law — has conferred on the plaintiffs a cause of action."); Winter, *supra* note 14, at 1451 ("For over a hundred years, the metaphor of 'standing' was shorthand for the question of whether a plaintiff had asserted claims that a court of equity would enforce."); *id.* at 1470 ("'Standing' is and can only be a question about the legal rights at stake."). Cf. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1382-83 (1995) (agreeing that standing is "inevitably substantive, rather than procedural," while contending that standing doctrine, by presumptively finding "no right to enforce the rights of others," "no right to prevent diffuse harms," and "no right to an undistorted market" works to prevent litigants from manipulating the path of the legal decisions).

64. Professor Sunstein attempts to maintain a link with Article III, contending that if there is no cause of action, there is no "case" or "controversy." Sunstein, *What's Standing*, *supra* note 14, at 222. If a plaintiff fails to state a cause of action (or, under the Federal Rules of Civil Procedure, a claim upon which relief can be granted), the dismissal is on the merits, not for lack of jurisdiction. See *Bell v. Hood*, 327 U.S. 678, 682 (1946) (noting that it is "well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction").

65. See Fletcher, *supra* note 14, at 233 ("In significant part, a debate over what constitutes 'injury in fact' sufficient for Article III is thus a debate about separation of powers and the respective responsibilities of Congress and the Court.").

66. Individuals seeking to protect their own life and liberty have at least one constitutionally required right of action and remedy: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. It has been held that the Fifth Amendment's just compensation clause, U.S. CONST. amend. 5, protects a constitutionally required right of action and remedy for the protection of property, *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 321 (1987), but the historical accuracy of this description has recently been called into question. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999). The extent to which the constitution requires the creation of additional rights of action and remedies is uncertain. See generally Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. (forthcoming 1999). See also Sunstein, *What's Standing*, *supra* note 14, at 210 (arguing that it is "implausible to say that constitutional provisions create [private rights of action] when the relevant duty runs to the public as a whole rather than to affected individuals").

under Article I,⁶⁷ while others argue that, at least in the first instance, courts properly create (or broadly infer) such rights of action and remedies.⁶⁸

So understood, the injury-in-fact requirement would be demoted from a constitutional rule to a principle of statutory construction:⁶⁹ in the absence of a clear statement from Congress to the contrary, the judiciary will infer rights of action only for the

67. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting) ("As the Legislative Branch, Congress . . . should determine when private parties are to be given causes of action under legislation it adopts. . . . When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy."); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 427-30 (1971) (Black, J., dissenting) (stating that, while Congress could create right of action for damages against federal officials for violating the fourth amendment, the Court may not do so); *Bivens*, 403 U.S. at 412 (Burger, C.J., dissenting) (arguing that the creation of right of action for damages is exercise of legislative power and "[l]egislation is the business of Congress"); cf. *Karahalios v. National Fedn. of Fed. Employees*, 489 U.S. 527, 536 (1989) (refusing to recognize a private right of action and noting that "Congress undoubtedly was aware . . . that the Court had departed from its prior standard for resolving a claim urging that an implied statutory cause of action should be recognized, and that such issues were being resolved by a straightforward inquiry into whether Congress intended to provide a private cause of action"); *Morse v. Republican Party of Va.*, 517 U.S. 186, 230 (1996) (Stevens, J., announcing the judgment of the Court) (implying a right of action under § 10 of the Voting Rights Act because Supreme Court precedent at the time the statute was enacted was much more receptive to such inferences than current precedent).

See also Sunstein, *Public Law*, *supra* note 14, at 1475 ("[L]itigants do not have standing unless Congress or the Constitution has granted them a right to bring suit."); Winter, *supra* note 14, at 1513 ("If standing is really about the right to be recognized and its concomitant remedies, then Congress, and not the Court, should have the ultimate power to define standing.").

68. See, e.g., *Cort v. Ash*, 422 U.S. 66, 78 (1975) (establishing four part test for implying right of action); *Bivens*, 403 U.S. at 396-97 (implying private right of action for damages for violation of fourth amendment in absence of "explicit congressional declaration" to the contrary or "special factors counselling hesitation"); *J.I. Case v. Borak*, 377 U.S. 426, 432 (1964) (implying private right of action for damages as a "necessary supplement" to Securities & Exchange Commission enforcement); see also Henry Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 24 (1975) (treating *Bivens* as a form of constitutional common law, inspired by the constitution but changeable by Congress); cf. *Flast v. Cohen*, 392 U.S. 83, 111-12 (1968) (Douglas, J., concurring) ("I would not be niggardly . . . in giving private attorneys general standing to sue. I would certainly not wait for Congress to give its blessing to our deciding cases clearly within our Article III jurisdiction."); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) ("Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.") (citation omitted).

69. See Fletcher, *supra* note 14, at 239 (suggesting that standing precedents "are useful as presumptions aids for construction"); see also *id.* at 252 (arguing that dismissals for lack of prudential standing are better described and understood as refusals to "infer a cause of action absent a clear statutory directive"); cf. Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1198-99 (1993) (arguing that all of the Court's opinions prior to *Lujan* were "consistent with the principle of legislative supremacy"). Such a demotion of the injury-in-fact requirement would be especially appropriate since the injury-in-fact requirement was born in an interpretation of the Administrative Procedure Act. See Sunstein, *What's Standing*, *supra* note 14, at 185-86 (discussing *ADP v. Camp*, 397 U.S. 150 (1970)).

kinds of concrete, individualized, personal injuries that courts expect to see vindicated by private rights of action.⁷⁰

This, I think, is the essence of the position taken by Justice Harlan: (1) public actions are within a federal court's Article III jurisdiction,⁷¹ (2) federal courts should leave the creation of such rights of action to Congress,⁷² but (3) federal courts may infer private rights of action when faced with a litigant who has suffered the kind of concrete, individualized, personal injury that courts are used to seeing vindicated by private rights of action.⁷³ There is

70. Sunstein, *supra* note 12, at 672 ("Denials of standing in cases involving novel interests foreign to the existing legal culture are therefore best understood as interpretations of the underlying statute."). Under this approach, *Federal Election Commn. v. Akins*, 118 S. Ct. 1777 (1998) is readily reconcilable with *United States v. Richardson*, 418 U.S. 166 (1974) (rejecting taxpayer standing to litigate demand for regular statement and account from CIA); in *Akins*, but not in *Richardson*, there was a Congressionally created right of action. See Sunstein, *supra* note 12, at 642 (distinguishing *Richardson* from *Akins* and noting that if *Richardson* was decided correctly it was because "no source of law created a right to bring suit"); *Leading Cases*, *supra* note 12, at 261 (making this point). Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (noting that the Court must be "sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition" but that "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit") (Kennedy, J., concurring).

71. *Flast*, 392 U.S. at 130 (Harlan, J., dissenting).

72. *Flast*, 392 U.S. at 131 (Harlan, J., dissenting) ("This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits."). Concededly, Justice Harlan's *Flast* opinion speaks in terms of "standing" rather than "rights of action."

73. *Bivens*, 403 U.S. at 408 n.8 (Harlan, J., concurring) ("[A] court of law vested with jurisdiction over the subject matter of a suit has the power — and therefore the duty — to make principled choices among traditional judicial remedies."). Justice Harlan's emphasis on the personal interests involved in *Bivens* appears throughout the opinion. See *Bivens*, 403 U.S. at 399 ("[A] traditional judicial remedy such as damages is appropriate to the vindication of the personal interests [involved]."); 403 U.S. at 408 (noting "personal interests" protected by fourth amendment); 403 U.S. at 409 (relying in part on "experience of judges in dealing with private trespass and false imprisonment claims").

It might be thought that a similar rule should apply to civil litigation brought by the United States. See *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285 (1888) (suggesting that, in the absence of a Congressionally created right of action, the United States could only "institute such a suit . . . upon the same general principles which authorize a private citizen to apply to a court of justice for relief"). Justice Field advocated even further restriction, refusing to "recognize the doctrine that the Attorney General takes any power by virtue of his office except what the Constitution and the laws confer." *San Jacinto*, 125 U.S. at 307 (Field, J., concurring in the judgment). The most prominent case rejecting this limitation should give one pause before endorsing judicially-created rights of action to vindicate the public interest. See *In re Debs*, 158 U.S. 564 (1895) (upholding injunction against Pullman strike of 1894 without need for Congressionally created right of action). In *Debs*, the Supreme Court explicitly declined to rely on any Act of Congress, 158 U.S. at 600, or to place its decision solely on the property interest of the United States in the mail carried on the railways, preferring to rest its decision on broader grounds. 158 U.S. at 583-84. It reasoned that the "obligations which [the executive branch of the United States] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is of itself sufficient to give it a standing in court." *Debs*, 158 U.S. at 584. Compare CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 24 (1969) (approving *Debs* by analogy to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)) with RICHARD H. FAL- LON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*

much to be said for Justice Harlan's approach⁷⁴ — not the least of which is that it was too conservative for the Warren Court and too liberal for the Rehnquist Court.

Federal criminal prosecutions may have something to tell us about this debate. For one of the earliest, most significant, and most enduring decisions the federal judiciary has ever made was to leave the creation of criminal rights of action to Congress and to refuse to recognize a common law of federal crimes.⁷⁵ To my mind, the example of criminal prosecutions suggests the wisdom of insisting that it is the job of Congress, not the courts, to create rights of action to vindicate the public's interest in obedience to the law.⁷⁶

Yet even those who would distinguish criminal prosecutions from other public rights of action⁷⁷ and encourage greater judicial creativity should, I believe, agree that this is the right set of questions to be asking — that what is truly at stake in current standing doctrine is not the meaning of "cases" and "controversies" in Article III, but the extent (and possible exclusivity) of the legislative power of Article I.⁷⁸

816 n.3 (4th ed. 1996) (suggesting that there is a difference between affirmative rights of action, as in *Debs*, and defenses, as in *McCulloch*). See also FALLON ET AL., *supra*, at 817 (suggesting that the New York Times in the Pentagon Papers case, *New York Times v. United States*, 403 U.S. 713 (1971), perhaps should have argued that the United States needed a Congressionally created right of action before it could bring suit); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 65-66 (1993) (suggesting that *Debs* can be "at least understood," if not defended, as an example of the protective power of the executive, without statutory authority, "to make contracts and, more importantly, to sue to protect the personnel and property interests of the United States, and when necessary to use force and other resources to protect them").

74. See, e.g., Fletcher, *supra* note 14, at 277 (describing Justice Harlan's opinion in *Flast* as "widely admired").

75. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare that Court that shall have jurisdiction of the offence."); *Hudson & Goodwin*, 11 U.S. at 32 ("Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion."). Significantly, the Court in *Hudson & Goodwin* was willing to assume, at least arguendo, an implied power in the United States to "preserve its own existence, and promote the end and object of its creation," but insisted that it did not follow that the courts could act without an act of legislation. 11 U.S. at 33-34. See also *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816) (refusing to draw *Hudson & Goodwin* into doubt).

76. Cf. Stearns, *supra* note 38, at 456 ("The injury in fact requirement . . . is intended to protect Congress's power to govern. Critical to that power . . . is the power not to make law unless and until an appropriate consensus forms.").

77. See, e.g., Yackle, *supra* note 48, at 130 (suggesting that the executive should have a right of action to enforce constitutional rights, even if "there are occasions," such as criminal prosecutions, "when we might demand explicit congressional authority for suits to enforce federal statutes").

78. Of course, one might rephrase the question to concern the appropriate scope of "judicial power" under Article III, and thus make it an Article III question. I don't deny that what I describe as an Article I question can be thought of as an Article III question, or (perhaps more precisely) as a question about the relative scope of Articles I and III. My point in labeling it an Article I rather than an Article III question is to highlight the fact that

B. The Article II Issue

Let us take stock of where we are. We have seen that there is no impediment in Article III to a federal court enforcing the law of the sovereign in the interests of the public, such as in a criminal case.⁷⁹ We have also seen that the strongest conclusion that we can draw from Article I is that the judiciary should leave the creation of rights of action to vindicate the public interest to Congress, as in the statutes creating federal crimes.⁸⁰ The constitutional question that remains to be addressed is "Who can constitutionally be empowered to represent such public interests in court?" That is a question of the proper interpretation, not of Article III or Article I, but of Article II.⁸¹

It is no coincidence that the Justice most dedicated to using the doctrine of standing to bar actions seeking to vindicate the public interest in law enforcement is the same Justice most dedicated to the unitary executive: Justice Scalia. Before taking his seat on the Supreme Court, Justice Scalia emphasized the importance of the doctrine of standing to the separation of powers.⁸² On the Court, he authored the majority opinion in *Lujan*.⁸³ He is also a firm believer in the unitary executive — the only Justice to conclude the independent counsel statute is unconstitutional because it gives purely executive functions to a person "whose actions are not fully within the supervision and control of the President."⁸⁴ Although he has denied that his views on standing are simply a dislocated version of his views on the unitary executive,⁸⁵ he has explicitly stated

it has everything to do with the scope of the legislative power, and nothing to do with the meaning of the terms "case" and "controversy."

79. See *supra* Part II.

80. See *supra* section III.A.

81. See Sunstein, *What's Standing*, *supra* note 14, at 213 ("[M]any of the recent standing cases might be thought to be Article II cases masquerading under the guise of Article III.").

82. See Scalia, *supra* note 52, at 894.

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

84. *Morrison v. Olson*, 487 U.S. 654, 708 (1988).

85. He wrote:

Our opinion is not motivated, as Justice Stevens suggests, by the more specific separation-of-powers concern that this citizen's suit "somehow interferes with the Executive's power to 'take Care that the Laws be faithfully executed,' Art. II, § 3 . . ." The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches. This case calls for nothing more than a straightforward application of our standing jurisprudence, which, though it may sometimes have an impact on presidential powers, derives from Article III, and not Article II.

Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 102 n.4 (1998) (quoting 523 U.S. at 129 (Stevens, J., concurring in the judgment)). Cf. Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1806 (1993) (relying on Article II's unitary executive to conclude that "Congress should not be able to confer on private citizens the general power to vindicate rights shared by the public as a whole."). Clanton, *supra* note 15, at 1040, n.251 (noting that a legislatively-created bounty might be a sufficient personal stake for an informer action, but relying on Article II to conclude that "separation of powers

that the reason (in his view) Congress cannot create citizen standing to vindicate the public interest is that such citizen standing would operate to transfer the President's most important duty: to take care that the laws be faithfully executed.⁸⁶

There is, of course, a large and ongoing debate about the meaning of Article II. There are those, such as Justice Scalia, who contend that Article II creates a unitary executive and that anyone exercising any part of national executive power must be answerable to the President.⁸⁷ There are others who contend that Article II is perfectly consistent with creating officers and agencies who administer the law with considerable autonomy from presidential control.⁸⁸ In addition, there are those who are willing to accept, at least for purposes of argument, that the original understanding of Article II was a unitary one, but that modern conditions require the acceptance of greater autonomy of those with executive power.⁸⁹ There are even those who argue that the original understanding accepted considerable autonomy, but that modern conditions may call for a unitary executive.⁹⁰

I do not attempt to resolve that debate, or even to enter into it. Instead, my point is that this is the right set of questions to be ask-

principles in the United States limit Congress' ability to give the public at large penalties to prosecute others for breaches of law").

86. *Lujan*, 504 U.S. at 577. In his dissent in *Akins*, Justice Scalia reiterated the same concern. "A system in which the citizenry at large could sue to compel executive compliance with the law would be a system in which the courts, rather than the President, are given the primary responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3." Federal Election Comm'n. v. *Akins*, 118 S. Ct. 1777, 1791 (1992) (Scalia, J., dissenting). A similar reliance on Article II appears in Justice Kennedy's opinion for the Court in *Alden v. Maine*, 119 S.Ct. 2240 (1999). There the Court held that Congress lacks the Article I power to authorize private litigants to bring suits for money damages against unconsenting states, but distinguished suits brought "in the name of the United States by those who are entrusted with the constitutional duty to 'take care that the laws be faithfully executed,' U.S. CONST. art. II, § 3." *Alden*, 119 S.Ct. at 2267.

87. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

88. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1792 (1996) (arguing that history does not support a formalist interpretation of the separation of powers and that the "Constitution was a sketch that left the future resolution of separation of powers matters mainly to the processes inked in at the highest levels of the three branches").

89. See, e.g., Abner Greene, *Checks & Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 128 (1994) ("[E]ven if in the nondelegation doctrine days Congress could not constitutionally regulate presidential control of agency officials . . . in the post-nondelegation doctrine world such congressional actions restore a proper balance of power consonant with the framers' view of checks and balances.").

90. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 86 (1994) (arguing that the framers distinguished between executive power and administrative power, but suggesting that "[u]nder current circumstances, a strongly unitary executive is the best way of keeping faith with the most fundamental goals of the original scheme").

ing — that what is truly at stake in current standing doctrine is not the meaning of Article III, but the meaning of Article II.

Again, criminal cases illustrate the point. If Congress has, within the scope of its enumerated powers under Article I, created a federal crime, there is no constitutional impediment to its prosecution in a federal court. Even if no one has suffered a concrete particularized injury in fact and the only interest being vindicated is the general public interest in law enforcement, and even if the judiciary would not infer a right of action absent the statute, there is a “case” within the meaning of Article III. The remaining constitutional question is a question of Article II: Who can prosecute such crimes and thereby vindicate the general public interest? The possibilities include federal officials, private actors, and even Congress or its members.⁹¹

Some might object that, regardless of the degree of independence from the President a criminal prosecutor is permitted by Article II, the named party in the case will be the United States of America, not the particular individual prosecutor. On this view, the question is not who may prosecute crimes and vindicate the general public interest, but rather who is permitted to represent the United States.

Perhaps so, but this rather formal distinction only highlights that the real issue is one under Article II, not Article III. For it would be a simple matter for Congress, any time it wishes to empower someone to vindicate the general public interest, to provide that the person may sue in the name of the United States.⁹² Indeed, this is precisely how the classic actions brought by private individuals to vindicate the public interest were (and often still are) captioned: mandamus, prohibition, certiorari, quo warranto, qui tam, informer, and relator actions were all brought in the name of the sovereign.⁹³

91. State officials present another possibility, *cf.* *Maine v. Taylor*, 477 U.S. 131 (1986) (permitting Maine standing to appeal from a federal court of appeals judgment in a federal prosecution), but from the perspective of federal separation of powers, they can be assimilated to private actors. *Cf.* *Printz v. United States*, 117 S. Ct. 2365 (1997) (holding, as a matter of federalism, that federal government cannot command state officers to enforce federal regulatory program).

92. *Cf.* 28 U.S.C. § 547(1) (1994) (authorizing United States attorneys, not citizens generally, to “prosecute for all offenses against the United States”).

93. *See, e.g.,* GEORGE E. HARRIS, A TREATISE ON THE LAW OF CERTIORARI AT COMMON LAW AND UNDER THE STATUTES § 1, at 2 (1893) (noting one definition of a writ of certiorari as “an original writ . . . directed in the king’s name” (quoting MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 162 (Sir Henry Gwyllin & Charles Edward Dodd eds., 1852) (1768))); JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION § 430, at 419 (3d ed. 1896) (explaining that mandamus proceedings are instituted in the name of the state or sovereign); *id.* § 697, at 653-54 (noting the common law rule that quo warranto proceedings be instituted in the name of the state or sovereign power). Such writs also came to be used to protect private interests. *See, e.g.,* HIGH, *supra*, § 430, at 419 (noting that use of the sovereign’s name was treated as “merely nominal”); S.S. MERILL, LAW OF MANDAMUS § 228, at 286 (1892) (recognizing

On the other hand, perhaps, as the Court seemed to say in *Buckley v. Valeo*,⁹⁴ only officers of the United States, and not private individuals, can be constitutionally empowered to represent the United States in court. There is reason to doubt such a broad reading of *Buckley*,⁹⁵ particularly in light of subsequent doctrinal developments that emphasize the prevention of Congressional aggrandizement of power rather than Presidential control over the execution of the law.⁹⁶ But even if the broad reading of *Buckley* is correct, Congress may well be able to meet this formal requirement by simply vesting the power of appointment in the court where the action is filed.⁹⁷

"long-established" rule that a writ of mandamus "runs in the name of the state to protect private interests"). See also Clanton, *supra* note 15, at 1033-41.

94. 424 U.S. 1, 140 (1976) ("[P]rimary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States'").

95. See Caminker, *supra* note 19, at 374-80 (doubting that *Buckley* should be understood as "enshrining a public/private interest distinction governing the appointments clause" and suggesting that a one-shot litigant without authority over government employees need not be an "officer"). See also, e.g., *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (person "without tenure, duration, continuing emolument, or continuous duties, and [who] acts only occasionally and temporarily" is not "officer" of United States); *United States ex rel. Stillwell v. Hughes Helicopters*, 714 F. Supp. 1084, 1095 (C.D. Cal. 1989) (interpreting *Buckley* as "preventing Congress from attempting to enforce federal law"); *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 623 (C.D. Cal. 1989) (interpreting Court in *Buckley* as "concerned that Congress was encroaching impermissibly on executive branch functions"). Office of Legal Counsel, *The Constitutional Separation of Powers Between the President and Congress*, 1996 WL 876050 at § IIB1 & n.66 (preliminary print, May 7, 1996) (concluding that *qui tam* statute is constitutional under the best reading of *Buckley*, and explicitly disapproving prior OLC opinion to the contrary).

96. See *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding independent counsel statute); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress may not place executive power in a person answerable to Congress); *INS v. Chadha*, 462 U.S. 919 (1983) (permitting delegation of Congressional authority to INS but invalidating legislative veto). See also *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (holding on basic separation of powers grounds that members of Congress may not sit on board that exercises executive power); *Airports Auth.*, 501 U.S. at 277 n.23 (declining to address incompatibility clause, ineligibility clause, and appointments clause arguments); see generally Greene, *supra* note 89, at 126 ("Congress may give away legislative power and insulate such delegated power from total presidential control, but Congress may n[ot] draw executive power to itself."); Lessig & Sunstein, *supra* note 90, at 115-16 (arguing that preventing Congress from having a role in the enforcement of law both preserves liberty and reduces the incentives toward Congressional delegation).

97. U.S. CONST. art. II, § 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). Such a mechanism would not be valid if the litigant to be appointed were considered a principal officer, who must be appointed by the President, see *Edmond v. United States*, 520 U.S. 651, 659 (1997), or if inferior officers may only be appointed by their superiors. See Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 805 (1999) (arguing that inferior officers may only be appointed by their superiors); Akhil Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 669 (1996) (arguing that "interbranch appointments are ruled out by the relational word 'inferior'"). But see *Morrison v. Olson*, 487 U.S. 654, 673-74 (1988) (permitting interbranch appointments); see also Act of June 24, 1898, ch. 495 § 2, 30 Stat. 487, current version at 28 U.S.C. 546(d) (providing for

Others might object that I am missing a crucial distinction between criminal prosecutions and the kinds of cases in which the Court has erected its standing doctrine: unlike criminal prosecutions, the Court's standing cases have often involved actions *against* an official of the federal government seeking to control that official's action. I concede, of course, that many (though certainly not all) of the Court's standing cases have involved federal officials as defendants and that the Court seems particularly concerned about using the judicial power to enforce the public interest against such officials.⁹⁸ But this distinction turns back on itself. If it is the defendant's status as a federal official that is driving the decision, it is even clearer that the issue concerns Article II: Who has the power to ensure that the official respects the public interest in compliance with the law?⁹⁹

Although it may seem odd to even contemplate, another potential candidate for representing the public interest in compliance with the law is Congress or its members. Despite its oddity, this approach, unlike the claimed "personal injury" requirement of Article III, may help illuminate the difficult area of Congressional standing.¹⁰⁰ For if Congress has the Article I power to create rights

interim appointment of United States Attorney by district court). Yet again, this highlights that the debate is better focused on Article II than on Article III.

98. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("[I]n suits against the government, at least, the concrete injury requirement must remain."); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984) (suit against Secretary of Treasury and Commissioner of Internal Revenue).

99. See Sunstein, *What's Standing*, *supra* note 14, at 231 ("[I]f Article III does indeed require a personal stake, the identification of the defendant should not matter."). It might be thought that there is an Article III difference in that "judicial power" does not include the power to command executive discretion. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("[T]he province of the courts is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion."). But the scope of executive discretion is defined "by the constitution and law," *Marbury*, 5 U.S. at 170 — that is, by Article II and law enacted pursuant to Article I. Thus Article III is not doing any independent work. There may nonetheless be an Article III issue lurking here: if both sides of the "v." are controlled by the same person, the case may be considered feigned. See generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 Wm. & Mary L. Rev. 893, 917-18 (1991) (exploring the possibility that intragovernmental disputes are not justiciable but generally rejecting it); William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 Minn. L. Rev. 1197, 1255 (1999) (arguing that, for Article III purposes, "the better way to consider whether the parties could properly litigate against one another is . . . whether one of them, or an officer superior to them, has the authority in law to dictate the outcome without resorting to court").

100. See, e.g., *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) (concluding that members of Congress lacked standing to challenge the line-item veto, despite an Act of Congress providing for such an action, because they lacked a "personal injury"). See *The Supreme Court: Leading Cases*, 111 Harv. L. Rev. 197, 218 (1997) ("[T]he law of legislative standing after *Raines* is a doctrine fraught with analytical inconsistency and uncertain boundaries."). Despite a clear opportunity to do so this year, the Court did not attempt to clarify Congressional standing in *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765 (1999). Instead, the court consolidated two cases involving challenges to the use of sampling in the 2000 census, one brought by the House of Representatives and another brought by

of action to vindicate the public interest and Article III permits federal courts to hear such actions, it might seem — unless we adopt a unitary view of the executive under Article II — that Congress could give itself (or its members) such rights of action against executive officials. But if we stop looking for a “personal injury” that we mistakenly think Article III requires, we might more profitably inform our analysis of congressional standing by asking other questions: Has Congress actually provided for such a right of action and, if not, is it appropriate for the judiciary to create one?¹⁰¹ May Congress or its members constitutionally be empowered to bring actions to vindicate the public interest in seeing that the law is obeyed?¹⁰²

various voters. It decided the case brought by the voters on the merits, and, in light of that disposition, dismissed the case brought by the House for want of a “substantial federal question,” without addressing the standing of the House. *Dept. of Commerce*, 119 S. Ct. at 779. Only Justices Stevens and Breyer concluded that the House had standing “to challenge the validity of the process that will determine the size of each State’s Congressional delegation.” *Dept. of Commerce*, 119 S. Ct. at 789 (Stevens, J., joined by Breyer, J., dissenting). Although Justices Ginsburg and Souter agreed with Justice Stevens on the merits, they agreed with the majority — but without explanation — that the case filed by the House should be dismissed. *Dept. of Commerce*, 119 S. Ct. at 789 (Ginsburg, J., joined by Souter, J., dissenting). It appears that, having lost on the merits in the case brought by the various voters, they accepted that decision as precedent in the case brought by the House. For an exploration of when a judge should treat a prior decision in which her position was rejected as a baseline for further decisions, see Suzanna Sherry, *Justice O’Connor’s Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865 (1998). Cf. Hartnett, *supra* note 58, at 141-45 (arguing that judges in a single case should not vote on each issue and accept the majority resolution of each issue, but instead should adhere to the tradition of simply voting on the judgment).

101. This question seems to have been all but ignored in the congressional standing cases in the Court of Appeals for the District of Columbia. See, e.g., *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985) (permitting Senate and members of Congress standing to challenge pocket veto), *vacated*, 479 U.S. 361 (1987); *Barnes*, 759 F.2d at 41 (Bork, J., dissenting) (decrying Congressional standing); *Moore v. United States House of Rep.*, 733 F.2d 946 (D.C. Cir. 1984) (permitting members of Congress standing to sue the two Houses and their officers to enforce the origination clause), *cert. denied*, 469 U.S. 1106 (1985); *Moore*, 733 F.2d at 956 (Scalia, J., dissenting) (objecting to such standing); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (permitting member of Congress standing to challenge pocket veto); see also *Chenoworth v. Clinton*, 1999 WL 446007 (D.C. Cir. July 2, 1999) (treating reasoning of *Moore* and *Kennedy* as repudiated by *Raines*). Congress, of course, is not likely to create rights of action against itself, its Houses, or its officers. Nor is the President likely to sign bills creating Congressional rights of action against the executive. The major exception would seem to be if Congress and the President are eager for a judicial resolution of a constitutional question, as they may have been concerning the line-item veto. See 2 U.S.C. § 692(a)(1) (Supp. 1998) (providing that any Member of Congress may sue to challenge line-item veto statute). Such a situation, however, may simply take us out of the standing frying pan into the advisory opinion fire. See Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court’s Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351, 351 (1997) (stating that in enacting a statutory grant of standing to members of Congress in the 1996 Line Item Veto Act, “Congress effectively asked the Court . . . to determine whether [the] proposed legislation was constitutional”); Fletcher, *supra* note 14, at 283-90 (suggesting that when Congress enacts a law providing for Congressional standing, it resembles a request for advisory opinions).

102. Shifting the focus from Article III also offers a way to reconcile the denial of Congressional standing in *Raines* with the recognition of state legislative standing in *Coleman v. Miller*, 307 U.S. 433 (1939) (holding that a block of twenty state senators from Kansas had

Even if Article II permits individuals with considerable independence from the President to represent the United States and vindicate the public interest in court, however, members of Congress (and Congress itself) could be precluded from exercising this power themselves. First, if Article II requires that only officers of the United States represent the United States in vindicating the public interest in court,¹⁰³ then the incompatibility clause¹⁰⁴ prevents members of Congress from bringing such actions. But even if such a litigant need not be an officer, it does not follow that such a litigant can be a member of Congress. The Supreme Court has been far more tolerant when Congress gives law enforcement powers to those with some independence from the president than when it attempts to give itself or its members a role in the enforcement of the law.¹⁰⁵

standing to seek to compel a state official to certify that a federal constitutional amendment had not been ratified where the state senate voted twenty to twenty and the Lieutenant Governor cast a deciding vote in favor of the amendment). In *Coleman*, which involved state legislators, there was no federal separation of powers issue. *Cf. Raines*, 117 S. Ct. at 2319-20 & n.8 (distinguishing *Coleman* on the grounds that the voting block in *Coleman* was sufficient to control the outcome if they were correct that the Lieutenant Governor was not part of the legislature for purposes of ratifying a federal constitutional amendment, and noting that it "need not decide whether *Coleman* may also be distinguished" on the ground that it "has no applicability to a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman*").

Of course, there is always the question whether any particular Congressionally-created right of action is best understood as an attempt to empower itself or its members to vindicate the public interest. *Cf. Raines*, 117 S. Ct. at 2323 (Souter, J., concurring in the judgment) (stating that members of Congress are "not simply claiming harm to their interest in having government abide by the Constitution," and that it is "fairly debatable" whether their injury is "sufficiently personal and concrete to give them standing" and therefore "resolv[ing] the question under more general separation-of-power principles").

103. See *supra* text accompanying notes 94-97.

104. U.S. CONST. art. I, § 6 ("[N]o Person holding Office under the United States, shall be a Member of either House during his Continuance in Office."). For an argument that the incompatibility clause is "the cornerstone of the entire American constitutional structure," see Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1157 (1994). While the Supreme Court has held that citizens and taxpayers lack standing to bring an action challenging Congressional membership in the military reserve based on the incompatibility clause, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), this does not mean that a court should ignore the incompatibility clause when adjudicating a claim brought by a member of Congress. *Reservists*, like other standing decisions, is better understood as a judicial refusal to create a public right of action to enforce the incompatibility clause; it should not bar a defensive challenge to the authority of a member of Congress under that clause. There is a significant difference between creating a right of action and recognizing that a defendant may object to the constitutional authority of the plaintiff to bring the action against him. See FALLON ET AL., *supra* note 73, at 816 n.3 (suggesting that there is a difference between affirmative rights of action and defenses); Calabresi & Larsen, *supra*, at n.12 (stating that if a member of Congress was acting as an officer of the United States and "taking government action that bore down on the life, liberty, or property rights of a private individual . . . we would have no doubt that the private individual so affected would have standing to defend against the government action on the ground that it was unconstitutional because of a violation of the Incompatibility Clause.").

105. See *supra* note 96.

CONCLUSION

Perhaps it is unduly optimistic to think that there is any hope of dislodging the current standing doctrine. After all, scholars far more prominent than I have been trying for years. But there are glimmers of hope, and those glimmers have appeared (I think) precisely in the cracks of standing doctrine explored above.

First, Justice Souter has observed that the injury-in-fact requirement is very difficult to apply sensibly to official capacity actions.¹⁰⁶ This observation is a step toward recognizing that the injury-in-fact requirement cannot be sensibly applied as an Article III requirement to any case which seeks to vindicate the public interest in law enforcement.

Second, Justice Stevens has observed that what really seems to be motivating Justice Scalia's views on standing is his commitment to a unitary theory of Article II.¹⁰⁷ This observation is a step toward recognizing that what is really at stake in current standing doctrine has everything to do with Articles I and II, and nothing to do with the meaning of "case" and "controversies" in Article III.

Finally, while the Court last year retained an Article III bar to standing where the "harm at issue is not only widely shared, but is also of an abstract and indefinite nature — for example, harm to the common concern for obedience to law,"¹⁰⁸ it also made clear that in other circumstances, Congress can authorize standing to litigate a generalized grievance. In so doing, it partially retreated from the view of Article III articulated by Justice Scalia for the Court in *Lujan*. Once the retreat has begun, there is greater hope, perhaps, for its continuance.¹⁰⁹

106. See *Raines*, 117 S. Ct. at 2323 (Souter, J., concurring in the judgment) ("There is, first, difficulty in applying the rule that an injury on which standing is predicated be personal, not official."); *Raines*, 117 S. Ct. at 2323 n.2 ("[A]n injury to official authority may support standing for a government itself or its duly authorized agents."). The cases which Justice Souter relies upon to support the standing of officials, however, are cases that arose in the context of a state official seeking review in the Supreme Court of the United States, in his official capacity, of a judgment of his own state's court. For a discussion of these cases arguing that the Supreme Court should not have abandoned its earlier doctrine barring such cases from its jurisdiction, see Edward A. Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEXAS L. REV. 907, 957-71 (1997).

107. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 129 (1998) (Stevens, J., concurring in the judgment) (suggesting that Justice Scalia's opinion for the Court might be "rooted in another separation of powers concern: that this citizen suit somehow interferes with the Executive's power to 'take Care that the Laws be faithfully executed'").

108. *Federal Election Comm'n. v. Akins*, 118 S. Ct. 1777, 1785 (1998) (internal quotation marks and citation omitted).

109. Cf. *Leading Cases*, *supra* note 12, at 262-63 (applauding the "subtle move away" from *Lujan* in *Akins*, while noting failure to "retreat squarely from it"); Sunstein, *supra* note 12, at 674 (proclaiming that "the *Akins* decision deserves a more general celebration").

Focusing on Articles I and II rather than Article III does not provide any simple answers. But we certainly have a far better chance of finding the right answers if we stop looking in the wrong place.