

# INJURY-IN-FACT, HISTORICAL FICTION: CONTEMPORARY STANDING DOCTRINE AND THE ORIGINAL MEANING OF ARTICLE III

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Justice Scalia had a problem. Under the False Claims Act, Congress had authorized private citizens to sue in their individual capacity to vindicate fraud on the United States, rewarding successful plaintiffs with a portion of the judgment. The Supreme Court had granted certiorari in the case of *Vermont Agency of Natural Resources v. United States ex rel. Stevens* to determine whether the Constitution permitted Congress to authorize such private prosecutions.<sup>1</sup> Suddenly, two different strands of Justice Scalia's jurisprudence seemed to be in direct conflict.<sup>2</sup>

On the one hand, Justice Scalia was outspoken in his belief that the Constitution authorized federal courts to adjudicate lawsuits only if the defendant's unlawful conduct had caused the plaintiff an "injury-in-fact."<sup>3</sup> Over the course of Justice Scalia's tenure, the Court had solidified this belief into an expansive body of laws governing justiciability—the doctrine of standing.<sup>4</sup> The False Claims Act, however, seemed to waive this requirement, allowing plaintiffs to sue and recover damages for fraud against the government, even if the fraud had not injured them personally.<sup>5</sup>

On the other hand, Justice Scalia had long maintained that judges should interpret constitutional provisions in accordance with the meaning ascribed to them at the time they were ratified.<sup>6</sup> To that end, founding-era law was replete with statutes that authorized uninjured plaintiffs to sue and collect damages for violations of commercial law.<sup>7</sup> More so, such statutes were enacted

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1. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771–78 (2000).

2. See Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155, 164 (2001).

3. See generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

4. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290–99 (2008) (summarizing the development of contemporary standing doctrine).

5. 31 U.S.C.A § 3730(b) (West 2010).

6. See Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017) ("Justice Scalia was the public face of modern originalism. Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative.").

7. See, e.g., Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (informer for informers against violators of slave trade laws); Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277–78; Act of July 31, 1789, ch. 5, § 29, 1 Stat. 44–45 (informer for informers against violators of customhouse regulation). See generally Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–97 n.104 (1989).

and enforced without any apparent constitutional objection by members of the founding generation.<sup>8</sup>

In the face of this conflict, Justice Scalia dodged. Applying a previously-unannounced legal fiction, Justice Scalia, writing for the Court, held that plaintiffs suing under the False Claims Act had been assigned the government's claim—the injury to the government rendering the suit justiciable.<sup>9</sup>

The Court's conclusion raises a number of difficult questions about the limits of standing doctrine and the injury-in-fact requirement. If a plaintiff could gain standing to sue a defendant because (1) the defendant had injured the United States through fraud, and (2) the United States had assigned its claim to the plaintiff, could any injured party assign their claim to an uninjured plaintiff?<sup>10</sup> It is well settled that the United States is injured when its laws are violated.<sup>11</sup> Were there any limits on the United States' ability to assign claims for violations of public law to private litigants?<sup>12</sup> Would it be constitutional, for instance, for the Federal Trade Commission to assign its claim against a company engaged in unfair trade practices to a plaintiff uninjured by such practices?

These questions do not necessarily suggest the Court got *Stevens* wrong. They do show, however, that the Court could not resolve the tension between its standing doctrine and the long history of constitutionally uncontroversial *qui tam* statutes in the

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8. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175–77 (1992).

9. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (“We believe, however, that adequate basis for the relator’s suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.”).

10. Compare, e.g., *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285–86 (2008) (holding that, under *Stevens*, when a payphone operator assigns their claim against a long-distance carrier for monies owed to a collection firm, the firm has standing to sue the carrier even where the firm will not receive a portion of the judgement), with *APCC Servs.*, 544 U.S. at 300–01 (Roberts, C.J., dissenting) (arguing that *Stevens* does not apply when the assignee will not receive a portion of the judgement).

11. See, e.g., *Stevens*, 529 U.S. at 771 (“It is beyond doubt that the complaint asserts an injury to the United States . . . the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) . . .”).

12. Compare Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 342 (2001) (“It seems safe to say that assignment may form the basis of representational standing only where the government’s claim seeks to vindicate a proprietary injury.”), with Sunstein, *supra* note 8, at 232–34 (arguing that Congressional assignment of cash bounties will cure standing problems in the context of citizen suits generally).

United States and England without announcing a potentially wide-ranging exception to standing doctrine's injury-in-fact requirement. This is symptomatic of a larger tension between the Court's rhetoric regarding standing doctrine and the history of English and U.S. law. On the one hand, the Court's rhetoric surrounding standing doctrine suggests the doctrine has deep roots in English law and U.S. history.<sup>13</sup> On the other hand, although the vast majority of founding-era private lawsuits in both England and the United States were undoubtedly brought by plaintiffs vindicating a private injury, no authoritative body in either country ever explicitly held that injury-in-fact was a universal prerequisite to judicial relief.<sup>14</sup>

In this Note, I suggest a simpler resolution to this tension than that offered by the *Stevens* Court: standing doctrine is a modern invention rooted in neither English nor U.S. legal history.<sup>15</sup> The

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13. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (“[A] court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.”); see also James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEGAL STUD. 85, 101–07 (2017).

14. See Sunstein, *supra* note 8, at 178.

15. Several scholars have already weighed in on this debate. On one side, Professors Louis Jaffe and Raoul Berger both produce a number of examples wherein English and early American courts seem to permit uninjured plaintiffs to bring suit. See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 823–24 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1270 (1961). Examining this evidence, both Jaffe and Burger conclude that an “injury-in-fact” requirement would have been a foreign concept to members of the founding generation. Berger, *supra*, at 837–40; Jaffe, *supra*, at 1269–82. Professors Stephen Winter and Cass Sunstein both capitalize on Jaffe and Berger's research in their criticism of the Court's (then) emerging commitment to a constitutionalized injury-in-fact requirement. Sunstein, *supra* note 8, at 170–80; Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418–25 (1988). Following Jaffe and Berger, three papers emerged to defend the historical pedigree of an injury-in-fact requirement. First, Bradley Clanton argues that the English King's Bench would not issue its prerogative writs at the behest of a “stranger” and, on that basis, concludes that English law disallowed suits by uninjured plaintiffs. Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1009–10 (1997). Second, Professors James Leonard and Joanne Brant argue that an injury-in-fact requirement is consistent with the original meaning of Article III because such a requirement is necessary to actualize the Founders' vision for separation of powers. See James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 33–91 (2001). Finally, an article by Professors Ann

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founding generation would not have been familiar with a constitutional requirement that plaintiffs demonstrate injury-in-fact for their suit to be justiciable. Although many causes of action historically available to private plaintiffs required them to prove injury to succeed on the merits of their claim, that requirement was a function of the positive law governing their cause of action, not a constitutional background principle of justiciability.

In the following sections, I show that contemporary standing doctrine is inconsistent with the Constitution as it was understood at the time of ratification. In Part I, I refine my research question, defining both the concept of “original meaning” and “contemporary standing doctrine,” and developing a theory about what evidence might indicate whether the former was consistent with the latter. In Part II, I turn to English and U.S. legal history to show that contemporary standing doctrine is inconsistent with the original meaning of Article III. In the first sub-section, I examine the practices of founding-era English courts and Parliament, which informed the founding generation’s understanding of judicial power. I show that, in at least some circumstances, a typical member of the founding generation would have believed that Parliament could create, and English courts could adjudicate, causes of action brought by uninjured plaintiffs. In the second sub-section, I examine constitutional ratification debates surrounding the scope of the federal courts’ powers to adjudicate lawsuits. I find that the debates are ambiguous, shedding little light on the role of standing during the founding era. Likewise, in the third sub-section, I find that the text of Article III, as it would have been understood in the founding era, neither clearly conveys nor clearly refutes the proposition that federal judicial power extended only to suits brought by injured plaintiffs. Lastly, in the fourth sub-section, I examine eighteenth and nineteenth-century U.S. law. I conclude that the founding generation would not have understood Article III to dictate a universal bar to suits by uninjured plaintiffs. In the course of this analysis, I specifically examine and reject the thesis that separation of powers concerns would have spurred a founding-era interpreter to read an injury-in-fact requirement into Article III. Finally, in Part III, I challenge the reasoning put forth in papers by Professors Leonard and Brandt, and Professors Woolhandler and

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Woolhandler and Caleb Nelson argues that although formal standing doctrine may be a relatively recent invention, early U.S. courts consistently employed various justiciability principles to limit judicial relief to injured plaintiffs. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

Nelson, which concluded that standing doctrine was not inconsistent with the original meaning of Article III. Ultimately, I conclude that an injury-in-fact requirement, whatever its prudential merits, is a modern invention rather than one rooted in the Constitution's original meaning.

Analysis of the Court's misconception about the history of standing doctrine is relevant in the modern era because societal changes and new technology require the courts to regularly grapple with new forms of injury that test the limits of established doctrines of justiciability.<sup>16</sup> The Court looks to historical justiciability principles to inform its approach to new theories of injury, drawing on historical nuisance cases to develop modern rules about distributing information on the internet,<sup>17</sup> or Elizabethan informer statutes to evaluate the validity of modern *qui tam* actions.<sup>18</sup> Thus, even if the Court does not plan to reconsider the basic tenets of standing doctrine anytime soon, the debate surrounding standing doctrine's historical pedigree has important implications for how standing evolves to meet challenges of the modern era.

As a final note, although my purpose is to show that the original meaning of Article III is inconsistent with contemporary standing doctrine, I take no position on whether inconsistency with original meaning renders a legal doctrine *per se* unconstitutional. I do not need to. Even though originalists are noteworthy for their belief that the original meaning of the Constitution is controlling regardless of other interpretive considerations (e.g., precedent, policy, morality),<sup>19</sup> most other widely accepted methodologies at least consider original meaning as an analytical factor.<sup>20</sup> As such,

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16. See, e.g., *Microsoft Corp. v. U.S. Dep't of Justice*, 233 F. Supp. 3d 887, 899 (W.D. Wash. 2017) (evaluating whether Microsoft has standing to challenge restrictions on its ability to inform users of its cloud products that the government has searched their data); *Righthaven LLC v. Wolf*, 813 F. Supp. 2d 1265, 1268–73 (D. Colo. 2011) (evaluating standing in a digital patent troll case); Miles L. Galbraith, Comment, *Identity Crisis: Seeking a Unified Approach to Plaintiff Standing for Data Security Breaches of Sensitive Personal Information*, 62 AM. U. L. REV. 1365, 1381–85 (2013) (discussing plaintiffs' standing in data breach cases).

17. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551–52 (2016) (Thomas, J., concurring).

18. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774–78 (2000).

19. DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 139 (2005).

20. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (describing non-originalist methodologies that take into account original meaning); see also Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24–25 (2009) (“Not a single self-identifying non-originalist of whom I'm aware

analyzing the Constitution's original meaning is worthwhile under almost any theory of constitutional interpretation. With this in mind, I leave debates about the implications of my conclusion for the Court's justiciability doctrine for another day and turn to the history itself.

## I.

### DEVELOPING A RESEARCH QUESTION

To examine historical evidence probative of Article III's original meaning, it is necessary to first develop a conceptual framework for analyzing such evidence. To that end, asking whether or not contemporary standing doctrine is consistent with the original meaning of Article III requires us to first answer three subsidiary questions: (1) What does it mean to speak of the Constitution's "original meaning"?; (2) What is "contemporary standing doctrine"?; and (3) What evidence is probative of whether the two are consistent? In this part, I address each question before synthesizing the answers into a research question.

#### A. Defining "Original Meaning"

For purposes of this inquiry, when I refer to the original meaning of a constitutional provision, I am referring to the meaning a reasonable interpreter would have ascribed to the provision around the time the provision was ratified.<sup>21</sup> To be sure, this is not the only way to frame an inquiry into the original meaning of the Constitution. Others have asked about the "intention," the "purpose," and the "understanding" of the framers.<sup>22</sup> Nonetheless, I ask about the hypothetical findings of a reasonable, founding-era interpreter for two reasons.

First, a consensus has emerged among originalist scholars that conceptualizing the original meaning of a constitutional provision as the provision's "original public meaning" is the most methodologically defensible way to define original meaning.<sup>23</sup> According

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argues that original meaning has no bearing on proper judicial constitutional interpretation."); see generally Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1754 (2015).

21. See Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–33 (2003).

22. See, e.g., Fallon, Jr., *supra* note 20, at 1763–65 (surveying originalist methodology). R

23. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–55 (2009); see also Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 574 (2013); Kesavan & Paulsen, *supra* note 21, at 1134–48. R

to this theory, the idea of original meaning, by definition, presupposes that constitutional text can have an objective meaning distinct from the meaning subjectively imparted to it by any individual interpreter.<sup>24</sup> It follows then that a text's public meaning—the meaning that would most likely be ascribed to the text by a reasonable interpreter familiar with the language and context in which the text was situated—does not tie a text's meaning to the interpretation of an individual or a discrete group.<sup>25</sup> Thus, conceptualizing the original meaning of a constitutional provision as the provision's original public meaning is the only analytic framework that recognizes a distinction between the meaning of constitutional text itself and the subjective interpretation of a particular figure or group.<sup>26</sup> By contrast, conceptualizing the Constitution's original meaning as the meaning intended or understood by the founders or ratifiers implicitly rejects the idea that the constitutional text has objective meaning distinct from the subjective meaning of particular interpreters.

Second, I dedicate only one paragraph to the above analysis because, to the extent that the existence or wisdom of this consensus is debatable, the debate is not worth joining. As Professor Michael McConnell notes, "For all of the attention given to the difference between 'original public meaning' originalism, and originalism based on the understandings of the framers and ratifiers, no one has identified nontrivial examples of actual constitutional interpretation that turn on the distinction."<sup>27</sup> Thus, for the purpose of my analysis, original public meaning of a constitutional provision refers to the meaning a reasonable interpreter would have ascribed to the provision at the time the provision was ratified.

### B. *Defining Contemporary Standing Doctrine*

I define standing doctrine as a justiciability doctrine that holds a lawsuit is justiciable only if the plaintiff has suffered an injury that is both traceable to the defendant's conduct giving rise to liability and redressable through a mode of relief the court may legally issue.

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24. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551–53 (1994).

25. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 108–11 (2001).

26. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 397–98 (2002).

27. Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1758 (2015).

The Supreme Court solidified contemporary standing doctrine in the 1992 case, *Lujan v. Defenders of Wildlife*.<sup>28</sup> In *Lujan*, the plaintiffs accused the government of violating the Endangered Species Act, which required federal government agencies to consult with the Secretary of the Interior or Commerce before taking action that might harm an endangered species. The Department of the Interior interpreted the Act to require consultation only for projects on U.S. soil or the high seas. When the federal government, pursuant to this interpretation, authorized funding for overseas hydroelectric projects without consulting either Secretary, the plaintiff environmentalists brought suit under the Act's citizen suit provision, which authorized anyone to sue to enjoin violations of the Act.<sup>29</sup> The plaintiffs argued that the Act must be interpreted to apply to government action worldwide, asking the Court to require the Secretary to promulgate a new rule to that effect.

The Supreme Court ordered the suit dismissed, finding that adjudication of the suit would exceed the judiciary's powers under Article III. The majority reasoned that, although the Constitution grants the judiciary power to adjudicate "cases" and "controversies," it limits that power to "cases" and "controversies" that "are of the judicial sort."<sup>30</sup> According to the majority: "One of those landmarks, setting apart the cases and controversies that are of the justiciable sort referred to in Article III . . . is the doctrine of standing."<sup>31</sup> The majority held that the "irreducible constitutional minimum of standing contains three elements": (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actually or imminent," (2) "there must be causal connection between the injury and the conduct complained of," and (3) "it must be likely as opposed to merely speculative that the injury will be 'redressed by a favorable decision.'"<sup>32</sup>

Under this framework, the Court drew two conclusions. First, it found that federal courts lacked jurisdiction to hear the plaintiffs' suit because the plaintiffs failed to show they suffered a particular-

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

29. *Id.* at 555, 559.

30. *Id.* at 559–60 (1992) ("To be sure, [Article III] limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' but an executive inquiry can bear the name 'case' (the Hoffa case) and a legislative dispute can bear the name 'controversy' (the Smoot-Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

31. *Id.* at 560.

32. *Id.* at 560–61.

ized injury as a result of the government's failure to consult with the Department of the Interior.<sup>33</sup> Second, the Court rejected plaintiffs' argument that their suit was justiciable even without injury because the Endangered Species Act authorized any citizen to challenge the Secretary's failure to consult. According to the majority, Congress lacked the power to authorize suits by uninjured plaintiffs.<sup>34</sup> Ever since, *Lujan* has stood for the proposition that the Constitution requires private plaintiffs seeking relief in federal court to show that they have suffered a concrete injury, traceable to the defendant's unlawful conduct and redressable by a court.

Moreover, standing doctrine not only requires a plaintiff to show injury, it also prescribes limits on an adequate injury for the purposes of Article III. Since *Lujan*, the Court has held that to satisfy the injury-in-fact requirement, a plaintiff's injury must meet four criteria. It must be: (1) an invasion of a legally protected interest, (2) concrete, (3) particularized rather than general, and (4) actual or imminent rather than conjectural or hypothetical.<sup>35</sup> Because these limits are derived from the Constitution, no law can create a cause of action that allows plaintiffs to sue absent an injury satisfying all four requirements.<sup>36</sup> This is why the *Lujan* Court found that the plaintiffs' suit was non-justiciable despite the Endangered Species Act's citizen suit provision. The Court found that Congress lacked the power to authorize courts to adjudicate suits by an uninjured plaintiff.

Since *Lujan*, the Court has consistently stated that standing doctrine is the product of the Constitution's division of powers between an executive, legislative, and judicial branch.<sup>37</sup> As Professor Heather Elliott details, the Court has primarily relied on three justifications for why standing doctrine is necessary to effectuate separa-

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33. *Id.* at 562–67.

34. *Lujan*, 504 U.S. at 571–73.

35. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

36. *See id.* at 1547–48; *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (“It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”).

37. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993) (“The doctrine of standing is an essential and unchanging part of the case-or-controversy requirement of Article III which itself defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.”) (internal citation and quotation marks omitted); *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”); Heather Elliott, *The Functions of Standing*, 61 *STAN. L. REV.* 459, 461–63 (2008); Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 *DICK. L. REV.* 303, 318–23 (1996).

tion of powers.<sup>38</sup> First, the Court has argued that resolution of disputes involving uninjured parties is simply not an exercise of judicial power.<sup>39</sup> In particular, the Court has emphasized that an injury is necessary to ensure that a lawsuit is adversarial and the parties have incentive to oppose each other.<sup>40</sup> Second, the Court has argued that if an injury is common to most or all of the citizenry, it is the type of problem the Constitution has charged the political branches, not the courts, with addressing.<sup>41</sup> Third, the Court has held that if Congress could authorize any person to sue to remedy violations of federal law, it would effectively usurp the executive branch's role by allowing any citizen to ask the courts to second-guess every executive interpretation or implementation of that law.<sup>42</sup>

Thus, for the purposes of this Note, standing doctrine has three core elements. First, standing doctrine holds that courts may not adjudicate lawsuits unless the plaintiff has suffered an injury that constitutes the invasion of a legally protected right and is concrete, particularized, actual or imminent, traceable to the unlawful conduct of the defendant, and redressable through means available to the court. Second, because standing doctrine is a constitutional

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38. Elliott, *supra* note 37, at 461–63.

39. *Id.* at 469; *see* Flast v. Cohen, 392 U.S. 83, 94–95 (1968) (“Embodied in the words ‘cases’ and ‘controversies’ are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.”); *see also* Massachusetts v. EPA, 549 U.S. 497, 516 (2007).

40. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 80 (1978) (“There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.”); Baker v. Carr, 369 U.S. 186, 204 (1962) (“Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.”).

41. Elliot, *supra* note 37, at 477–82; *see* Warth v. Seldin, 422 U.S. 490, 500 (1975) (“Without such limitations [on standing] . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions . . . .”); *Allen*, 468 U.S. at 756 (“Recognition of standing in such circumstances would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders.” (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973))).

42. Elliot, *supra* note 37, at 493–96; *see* Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–78 (1992).

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limit, Congress lacks the power to create a cause of action for a plaintiff that cannot meet the requirements for an injury-in-fact. Third, such limits on the judiciary's ability to adjudicate lawsuits and Congress's ability to authorize them stem from the separation of power into executive, legislative, and judicial branches.

*C. Establishing a Research Question*

The above analysis yields two important conclusions on which I can construct my research questions. First, the original meaning of a constitutional provision is best conceptualized as the meaning a hypothetical reasonable interpreter would ascribe to the provision around the time it was ratified. Second, constitutional standing doctrine holds that courts can adjudicate, and Congress can authorize, lawsuits only if plaintiffs have suffered an injury-in-fact that consists of a particular, concrete, actual or imminent invasion of a legally protected right that is both traceable to the defendant's conduct and redressable by the court. Thus, standing doctrine is consistent with the Constitution's original meaning only if a reasonable interpreter reading the Constitution around the time of ratification would have understood the Constitution to so limit the jurisdiction of federal courts.

To determine whether a hypothetical interpreter would have ascribed such meaning to the Constitution requires answering two related questions: (1) What are the relevant constitutional provisions that might have expressed an injury-in-fact requirement to a founding-era interpreter?; and (2) What evidence is probative of how a founding-era interpreter would have interpreted those provisions?

With regard to the first question, Article III of the Constitution outlines the power of the judicial branch. Thus, if the Constitution denied federal courts the power to hear cases lacking an injured plaintiff, it must be true that some combination of words in Article III must have conveyed such a limit to a founding-era interpreter.<sup>43</sup>

Article III extends the "judicial power" to a discrete set of enumerated "cases" and "controversies,"<sup>44</sup> yet contains no express limit on the power of federal courts to adjudicate suits by uninjured plaintiffs. If a founding era interpreter would have read Article III

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43. *Cf.* ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990) ("All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the [ratifying] conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.").

44. U.S. CONST. art. III, § 2.

to contain such a limit, the limit must be derived from the fact the judiciary is granted only the use of “judicial power,” and only over “cases” and “controversies.” Thus, to determine whether standing doctrine is consistent with the original meaning of Article III, we must ask whether a founding-era interpreter would have understood the terms “judicial power” in relation to “cases” and “controversies” to denote only power to resolve disputes involving injured parties.

With regard to the second question, four types of evidence are probative of how a founding-era interpreter would have interpreted Article III’s grant of “judicial power” to “cases” and “controversies.” The first is English law. Although the founders did not adopt English law wholesale, the founding generation’s understanding of legal concepts was primarily based in English law.<sup>45</sup> Thus, whether the terms “judicial power,” “case,” and “controversy,” as used in English law, implied a bar to adjudication of suits by uninjured plaintiffs is probative of whether a founding era interpreter would have found Article III to mandate similar limits on the power of the U.S. judiciary. The second is evidence from debates over the power and jurisdiction of the judicial branch at the constitutional and ratifying conventions. If those debates show there was clear intent on the part of the founding generation to either permit or forbid adjudication of suits by uninjured plaintiffs, it would suggest that the words in Article III would have signaled such a limit to a founding-era interpreter.<sup>46</sup> The third is the ordinary meaning of the words “judicial power,” “case,” and “controversy” at the time of ratification. I will examine whether the plain meaning of the words themselves in

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45. See Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 786–92 (2004); see also Andrew Tutt, *Treaty Textualism*, 39 YALE J. INT’L L. 283, 292–94 (2014).

46. The reason for this, in essence, is that the founders themselves were reasonable people in the founding era. If they intended the Constitution to permit or forbid suits by uninjured plaintiffs, they would have chosen language that would convey such a bar to a reasonable person. This conclusion in turn creates a presumption that the words in the Constitution would have held such a meaning. This presumption is obviously rebuttable—writers are not always successful at conveying their intended meaning—but it serves as a reasonable starting point for analysis. See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1341–42 (1998) (“Even if we cannot know the actual intent of the legislature, we can at least charge each legislator with the intention ‘to say what one would be normally understood as saying, given the circumstances in which one said it.’ Ascribing that sort of objectified intent to legislators offers an intelligible way to hold legislators accountable for the laws they have passed, whether or not they have any actual intent, singly or collectively, respecting its details. Textualists subscribe to this theory of intent.”).

the founding era would have led a founding-era interpreter to interpret Article III as a bar on adjudication of suits by uninjured plaintiffs. The fourth and final category of probative evidence is the practice of Congress and state and federal courts following the Constitution's ratification.

Finally, I want to be clear: asking whether Article III was originally understood to permit courts to hear suits by uninjured plaintiffs is not the same as asking whether injury was, as a matter of course, irrelevant to the appropriateness of judicial relief. Standing doctrine holds that injury-in-fact is a constitutional prerequisite for federal jurisdiction.<sup>47</sup> The cause of action under which a plaintiff seeks relief will inevitably require the plaintiff to make additional showings. Thus, there is no question that the vast majority of causes of action available to founding-era plaintiffs would have required them to demonstrate that they had been injured by the defendant's conduct. For example, a property owner needed to show they owned the property in question in order to sue for trespass, and a plaintiff would have to show they were party to a contract in order to sue for breach. This Note, however, asks whether Article III was understood by members of the founding generation to require *every* plaintiff to show injury, or whether the relevance of injury was a function only of the substantive law underlying a claim.

Synthesizing the above analysis, my research question is as follows: Taking into account the (A) practice of English courts, (B) pre-ratifying debates, (C) founding-era plain meaning of the Constitution's words, and (D) post-ratification decisions by Congress and courts in the United States, is it more likely than not that a reasonable person interpreting the Constitution around the time of ratification would have understood the fact that Article III grants federal courts only "judicial power" over "cases" and "controversies" to mean that the federal judiciary has the power to adjudicate lawsuits only if the plaintiff had suffered an injury traceable to the defendant's unlawful conduct and redressable by the court? As the following pages will show, the answer to this question is "no."

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47. See *Lujan*, 504 U.S. at 560 (describing standing as an "irreducible constitutional minimum").

II.  
STANDING DOCTRINE AND THE ORIGINAL  
MEANING OF ARTICLE III

A. *English Law*

At the time of the founding, nothing akin to standing doctrine existed in English law. Although the founders did not adopt the practices of the English judiciary wholesale, English law informed their understanding of legal concepts generally<sup>48</sup> and of the role of the courts in particular.<sup>49</sup> Therefore, the lack of any historical antecedents to standing doctrine in founding-era English law suggests (though not definitively) that a founding-era interpreter would not have understood Article III's grant of "judicial power" over "cases" and "controversies" to convey anything akin to standing doctrine.

This section proceeds in two parts. In the first part, I examine the structure of the founding-era English government. There, I argue that, because founding-era English courts were inferior to, not co-equal with, Parliament, standing doctrine could not have existed at English law. Parliamentary supremacy over the courts would have precluded legal doctrine limiting Parliament's ability to authorize uninjured plaintiffs to seek judicial relief. In the second section, I show that English courts did in fact entertain suits by uninjured plaintiffs. Specifically, King's Bench writs of prohibition and information in the nature of quo warranto could be issued at the behest of plaintiffs that lacked a stake in the underlying controversy.

1. Parliamentary Supremacy and the Structure of English Governance

Unlike in the United States, where sovereignty is vested in the people, the sovereignty of founding-era England was vested in Parliament. Thus, Parliament was largely empowered to create whatever substantive law it saw fit.<sup>50</sup> This principle was articulated by Lord Coke, who claimed that Parliament was "so transcendent and absolute, that it cannot be confined, either for causes or per-

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48. See Moline, *supra* note 45.

49. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 27–28 (2001) ("In short, English law undoubtedly informed their understanding of the government they were forging. Hence, if the equity of the statute reflected a settled common law understanding of what judges do when they implement statutes, it may supply probative evidence of the Founders' own understanding of 'the judicial Power.'"); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 400–07 (1996).

50. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 337 (5th ed. 1956); Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 489–91 (1937).

sons, within any bounds.”<sup>51</sup> Similarly, Blackstone stated that “the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledged no superior upon earth.”<sup>52</sup>

This “absolute authority” included the power to control access to judicial relief. For instance, in the eighteenth century, Parliament created numerous causes of actions that had not existed at common law,<sup>53</sup> including rights in labor,<sup>54</sup> bankruptcy,<sup>55</sup> and patent infringement.<sup>56</sup> Moreover, a founding-era jurist would have likely understood Parliament to possess the power not only to create new causes of action, but to alter the jurisdiction of English courts. First, the English courts were not a co-equal branch of government, and thus, did not possess a separate base of power that Parliament could not alter.<sup>57</sup> Second, Parliament altered the jurisdiction of English courts without any apparent controversy in the nineteenth century by passing the Chancery Amendment Act of 1858.<sup>58</sup> The Act gave courts of equity the right to assign damages along with equitable remedies in cases where they otherwise had jurisdiction.<sup>59</sup> If Parliament had been thought to lack the ability to alter the jurisdiction of English courts in the late eighteenth century, the validity of such changes would have been at least challenged in the nineteenth century.<sup>60</sup>

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51. 4 EDWARD COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND* 36 (1634).

52. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*90.

53. See Suja A. Thomas, *A Limitation on Congress: “In Suits at Common Law”*, 71 OHIO ST. L.J. 1071, 1097 (2010).

54. See generally *Frauds by Workmen Act 1748*, 22 Geo. 2, c.27 (Eng.).

55. *Bankrupts Act 1705*, 5 Ann., c. 4, (Eng.).

56. *Copyright Act 1710*, 8 Ann., c. 21 (Eng.).

57. See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 814 (2001).

58. *Chancery Amendment Act 1858*, 21 & 22 Vict. c. 27 (Eng.); see Thomas, *supra* note 53, at 1098.

59. *Chancery Amendment Act 1858*, 21 & 22 Vict. c. 27 (Eng.); H. Tomás Gómez-Arostegui, *Prospective Compensation in Lieu of a Final Injunction in Patent and Copyright Cases*, 78 FORDHAM L. REV. 1661, 1699 (2010).

60. To be sure, one should not impute the belief that Parliament had limitless power to create causes of action to a hypothetical founding-era constitutional interpreter. By the time of the founding, England had experienced numerous debates about “fundamental law,” or “unwritten constitution,” limiting Parliament’s power. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 856 (1978). In the landmark *Dr. Bonham’s Case*, Lord Coke remarked that “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.” *Thomas Bonham v. Coll. of Physicians* [1610] 77 Eng. Rep. 647, 652 (C.P.). This sentiment was repeated by

Thus, the structure of English governance would not have facilitated the sort of background principle that could serve as a genuine antecedent to modern standing doctrine. If one had asked a founding-era English jurist whether Parliament had the power to create a cause of action that did not require a plaintiff to show injury, the answer almost certainly would have been “yes.” Who would have stopped Parliament? On what grounds? As a result, to the extent that the structure of English law would have informed a founding-era interpreter’s understanding of Article III, it is unlikely that interpreter would have understood English courts to be limited by any principles rendering suit by uninjured plaintiffs universally non-justiciable.

## 2. Informer Actions, Prerogative Writs, and the Practice of English Courts

Even if Parliament possessed the power to create a cause of action for an uninjured plaintiff, if Parliament never actually exercised whatever power it might have had to create causes of action for uninjured plaintiffs, and if English courts otherwise did not hear suits from uninjured plaintiffs, it could still be true that the terms “judicial power,” “case,” and “controversy” may have implied a bar to such suits. However, two areas of English law—the in-

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Coke’s successor, Lord Chief Justice Hobart, who remarked in *Day v. Savadge* that “an act of parliament made against natural equity, as to make a man judge in his own cause, is void in itself.” *Day v. Savadge* [1614] 80 Eng. Rep. 235 (K.B.). Such sentiments were also present in eighteenth-century political debates. See 7 Parl. Hist. Eng. (1811) col. 349 (UK). (“an act of parliament may be void of itself”); 16 Parl. Hist. Eng. (1813) col. 178 (UK). (arguing that taxation without representation was “contrary to the fundamental laws of our nature.”).

However, it is unlikely that a founding-era jurist would have understood these debates to apply to Parliament’s ability to alter the jurisdiction of English courts. First, the existence of such limits was hardly a settled principle of English law. See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1129 (1987) (“These ideas were those of the opposition party in England, and thus were never accepted by those who held power in that country.”). For instance, Blackstone, commenting on Justice Hobart, noted that “I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*41; see BLACKSTONE, *supra* note 52, at \*160 (describing Parliament as having “sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws . . .”). And second, to the extent that such limits did exist, they would have limited Parliament’s ability to infringe on specific rights of individuals or of the King. See Sherry, *supra*, at 1128–34. There is, by contrast, no evidence that principles of fundamental law were ever understood to control general justiciability questions.

former action and prerogative writs of the King's Bench—suggest that English courts did in fact evaluate lawsuits brought by uninjured plaintiffs.

a. The Informer Action

English courts frequently heard suits brought under common informer actions. The informer action was a cause of action created by Parliament that authorized individuals to sue, in their individual capacity, those who violated certain types of laws.<sup>61</sup> The informer did not need to show that they were personally harmed by the defendant's breach of the law, only that (a) such a breach had occurred, and (b) the law permitted them to sue to rectify it.<sup>62</sup> In his *History of English Law*, William Holdsworth noted the widespread use of these statutes, writing: "The number of statutes old and new, to which the public at large was encouraged to enforce obedience to a statute by a promise of a share of the penalty imposed for disobedience was very large."<sup>63</sup> Blackstone described such action in his *Commentaries*, writing that "[s]uch penalties are given by particular statutes, to be recovered on an action popular . . ."<sup>64</sup>

The history of informer statutes predates England itself and spans to the time of the founding.<sup>65</sup> A law issued in 695 by King Wihtrud of Kent offered a bounty to anyone who informed the King of a freeman working on the Sabbath.<sup>66</sup> The 1318 Statute of York offered bounties in exchange for the prosecution of public corruption.<sup>67</sup> One study found that during the reign of Elizabeth I, the vast majority of suits brought to enforce the apprenticeship statutes were brought by professional informers.<sup>68</sup> Around the time of the founding, informer actions were used to enforce restrictions on religious dissenters,<sup>69</sup> economic regulations,<sup>70</sup> public safety,<sup>71</sup> and

61. See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 565 (2000).

62. Winter, *supra* note 15, at 1406.

63. 4 WILLIAM HOLDSWORTH, *HISTORY OF ENGLISH LAW* 356 (1924).

64. BLACKSTONE, *supra* note 52, at \*438.

65. See generally, Beck, *supra* note 61.

66. See FREDERICK ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* 27 (1963).

67. Statute of York 1318, 12 Edw. 2, c. 5 (Eng.).

68. See MARGARET GAY DAVIES, *THE ENFORCEMENT OF ENGLISH APPRENTICESHIP: A STUDY IN APPLIED MERCANTILISM 1563–1642*, at 18–19 (1956).

69. Sunday Observance Act 1780, 21 Geo. 3, c. 49, § 1 (Eng.) (fines for businesses open on the Sabbath).

70. Gold and Silver Thread Act 1741, 15 Geo. 2, c. 20 (Eng.).

71. Fires Prevention Act 1785, 25 Geo. 3, c. 77 (Eng.) (fines for improper boiling of tar).

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anti-corruption measures.<sup>72</sup> In fact, informer actions were the primary enforcement mechanism of founding-era English commercial law because the English government lacked the capacity to monitor England's growing commercial sector without private relators.<sup>73</sup>

Of particular note is that, by the Elizabethan period, there was considerable frustration among English jurists (and undoubtedly English businesses) about widespread abuse of the informer action.<sup>74</sup> Detractors complained about the ease with which such suits could be brought and, by extension, used to harass.<sup>75</sup> Among the many outspoken critics of the practice was Lord Coke himself, who referred to "the vexatious informer" as "viperous Vermin."<sup>76</sup> The King and Parliament responded to such widespread complaints by increasing the quantity and specificity of requirements an informer had to meet to collect their bounty.<sup>77</sup> There is no evidence, however, that any serious consideration was given to eliminating the action entirely. This suggests that laws permitting suits by an uninjured plaintiff were not considered to be in tension with some other accepted element of English law, otherwise, the many opponents of informer actions would have likely explicitly noted such tension.

One law review article by Bradley Clanton argues that the existence of the informer action does not suggest widespread acceptance of an English court's ability to adjudicate suits by uninjured plaintiffs.<sup>78</sup> Clanton contends that because informers obtained a property right in their allotted portion of a bounty upon a successful prosecution of their suit, informers constituted interested parties.<sup>79</sup> But standing doctrine does not require just that parties be interested in the lawsuit; it requires that they suffer an *injury* as a result of the defendant's conduct. This is a very different thing. Even if Clanton is correct, uninjured plaintiffs could still sue in founding-era English courts, at least where they served to gain some benefit from successful prosecution of the suit. This would still refute the notion that English courts practiced something akin to modern standing doctrine, which requires not only that plaintiffs

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72. Levy of Fines Act 1822, 3 Geo. 4, c. 46, § 10 (Eng.) (fining public officials who failed to properly levy fines).

73. HOLDSWORTH, *supra* note 63, at 354–55; Beck, *supra* note 61, at 573–79.

74. *See* Beck, *supra* note 61, at 575–79.

75. *Id.* at 579–585.

76. 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 194 (1797).

77. *See* Beck, *supra* note 61, at 585–90; HOLDSWORTH, *supra* note 63, at 457.

78. *See* Clanton, *supra* note 15, at 1038–40.

79. *Id.* at 1040 ("The legal right to bring the action or information was given by statute, and by commencing the action the informer obtained a vested property right in the penalty provided for in the statute.")

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have an interest in winning the suit, but that the interest be connected to an injury traceable to a defendant's conduct.<sup>80</sup> If an interest alone was all that was required, standing issues could be remedied whenever a plaintiff showed that they stood to gain from a successful prosecution—certainly through government rewards but possibly also through third party bounties or even reputational advantages—regardless of whether or not they were injured by the defendant. Such a minimalist conception of standing, even if historically accurate, would not serve as a historical antecedent to *Lujan* and its progeny. Thus, the widespread use of informer actions suggests that English courts were not limited to suits by injured plaintiffs.

b. The Writs of Prohibition and Information in the Nature of Quo Warranto

The second area of English legal practice that demonstrates the ability of uninjured plaintiffs to bring suit is the prerogative writs of the King's Bench.<sup>81</sup> The prerogative writs were a product of political changes in English governance resulting from England's turn from absolute monarchy toward constitutional monarchy in the aftermath of the Glorious Revolution.<sup>82</sup> The accompanying reduction in the King's supervisory power over the English government allowed English courts, specifically the King's Bench, to take up such a supervisory role themselves.<sup>83</sup> By the time of the founding, the King's Bench had accumulated substantial power to supervise both inferior courts and government officials performing administrative functions.<sup>84</sup> To accomplish this, the King's Bench

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80. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (“[A]t an irreducible minimum, Art. III requires the party who invokes the court’s authority to ‘show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.’”) (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)).

81. See generally Edward Jenks, *The Prerogative Writs in English Law*, 32 *YALE L.J.* 523 (1923); see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *TEX. L. REV.* 1433, 1442–49 (2000).

82. See Pfander, *supra* note 81, at 1446–47.

83. For a history of the development of the prerogative writs, see *id.*

84. Some of this authority was more theoretical than exercised. For instance, although it was theoretically possible for the King's Bench to take a case from the Chancery via a writ of prohibition, the power was never used. See 1 CHARLES M. GRAY, *THE WRIT OF PROHIBITION: JURISDICTION IN EARLY MODERN ENGLISH LAW*, at liii (1st ed. 1994).

utilized a slate of “prerogative writs”—Lord Mansfield’s words<sup>85</sup>—which included writs of:

- Habeas corpus, which allowed the court to evaluate the legal justifications for a prisoner’s confinement<sup>86</sup>
- Prohibition, which directed either a lower common law court or a non-common law court to refrain from exercising jurisdiction over a case<sup>87</sup>
- Mandamus, which directed lower courts or government officials to take some action required by law<sup>88</sup>
- Certiorari, which directed a lower court to send the records of a trial proceeding to the King’s Bench for decision<sup>89</sup>
- Quo warranto (or its later equivalent, the “Information in the Nature of Quo Warranto”), which allowed the King’s Bench to determine the legitimacy of an officeholder to a franchise.<sup>90</sup>

Because these writs were used to secure the public interest as well as the rights of individuals, courts would occasionally issue them at the behest of an uninjured plaintiff when doing so would be in the public interest. Two of these prerogative writs, prohibition and the information in the nature of quo warranto, best demonstrate this point.

The first is the writ of prohibition. In founding-era England there were four distinct court systems: common law courts, courts of equity, ecclesiastical courts, and admiralty courts.<sup>91</sup> Each had jurisdiction over different kinds of suits.<sup>92</sup> At the time of the founding, if the King’s Bench determined that another court was adjudicating a lawsuit outside that court’s jurisdiction, the King’s Bench could issue a writ of prohibition, prohibiting the court from adjudicating the suit.<sup>93</sup>

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85. See S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 45–48 (1951).

86. PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 1–2 (Harvard Univ. Press 2010).

87. 2 CHARLES M. GRAY, *THE WRIT OF PROHIBITION: JURISDICTION IN EARLY MODERN ENGLISH LAW* 1–2, 161 (1st ed. 1994).

88. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 917, 917 n.63 (1997).

89. S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 45–48 (1951).

90. 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*263–64.

91. Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1185–87 (2007).

92. *Id.*

93. GRAY, *supra* note 84, at viii.

Thus, a founding-era jurist would have understood that both the parties to the suit and the public-at-large had an interest in the outcome of a writ of prohibition, the latter being a broad public interest in maintaining the correct lines of jurisdiction.<sup>94</sup> In 1695, the House of Lords articulated this public interest:

The reason of prohibition in general, that they were to preserve the Right of the King's Crown and Courts, and the ease and Quiet of the subject, that twas the Wisdom and Policy of the Law, to support both best preserved, when every Thing runs in its right Channel, according to the Original jurisdiction of every Court, that by the Same Reason one Court might allowed to encroach another might, which could produce nothing but Confusion and Disorder in Administration of Justice.<sup>95</sup>

This principle was most clearly articulated when a plaintiff sought to prohibit a lawsuit they themselves had initiated.<sup>96</sup> Although defendants in such suits argued that a plaintiff should not be permitted to prohibit lawsuits they themselves had brought in the wrong court, the King's Bench categorically rejected this argument. Whatever the interests of the party seeking prohibition, the government had its own interest in ensuring courts stayed within their proper jurisdiction.<sup>97</sup> In *Pyper v. Barnably*, Pyper sought to prohibit a suit he had brought in ecclesiastical court. When the defendant claimed that a plaintiff could not prohibit his own suit, the court reasoned that “[i]f the Court Christian will hold plea in derogation of the common law, the Court *ex officio* ought to restrain their proceedings.”<sup>98</sup> Similarly, in *Worts v. Clyfton*, the King's Bench upheld self-prohibition, reasoning that “if this court hath knowledge *by any means* that the Spiritual Court meddles with temporal trials, they ought to grant a prohibition.”<sup>99</sup>

Thus, it is likely that if a plaintiff sought a writ of prohibition to prohibit a lawsuit that did not injure them but prohibition was otherwise appropriate, the Kings Bench would issue the writ in order to vindicate the public's interest in maintaining jurisdictional lines. To be sure, this theory is somewhat difficult to test because the ma-

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94. *See id.* at 1–2.

95. *Oldys v. Domville* [1695] 15 Lds. Jo. 701 (HL).

96. For a broad discussion on the topic of self-prohibition *see* GRAY, *supra* note 84, at 161–75.

97. *See* GRAY, *supra* note 84, at 161.

98. *Pyper v. Barnably*, H. 41 Eliz. Q.B. Add. 25,230 f.47b.

99. *Worts v. Clyfton*, M. 12 Jac. K.B. Croke Jac. 350 (emphasis added).

jury of prohibitions were sought by injured parties.<sup>100</sup> However, this theory was validated by Lord Coke in his *Institutes of the Laws of England*. There, Coke explained that “the king’s courts that may award prohibition, being informed either by the parties themselves, or by any stranger, that any court temporal or ecclesiastical doth hold plea of that (whereof they have not jurisdiction) may law-fully prohibit the same, as well after judgement and execution, as before.”<sup>101</sup>

Clanton challenges the relevance of the writ of prohibition to the injury-in-fact requirement’s historical pedigree.<sup>102</sup> Clanton argues that the term “stranger,” as used by Coke, denoted parties who, although neither plaintiff nor defendant, had an interest in the outcome of the original lawsuit.<sup>103</sup> However, he reaches this conclusion through an exceedingly selective examination of the evidence. For one thing, English legal dictionaries are consistent in defining “stranger,” as someone who is not “privy or party to an act.”<sup>104</sup> Enumerated examples include “a stranger to judgement is he to whom a judgement doth not belong; and herein it is directly contrary to party or privy”<sup>105</sup> and “as a stranger to a deed denotes a person who has nothing to do therewith.”<sup>106</sup> In my research I could not find one founding-era dictionary in which “stranger” generally denoted an interested party.<sup>107</sup> Clanton does cite a number of English authorities that describe strangers to fines as having “either a present or future right” or “an apparent possibility of right.”<sup>108</sup> But he provides no evidence that this definition extends to other contexts. Indeed, the number of eighteenth-century dictionaries defining stranger without reference to any future right defeats this proposition. Finally, Clanton’s theory outright ignores the interest in public administration that animated writs of prohibition. To the extent that a party needed an interest to bring a writ of prohibition, there is contemporaneous authority describing the interest of all

100. Most writs of prohibition were issued to parties claiming to have been improperly sued in ecclesiastical court. See GRAY, *supra* note 84, at xviii.

101. 2 EDWARD COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND* 602 (1797).

102. See Clanton, *supra* note 15, at 1009-20.

103. See *id.* at 1015.

104. See, e.g., *Stranger*, *NOMO-LEXIKON: A LAW-DICTIONARY* (1670); *Stranger*, *THE STUDENT LAW DICTIONARY* (1740); *Stranger*, *COWELL’S LAW DICTIONARY* (1727); *Stranger*, *A NEW LAW DICTIONARY* (1739); *Stranger*, *A COMPENDIOUS AND COMPREHENSIVE LAW DICTIONARY* (1816).

105. *NOMO-LEXIKON: A LAW-DICTIONARY*, *supra* note 104.

106. *THE STUDENT LAW DICTIONARY*, *supra* note 104.

107. See *A NEW LAW DICTIONARY*, *supra* note 104.

108. Clanton, *supra* note 15, at 1015 (citing *A NEW LAW DICTIONARY*, *supra* note 104, and THOMAS WOOD, *AN INSTITUTE OF THE LAWS OF ENGLAND* 245 (3d ed. 1724)).

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English subjects in maintaining proper boundaries of jurisdiction.<sup>109</sup> Thus, although it is true that the vast majority of prohibition suits were brought by a party to the suit, legal authorities show that a concrete stake in the underlying lawsuit was not essential to obtaining a writ of prohibition.

The second prerogative writ accessible to an uninjured plaintiff was the information in the nature of quo warranto.<sup>110</sup> By the founding, under the statute of 9 Ann. c. 20, a relator with leave from the court could prosecute, in the name of the Attorney General, anyone who unlawfully held a public position in a franchise, city, borough, or town corporation.<sup>111</sup> In *Rex v. Brown*, the court considered whether defendant-councilmen were disqualified from office by having failed to receive the sacrament within twelve months of the election (as required by law).<sup>112</sup> Despite one judge's observation that "it does not appear here that the party making the application has any connection with the corporation," the court granted the information. The court explained:

Where the application is made merely to disturb the local peace of corporations, it is right to enquire into the motives of the party to see how far he is connected with the corporation. But the ground on which this application is made to enforce a general Act of Parliament, which interests all the corporations in the kingdom; and therefore, *it is no objection that the party applying is not a member of the corporation.*<sup>113</sup>

Clanton argues that the information in the nature of quo warranto, at least as authorized by 9 Ann., is not evidence that English courts could hear suits by uninjured parties. Clanton contends that because such actions were styled as lawsuits between the Attorney General and a defendant, and because the government is injured by breaches of the law, the suit was not technically brought by an uninjured party.<sup>114</sup> The problem with this argument is that it assumes English law was concerned enough about preventing suits by uninjured plaintiffs to require relators to sue in the name of the Attorney General rather than their own, but not concerned enough

109. See *supra* notes 94–98 and accompanying text.

110. See *Quo Warranto and Private Corporations*, 37 YALE L.J. 237 (1927).

111. See Berger, *supra* note 15, at 823 (citing 9 Ann. c. 20). The original common law writ of quo warranto was, by the time of the founders, supplanted in English law by the statutorily modified "information in the nature of quo warranto," which was more flexible in its requirements and criminal in nature. See *Quo Warranto and Private Corporations*, *supra* note 110, at 238–39.

112. *Rex v. Brown*, (1790) East. 29 Geo. 3, B. R.

113. *Id.* (emphasis added).

114. Clanton, *supra* note 15, at 1035.

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about uninjured plaintiffs to prevent them from suing at all. This would have been a strange set of priorities, and a simpler explanation exists. The statute of 9 Ann. c. 20 requires citizens to bring an information in the nature of quo warranto in the name of the Attorney General, rather than their own, because an information in the nature of quo warranto was originally a writ issued only at the request of the Crown.<sup>115</sup> Use of the name of the Attorney General in suits brought under 9 Ann. was just another in a long line of legal fictions designed to expand the utility of an existing writ without creating a new one.<sup>116</sup> In other words, it is more likely that an information in the nature of quo warranto was styled as a lawsuit between the Attorney General and the defendant because of the writ's history, and not because of any desire on the part of the framers of 9 Ann. to exclude uninjured plaintiffs.

### 3. Summary of Standing Under English Law

From the above analysis we can draw the following conclusions. It is more likely than not that a founding-era interpreter of Article III would have understood Parliament to possess the power to create a cause of action that did not require the plaintiff to show an injury-in-fact. Furthermore, that interpreter would have been aware that English courts could entertain suits by uninjured plaintiffs in at least an action pursuant to an informer statute, a suit for prohibition, and an information in the nature of a quo warranto. As a result, that interpreter would not have understood the terms “judicial power,” “case,” or “controversy,” at least in the context of English law, to imply a limit on power to adjudicate a suit by an uninjured plaintiff.

This is an important conclusion, but not the end of the matter, as the United States did not adopt English governance wholesale. Unlike the English judiciary, the U.S. judiciary is one of three co-equal branches of government in a system based around separation of powers.<sup>117</sup> So even if the English concept of judicial power did not bar suits by uninjured plaintiffs, it is possible that a founding-

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115. See generally *Discretion in Quo Warranto Against a Public Corporation*, 35 HARV. L. REV. 73 (1921).

116. See Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 120 n.270 (2007) (collecting examples of legal fictions in English Law designed to re-use existing writs for new purposes).

117. See Manning, *supra* note 49, at 28–29 (“The U.S. Constitution . . . built on its own carefully designed system of separated powers and checks and balances. Accordingly, one must always ask whether a particular English legal practice, however relevant it may seem on preliminary examination, conforms to the often distinctive structural assumptions underlying the U.S. Constitution.”).

era observer would have understood “judicial power” to denote such a bar when read in the context of the new U.S. system of governance.<sup>118</sup> Thus, to fully evaluate whether standing doctrine is consistent with the original meaning of Article III, we must examine how U.S. judicial power was conceived, discussed in the Constitution, and practiced following ratification.

### B. *Pre-Ratification Debates*

The discussion and debate leading to the final version of the Constitution can be a valuable tool for deriving the Constitution’s original public meaning. The founders’ specific intent is an object of analysis distinct from original public meaning.<sup>119</sup> Nonetheless, the former is probative of the latter because one can assume that the founders chose language that would convey their intended meaning to a reasonable interpreter.<sup>120</sup> Thus, if the framers intended Article III to prohibit or permit uninjured plaintiffs to bring suit in Article III courts, that intent provides evidence that the Constitution’s language did in fact convey such intent around the time of the founding.

Unfortunately, however, there was no meaningful discussion at either the Constitutional Convention or any of the ratifying conventions that could reasonably be characterized as an attempt to discuss standing.<sup>121</sup> Although the founders debated the jurisdiction of the federal judiciary at length, there is only one recorded discus-

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118. *Cf.* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) (“Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those ‘Cases’ and ‘Controversies’ that are the business of the courts rather than of the political branches.”).

119. *See* Barnett, *supra* note 25, at 108–11.

120. *See* Moline, *supra* note 45; *see* Tutt, *supra* note 45; Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 537 (1998) (“[T]he framers’ or ratifiers’ comments about a particular phrase or provision are often a fairly good reflection of what that phrase or provision commonly was understood to mean.”); *see also* Kesavan & Paulsen, *supra* note 21, at 1187–89 (arguing that Constitution’s Secret Drafting History is a useful guide to the Constitution’s original public meaning because the founders would have chosen words and phrases that a reasonable founding-era interpreter would have understood to reflect their intended meaning).

121. *See* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1150 (1993) (“The constitutional barrier to standing relied on in *Defenders* is Article III’s ‘case or controversy’ requirement. As has been much noted, the Framers gave almost no indication of what the phrase meant.”).

sion of the type of cases courts could hear within their jurisdiction. It reads:

Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not be of this nature ought not to be given to that Department.

The motion of Doctr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.<sup>122</sup>

Thus, the pre-ratification debates tell us only that participants of the Constitutional Convention conceived of judicial power as the power to decide cases “of a judiciary nature.” This, of course, raises the question—what does “judicial” mean in the context of the Constitution? Without discussion from the framing of Article III that clearly speaks to the matter, the pre-ratification debates are ambiguous regarding standing and the original meaning of Article III.

### C. *The Text of Article III*

The Constitution is a written document, so its founding-era meaning is, in essence, what a founding-era interpreter would ascribe to its words.<sup>123</sup> If the plain meaning of the Constitution’s words clearly permitted or forbade courts from adjudicating suits by uninjured plaintiffs, that would provide nearly dispositive guidance on standing doctrine. Like the pre-ratification debates, however, the founding-era plain meaning of Article III’s terms does not speak to the existence of standing doctrine.<sup>124</sup>

Article III extends the “judicial power” of the United States to certain categories of “cases” or “controversies.”<sup>125</sup> However, the founding-era definitions of these terms are ambiguous on standing doctrine. One founding-era dictionary defines “judicial” as “accord-

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122. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Farand ed. 1911).

123. Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1386–87 (2014).

124. See *Flast v. Cohen*, 392 U.S. 83, 94 (1968) (“In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to ‘cases’ and ‘controversies.’ As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government.”).

125. U.S. CONST. art. III § 2.

ing to the regular order, methods, or directions of a court of law.”<sup>126</sup> Another wrote: “belonging to the distribution of public justice.”<sup>127</sup> The definition of “case” is similarly referential: “a legal demand of one’s right” that “implies a recovery of, or restitution to something”; or “[t]he form of a suit given by law for recovery of that which is one’s due.”<sup>128</sup> English legal dictionaries did not have a separate definition for “controversy.”<sup>129</sup>

The ambiguity stems from the fact that founding-era definitions for “judicial” and “case” are referential rather than descriptive. Rather than outlining the parameters of what is and is not judicial or what is and is not a case, the definitions invoke whatever the reader would have understood to be the business of courts. Thus, the plain meaning of the terms neither clearly conveys, nor clearly contradicts, the hypothesis that a founding-era interpreter would have read Article III’s grant of judicial power over cases or controversies to suggest a prohibition on adjudication of suits by uninjured plaintiffs.

#### D. Congress and Courts in the United States

The practice of Congress, as well as state and federal courts, in the eighteenth and nineteenth centuries suggests that founding-era interpreters did not understand Article III to bar judicial adjudication of suits by uninjured plaintiffs. In this section, I show that this conclusion is supported by two distinct types of historical evidence. In the first sub-section, I show that decisions by Congress and the Supreme Court, institutions that were affirmatively bound by the limits of Article III, suggest that decisionmakers within those institutions did not read Article III to limit judicial relief to injured plaintiffs. I begin by discussing the first Congress’s adoption of informer actions, which, like their English counterparts, authorized private relators to sue to vindicate illegal behavior that did not injure them personally. I then discuss that in *Union Pacific Railroad Company v. Hall*, the Supreme Court acknowledged that writs of mandamus could be issued at the behest of uninjured plaintiffs. In the second sub-section, I show that a series of state court decisions issuing writs at the behest of uninjured parties suggests that a founding-era in-

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126. *Judicial*, A NEW GENERAL ENGLISH DICTIONARY (16th ed. 1777).

127. *Judicial*, A NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1775).

128. *Case*, 4 A NEW LAW DICTIONARY 3 (1797).

129. John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 221–22 (1997).

terpreter would not have understood adjudication of suits by uninjured plaintiffs to be antithetical to the practice of judicial power.

### 1. Congressional and Supreme Court Decisions

Article III limits the respective powers of both Congress and the Supreme Court by prescribing the powers of the Court and thereby implicitly prohibiting Congress from granting any greater power to the Court.<sup>130</sup> Thus, decisions by Congress and the Supreme Court regarding the Court's power demonstrate how reasonable decisionmakers in these institutions interpreted Article III. In this sub-section, I will show that (i) Congress's creation of informer actions in the eighteenth century and (ii) the Supreme Court's issuance of a writ of mandamus to an uninjured plaintiff in the nineteenth century suggest that the Constitution was not originally understood to bar suits by uninjured plaintiffs.

#### a. Congressional Creation of Informer Actions

Like the English Parliament, the early Congress created informer actions to give uninjured informers a cause of action and a bounty to enforce compliance with the law.<sup>131</sup> The first Congress created a customhouse informer statute, allowing informers to sue customhouses that did not post fee and duty schedules.<sup>132</sup> The second Congress approved regulations for awarding costs to common informers.<sup>133</sup> The third Congress created informer suits to enforce regulations of the slave trade.<sup>134</sup> Similarly, in the 1790s, Congress created *qui tam* actions allowing civil suits enforcing liquor import laws,<sup>135</sup> postal laws,<sup>136</sup> and Indian trading laws.<sup>137</sup>

What is truly telling about these statutes is that their legitimacy was never questioned on constitutional grounds.<sup>138</sup> Given their historical unpopularity in England,<sup>139</sup> if the Constitution appeared to founding-era interpreters to provide a viable argument against the enforcement of such suits, such an argument would likely be part of

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130. See *supra* Part II.C.

131. See Winter, *supra* note 15, at 1407–08.

132. Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45.

133. Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277.

134. Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349.

135. Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209.

136. Act. of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239.

137. Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474.

138. Sunstein, *supra* note 8, at 176. (“[I]f the stranger suit was thought constitutionally problematic, in all probability some constitutional concern would have been voiced about the *qui tam* action or the informers’ action.”).

139. See *supra* notes 69–72 and accompanying text.

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the historical record. Yet, there is no evidence that such objections were raised, suggesting that the founding generation did not perceive anything controversial, let alone unconstitutional, about Congress's ability to create causes of action for uninjured plaintiffs.

b. *Union Pacific Railroad Company v. Hall*

In the 1875 case, *Union Pacific Railroad Company v. Hall*, a group of Iowa merchants requested a writ of mandamus compelling the Union Pacific Railroad to fulfill its statutory obligation to utilize a particular railway line between Iowa and Nebraska.<sup>140</sup> The railroad objected, asserting that mandamus was improper when the plaintiff had “no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally.”<sup>141</sup> The court conceptualized the dispositive question as “whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator.” To answer the question, the Supreme Court looked to English precedent and concluded that “a private individual, without any allegation of special injury to himself” could obtain mandamus, and that “private persons may move for a mandamus to enforce a public duty, not due to the government as such . . . .”<sup>142</sup> Importantly, the mandamus in *Hall* was authorized pursuant to a statute “which confers upon the proper Circuit Court of the United States jurisdiction to hear and determine all cases of mandamus to compel the United Pacific Railroad Company to operate its road as required by law.”<sup>143</sup> Thus, it implicitly raised the question of whether Congress could create a cause of action for an uninjured plaintiff. The Court in *Hall*, in contrast to the Court in *Lujan*, answered in the affirmative.

To be sure, it would be fair to note that *Hall* was decided almost 100 years after the Constitution was ratified, so its probative value regarding the beliefs of a founding-era interpreter is limited. That said, *Hall* retains some probative value for three reasons. First, *Hall*'s characterization of mandamus was uncontroversial among the Justices. (A single Justice dissented on other grounds.) Second, neither the parties to the lawsuit nor the Court considered separation of powers. Third, discussion of separation of powers remains absent in subsequent state decisions citing *Hall* as persuasive au-

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140. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 343 (1875).

141. *Id.* at 354.

142. *Id.* at 354–55.

143. *Id.* at 343 (citing Act of Mar. 3, 1873, § 4, 17 Stat. 509).

thority for the existence of public rights mandamus.<sup>144</sup> These three aspects of *Hall* indicate that, at least in 1875, the notion of a private litigant suing for mandamus to enforce public rights was not understood to meaningfully implicate separation of powers concerns. Thus, either a reasonable founding-era interpreter could have reached the same conclusion, or conventional interpretation of Article III shifted so thoroughly between 1787 and 1875 that an understanding of judicial power foreign to a founding-era interpreter had become uncontroversial to a nineteenth-century one. While the latter is by no means impossible, in the context of all the other evidence cited about early U.S. enforcement of public rights, it is less likely than the former.

## 2. State Court Issuance of Writs to Uninjured Plaintiffs

A series of eighteenth and early nineteenth-century state court decisions also suggests that members of the founding generation would not have understood Article III's grant of "judicial power" over "cases" and "controversies" to implicitly forbid adjudication of suits by uninjured plaintiffs. Founding-era state courts were not bound by Article III; however, how state court judges understood their own power is nonetheless probative of how members of the founding generation understood what was and was not the business of courts.

Firstly, state courts empowered to exercise the prerogative writs of the King's Bench occasionally granted them at the behest of uninjured plaintiffs. Two telling examples involve the issuance of writs of certiorari in state court.<sup>145</sup> In the 1794 case, *State v. Justices of Middlesex*, the Supreme Court of New Jersey issued a writ of certiorari at the behest of electors who were challenging the integrity of an election meant to fix the location of a jail and a courthouse.<sup>146</sup> The plaintiffs in *Middlesex* claimed no individualized injury, in-

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144. See *State v. Mobile & M. Ry. Co.*, 59 Ala. 321, 324–25 (1877); *State ex rel. Flowers v. Bd. of Educ. of Columbus*, 35 Ohio St. 368, 376 (1880); *State ex rel. Hart v. Burke*, 33 La. Ann. 498, 510 (1881); *State ex rel. Winterburg v. Demaree*, 80 Ind. 519, 523 (1881); *Castle v. Kapena*, 5 Haw. 27, 35 (1883).

145. Certiorari was another of the King's Bench's prerogative writs used to remove proceedings from an inferior court (or, more specifically, the documents connected with those proceedings) for review. See HALLIDAY, *supra* note 86, at 77 and accompanying text.

146. *State v. Justices of Middlesex*, 1 N.J.L. 283 (1794); see *Gregory v. Jersey City*, 34 N.J.L. 390, 400 (Sup. Ct. 1871) (citing *State v. Justices of Middlesex*, 1 N.J.L. at 283, for the proposition that "Writs of certiorari, to review the proceedings of municipal corporations, have been sued out by prosecutors whose rights have not been directly affected . . .").

stead seeking certiorari on the theory that the method by which the votes had been counted was unlawful.<sup>147</sup> In its decision, the court made no individualized finding of injury, and noted that the issue would be better handled by the state legislature.<sup>148</sup> But the court still agreed to grant the writ, holding that it had the power to grant certiorari in cases concerning an injury to the entire community.<sup>149</sup> Similarly, in *State v. Tee Corporation*, a New Brunswick resident asked the court for a writ of certiorari compelling the return of a corporate bylaw to test its validity.<sup>150</sup> The defendant argued that the court should not grant certiorari at the behest of an individual who was not affected by the bylaw in question. The court ignored the argument and issued the writ.<sup>151</sup>

Grants of mandamus by courts in New York and Illinois reflect a similar dynamic. In the 1837 case, *People ex rel. Case v. Collins*, a group of road commissioners sought to compel a road opening in an adjoining town.<sup>152</sup> Despite the plaintiff's lack of injury, the Supreme Court of New York permitted the suit, reasoning that "[i]n matter of mere public right . . . [i]t is at least the right, if not the duty of every citizen to interfere and see that a public offence be properly pursued and punished, and that a public grievance be remedied."<sup>153</sup> Similarly, in *People ex rel. Blacksmith v. Tracy*, the Supreme Court of New York issued a writ of mandamus to remove "intruders" from the Tonawanda reservation.<sup>154</sup> The court recognized that "[plaintiff] John Blacksmith . . . shows no title either to appear as a relator, or to claim the relief prayed for."<sup>155</sup> But the court responded by noting that "[i]n a matter of public right, any citizen of the state may be a relator in an application for a mandamus (when that is the appropriate remedy), to enforce the execution of the common law, or of an act of the legislature."<sup>156</sup>

Likewise, *Pike County Commissioners v. People ex rel. Metz* involved a suit heard by the Illinois Supreme Court concerning the fourth of four installments of money allocated by the Illinois Legislature to a commissioner appointed to improve the navigability of a certain

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147. *Justices of Middlesex*, 1 N.J.L. at 284.

148. *Id.* at 285–86.

149. *Id.* at 291.

150. *See State v. Tee Corp.*, 1 N.J.L. 393 (1795).

151. *Id.*

152. 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837).

153. *Id.*

154. *People ex rel. Blacksmith v. Tracy*, 1 How. Pr. 186, 186–87 (N.Y. Sup. Ct. 1845).

155. *Id.* at 189.

156. *Id.*

Pike County creek.<sup>157</sup> The plaintiff-commissioner had drawn the first three installments, but had been unable to obtain the fourth because the Pike County Commissioners, believing they had discretionary power over the fund, had used the money elsewhere.<sup>158</sup> The plaintiff asked the Illinois Supreme Court for a writ of mandamus compelling the commissioners to produce the funds, and the commissioners sought dismissal on the grounds that “the relator has not such an interest in the fund sought to be recovered.”<sup>159</sup> The court rejected the commissioners’ argument, reasoning: “[W]here the object is the enforcement of a public right, the People are regarded as the real party, and the relator need not show that he has *any legal interest* in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced . . . .”<sup>160</sup>

The rulings in *Justices of Middlesex*, *Collins*, *Tracy*, and *Metz* provide evidence that a founding-era interpreter would not have understood Article III’s grant of judicial power over cases and controversies to imply a bar to suits by uninjured plaintiffs. They do so despite the fact that the decisions came about in state courts, whose power was derived from state constitutions, not the Federal Constitution. This is the case for three reasons.

First, as noted in Part II.B, the meaning that an interpreter would ascribe to the terms “judicial power,” “case,” and “controversy” would have depended on the interpreter’s preconceived understanding of what was and was not the business of courts. To that end, state courts, while not Article III courts, were courts nonetheless. The scope of their power was informed by founding-era jurists’ pre-conceived notions about what courts do. Thus, founding-era state court decisions are probative of the role courts were understood to play in society more broadly, at least when the decision does not turn on some feature unique to the judiciary of the state in question. And as discussed above, the decisions by the New Jersey, New York, and Illinois courts turned on analysis of common law governing writs of mandamus and certiorari, not on state law. Therefore, the fact that the courts issued writs at the behest of uninjured plaintiffs without any apparent concern that, by doing so, they were not acting like a court, suggests members of the founding generation would not have understood adjudication of suits by uninjured plaintiffs to be antithetical to the concept of judicial power

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157. Pike Cty. Comm’rs v. People *ex rel.* Metz, 11 Ill. 202, 204–05 (1849).

158. *Id.* at 205.

159. *Id.* at 206–07.

160. *Id.* at 208 (emphasis added).

over cases and controversies. As a result, the cases listed above suggest that a founding-era interpreter of Article III would not have read Article III's grant of judicial power over cases and controversies to imply a bar to suits by uninjured plaintiffs.

Second, both the *Metz* court (Illinois) and the *Collins* court (New York) were located in states where power was explicitly divided between executive, legislative, and judicial branches of government.<sup>161</sup> If the belief that an injury-in-fact requirement was necessary to effectuate separation of powers were common among founding-era jurists, one would have expected separation of powers concerns to animate the New York and Illinois courts' analyses. Not only was there no such discussion, but it does not appear that any party even raised the argument that the vesting of legislative, judicial, and executive power into different branches of state government required the state judiciary to apply an injury-in-fact requirement. This suggests that an injury-in-fact requirement was not understood, at the time of the founding, to flow logically from separation of powers concerns.

Third, in each case, the court's analysis turned on the court's consideration of the intrinsic properties of the writ in question. This is significant because, at minimum, a founding-era interpreter of the Constitution would have assumed that federal courts had the power to issue the Kings Bench's prerogative writs, at least where Congress had authorized it to do so.<sup>162</sup> If it were shown that that same observer would have conceptualized some of the prerogative writs to allow for judicial relief to uninjured parties—something the above cases suggest—it would stand to reason that a founding-era interpreter would have understood federal courts to have at least

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161. ILL. CONST. art. II, § 1 (1848) (“The powers of the government of the state of Illinois shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another, and those which are judicial, to another.”). N.Y. CONST. art. III, § 1 (“The legislative power of this state shall be vested in the senate and assembly.”); N.Y. CONST. art. IV, § 1 (“The executive power shall be vested in the governor . . .”); Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers” – the Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 78 n.61 (2009) (“New York did not have an explicit separation of powers provision, but that concept is reflected in the structure of its subsequent constitutions starting in 1821.”).

162. See Edward A. Hartnett, *Not the King’s Bench*, 20 CONST. COMMENT. 283, 293 (2003) (“Implicitly, however, [Marbury] indicates that whether the Supreme Court is empowered to issue a particular prerogative writ depends, in the first instance, on whether Congress authorized it to do so.”). See generally James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1568 (2001).

some power to grant relief to uninjured plaintiffs when authorized by Congress.

A critic could fairly note that even if New York and Illinois courts believed mandamus could be issued at the behest of an uninjured plaintiff, and even if New Jersey courts accepted that certiorari could be granted to cure a “generalized grievance,” such interpretations were not universal among the states. Indeed, by the middle of the nineteenth century, Michigan, Massachusetts, and Pennsylvania each rejected the proposition that an uninjured plaintiff could access mandamus to enforce a public right.<sup>163</sup> The reasoning of these decisions, however, still supports the proposition that the founding generation did not think either judicial power or separation of powers implied a bar to suits by uninjured plaintiffs.

The Pennsylvania, Michigan, and Maine courts’ rejection of mandamus was premised not on any general justiciability principle precluding suits by uninjured plaintiffs, but on each court’s assessment of the intrinsic properties of the writ as informed by English case law.<sup>164</sup> In other words, the court did not rule against the plaintiff on the basis of a general background principle dictating what suits courts could or could not hear, but because they found that the particular mandamus required a showing of injury. This implies the absence of a background principle akin to modern standing doctrine at the time these decisions were made.

Moreover, like New York and Illinois, the governments of Michigan, Maine, and Pennsylvania were characterized by separation of executive, legislative, and judicial branches at the time their respective high courts rejected public rights mandamus.<sup>165</sup> If founding-era jurists would have generally understood separation of powers issues to be implicated by the ability of uninjured plaintiffs to bring suit, such issues would have at least been raised by a party arguing for rejection of citizen mandamus. However, no such argument was ever addressed.<sup>166</sup>

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163. See *Heffner v. Commonwealth ex rel. Kline*, 28 Pa. 108, 112 (1857); *People ex rel. Russell v. Inspectors of the State Prison*, 4 Mich. 187, 188–89 (1856); *Sanger v. Cty. Comm’rs*, 25 Me. 291, 296 (1845).

164. See *Heffner*, 28 Pa. at 112; *Russell*, 4 Mich. at 188–89; *Sanger*, 25 Me. at 296.

165. See ME. CONST. art. III; MICH. CONST. art. III § 2; PA. CONST. art. I; *id.* art. II; *id.* art. V.

166. Also noteworthy is the fact that the Massachusetts Supreme Judicial Court later reversed course and explicitly approved of public rights mandamus and prohibition in response to rulings by the Supreme Court and the King’s Bench respectively. *Attorney Gen. v. City of Boston*, 123 Mass. 460, 478 (1877) (citing *Union Pac. R.R. v. Hall*, 91 U.S. 343, 355 (1875) and *Forster v. Forster*, [1871] 4 B. & S. 187, 199). If it had been understood that separation of judicial

Thus, even if the appropriateness of issuing mandamus to an uninjured plaintiff was openly in dispute, the forgoing state court decisions suggest the dispute was over the nature of the substantive law. This in turn suggests that founding-era conceptions of judicial power or separation of powers would not have spurred a founding-era interpreter to find an injury-in-fact requirement in Article III.

*E. Summary of Standing Doctrine and the Original Meaning of Article III*

In summary, history suggests that standing doctrine would have been as foreign to a founding-era interpreter of Article III as to an English jurist. Although the separation of federal power into an executive, legislative, and judicial branch created a U.S. government very different from that of England, there is no persuasive evidence suggesting that such separation brought with it anything akin to our modern injury-in-fact requirement. In fact, the opposite is suggested by the creation of *qui tam* and informer actions by the first three Congresses, the state and federal courts' practice of granting prerogative writs to private plaintiffs to enforce public rights, and the sheer lack of evidence that founding-era jurists saw a connection between the substantive requirement that plaintiff show injury and anything related to separation of powers. Thus, it is that a founding-era interpreter would have read Article III to contain anything akin to an injury-in-fact requirement.

### III.

#### A RESPONSE TO THE ORIGINALIST DEFENDERS OF STANDING DOCTRINE

In contrast to my conclusion, two sets of authors have defended the notion that standing is consistent, or at least not inconsistent, with the Constitution's original meaning. Professors James Leonard and Joanne Brant argue that standing doctrine is consistent with the framers' vision for separation of powers. Professors Ann Woolhandler and Caleb Nelson argue that standing doctrine is not inconsistent with the Constitution's original meaning because U.S. courts have always applied some form of constitutionalized justiciability constraints in order to limit judicial relief to injured parties. Although both sets of authors suggest members of the

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power from executive and legislative power (which the Massachusetts Constitution required) required courts to abstain from cases involving uninjured plaintiffs, decisions by federal and English courts should not have been sufficient to spur the change absent an accompanying change to the Massachusetts Constitution.

founding generation believed limiting judicial relief to injured plaintiffs was desirable in at least some situations, they do not show that members of the founding generation understood the Constitution to mandate such limits as a general principle of justiciability.

A. *Response to Leonard and Brant*

Professors Leonard and Brant argue that an injury-in-fact requirement is consistent with the Constitution's original meaning because it "effectuates the Framers' limited concept of the judicial function and their plan for a separation of powers."<sup>167</sup> Their argument consists of two parts. First, Leonard and Brant use historical evidence to show the framers' desire to ensure separation of powers generally, and specifically the executive's ability to enforce the laws "according to political considerations. . . [with] intervention [by the courts] only to protect the rights of individuals."<sup>168</sup> Second, they argue that an injury-in-fact requirement is necessary to actualize this vision.<sup>169</sup> They conclude that a "fair reading of the proceedings of the Constitutional Convention and the contemporary legal environment makes it more likely than not that the Framers envisioned that the federal courts would be limited, as a constitutional matter, to cases where individual plaintiffs brought their own grievances for resolution and relief."<sup>170</sup>

This argument is flawed in that—whatever the theoretical merits of Leonard and Brant's belief that an injury-in-fact requirement is necessary to effectuate separation of powers—they present no evidence that such a belief was widely held by members of the founding generation. To make their case, Leonard and Brant look to three Supreme Court decisions that they claim demonstrate that the founding generation not only hoped to effectuate separation of powers, but chose to do so in part by requiring private plaintiffs to prove injury. None of the three examples they cite are persuasive on the point.

First, Leonard and Brant cite *Hayburn's Case*.<sup>171</sup> In *Hayburn's Case*, Attorney General Edmund Randolph sought a writ of manda-

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167. Leonard & Brant, *supra* note 15, at 38.

168. *Id.* at 63. *But see* Berger, *supra* note 15, at 832–36 (arguing that any incentive on the part of the founders to create a limit on the justiciability of lawsuits against the government as a means of fostering separation of powers would have been outweighed by the founders' desire to maximize checks on the political branches' ability to act outside the law).

169. Leonard & Brant, *supra* note 15, at 63–90.

170. *Id.* at 47–48.

171. *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

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mus compelling circuit courts to comply with an act of Congress<sup>172</sup> empowering them to determine and certify pension amounts for Revolutionary War veterans. The circuit courts had refused to hear the cases because their decisions would not be binding if the Secretary of War had the option to reject the conclusion and certify the case to Congress.<sup>173</sup> Randolph sued, without claiming to represent any particular party, and the Court deadlocked on whether the Attorney General could sue *ex officio*.<sup>174</sup> Leonard and Brant infer from the Court's doubts about Randolph's ability to sue without a client that the Court was concerned with the justiciability of a suit without an injured plaintiff.<sup>175</sup>

Historical evidence refutes such an inference. Both the scant court reporting<sup>176</sup> and contemporaneous extrinsic evidence<sup>177</sup> indicate that the Justices' analysis was focused on whether the Attorney General had supervisory power over lower courts. In other words, the Court viewed the dispositive issue to be the authority of the Attorney General, not the justiciability of the suit. Additionally, the Court did not seem to believe that the case turned on a constitutional question. Instead, the Court was concerned about whether Randolph had obtained authorization from the President and

172. *Id.* at 408; Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended in part by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324).

173. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 591–92 (1989).

174. *Hayburn's Case*, 2 U.S. (2 Dall.) at 409.

175. Leonard & Brant, *supra* note 15, at 69 (“But without either client, Randolph’s petition for mandamus would have lacked the necessary personal injury.”).

176. Bloch, *supra* note 173, at 601 (“The Supreme Court minutes and docket sheet suggest that the Court focused on the Attorney General’s authority and not the justiciability of the controversy or the propriety of mandamus as a remedy.”) (citing 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 157, 203 (M. Marcus & J. Perry eds. 1985)); Erwin C. Surrency, ed., *The Minutes of the Supreme Court of the United States, 1789–1806: August Term 1792 to February Term 1794*, 5 AM. J. LEGAL HIST. 166, 170–71 (1961) (“The Court proceeded to hear the Attorney General in relation to the powers and extent of his office . . . . [The] Court being divided in their opinions on the subject of the Attorney Generals authority *ex officio* to move the Court for a mandamus to the circuit Court for the Pennsylvania district, to correct the error complained of in the case of William Haybern [sic], the writ prayed for cannot issue.”).

177. See Bloch, *supra* note 173, at 601–03 (citing FED. GAZETTE, Aug. 18, 1792 (describing the proceedings as concerning whether “it was part of the duty to Attorney General of the United States, to superintend the actions of the inferior courts . . . .”)); Letter from Edmund Randolph to James Madison (Aug. 12, 1792), reprinted in 14 THE PAPERS OF JAMES MADISON 348–49 (R. Rutland & T. Mason eds., 1983) (“Mr. Jay asked me, if I held myself officially authorized to move for a mandamus.”).

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whether the suit was consistent with the mandates of the Judiciary Act.<sup>178</sup> Thus, the decision in *Hayburn's Case* is not indicative of a founding-era belief akin to modern standing doctrine.

Second, Leonard and Brant cite the Court's 1793 refusal to render, at then Secretary of State Thomas Jefferson's request, an advisory opinion related to U.S. neutrality towards England and France.<sup>179</sup> The Justices responded to Jefferson's request with a letter to President Washington, stating in part that:

[Secretary Jefferson's questions] encroach on the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.<sup>180</sup>

Leonard and Brant read the Court's response to indicate that the Court was unwilling to answer legal questions absent an injured plaintiff.<sup>181</sup> However, although one can infer a wide range of possible motives from the Court's refusal to render an advisory opinion,<sup>182</sup> there is nothing to suggest lack of an injured plaintiff was particularly high among them. The text of the Court's letter highlights the "extra-judicial" nature of the request. As a result, there is no affirmative evidence to indicate the Justices' concerns would extend to an actual adversarial lawsuit.<sup>183</sup> Thus, the Court's decision cannot be said to signal anything about the founding generation's thoughts on suits by uninjured plaintiffs.

Third, Leonard and Brant cite a passage in *Marbury v. Madison* in which Chief Justice Marshall writes:

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178. See Bloch, *supra* note 173, at 604 (citing GAZETTE U.S., Aug. 25, 1792, at 99, col. 1). R

179. Leonard & Brant, *supra* note 15, at 71–76. R

180. Letter from Chief Justice John Jay and Associate Justices to President George Washington (Aug. 8, 1793), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763–1826, at 488–89.

181. Leonard & Brant, *supra* note 15, at 68–69. R

182. William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U. L. REV. 173 (2002) (surveying opinions on the significance of Jay's letter).

183. *Id.* at 201 ("The only absolute rule that can be teased out of their 1793 letter to President Washington, is that the President is not empowered to require the federal judiciary to provide an advisory opinion.").

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.<sup>184</sup>

Leonard and Brant, like the *Lujan* Court,<sup>185</sup> seize on the language “solely to decide on the rights of individuals” as evidence that “the jurisdiction of the Court was limited to giving relief to individual grievances and excluded review of the general performance of executive functions.”<sup>186</sup>

However, this conclusion is belied by the very next sentence, where Marshall further defines exactly what he is saying courts could not do. The sentence reads in part:

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet . . . if it be no intermeddling with a subject over which the Executive can be considered as having exercised any control; what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights . . . .<sup>187</sup>

Thus, in context, Marshall was noting the existence of a class of claims the judiciary cannot hear because it concerns issues “over which the executive can be considered as having exercised any control.”<sup>188</sup> This principle of justiciability is distinct from standing because it concerns claims the courts cannot evaluate under any circumstances, whereas standing concerns claims that the courts can evaluate, but delineates who can and cannot bring such claims. In other words, Marshall’s acknowledgment that the courts could not hear suits over decisions delegated exclusively to the Executive Branch does not speak to the conditions under which courts can and cannot adjudicate questions that are within its power to decide. Thus, it does not speak to anything akin to modern standing doctrine.

This conclusion is bolstered by the fact that, prior to *Lujan*, the “solely to decide” language of *Marbury* was not cited by any court, state or federal, in reference to a plaintiff’s standing to sue.<sup>189</sup> This

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184. *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

185. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992).

186. Leonard & Brant, *supra* note 15, at 84–85.

187. *Marbury*, 5 U.S. at 170.

188. *Id.*

189. In fact, the language was cited in a federal court’s opinion for the first time in 1950, in *Coates v. United States*, 181 F.2d 816, 818 (8th Cir. 1950), which one

is noteworthy because standing is, by definition, relevant to nearly every case. If Marshall had been describing a universal principle of justiciability through his “solely to decide” language, one would have expected the language to be cited for something akin to standing doctrine at least once between 1803 and the *Lujan* decision in 1992. By contrast, *Lujan* itself, which Leonard and Brant claim convey an analogous sentiment to their reading of *Marbury*, has been cited 21,553 times in the seventeen years between the decision and the writing of this Note. All to say, none of the examples Leonard and Brant provide constitute affirmative evidence that a founding-era constitutional interpreter would have understood the Constitution’s separation of powers to warrant an injury-in-fact requirement.

*B. Response to Woolhandler and Nelson*

Professors Woolhandler and Nelson take the more modest position “that history does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution’s meaning.”<sup>190</sup> Woolhandler and Nelson’s argument consists of three components. First, they note that in a number of areas of eighteenth and nineteenth-century law, U.S. courts denied relief to uninjured plaintiffs alleging illegal conduct by the defendant, but allowed the same conduct to be prosecuted by either the government or an injured plaintiff.<sup>191</sup> Second, they explain that courts justified such denials on constitutional grounds.<sup>192</sup> Third, they claim that constitutional grounds used by the courts can be fairly characterized as antecedents to modern standing doctrine.<sup>193</sup>

Woolhandler and Nelson fail to prove this third claim. While they cite five Supreme Court decisions in which the Court dismisses a suit by an uninjured plaintiff on constitutional grounds, none of the grounds can be fairly characterized as an antecedent to modern standing doctrine.<sup>194</sup>

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would not expect if it was expressing a constitutionalized rule of justiciability relevant to literally every lawsuit.

190. Woolhandler & Nelson, *supra* note 15, at 691.

191. *Id.* at 693–713.

192. *Id.* at 713–31.

193. *Id.* at 731–32.

194. There is arguably a second issue, namely that four of the five cases cited by Woolhandler and Nelson were decided after the Civil War. The most recent of which was decided closer to today than the summer of 1787. The precise nature of this problem begs a complicated historiographic question: how recently can one look for evidence regarding the original meaning of the Constitution? However, this is not a question I intend to answer here because even if each case cited by

Woolhandler and Nelson's first example is the same "solely to decide on the rights of individuals" language from *Marbury*.<sup>195</sup> As discussed above, such language cannot be considered an antecedent to modern standing doctrine because it concerns the sort of claims courts cannot hear regardless of whether the plaintiff is injured or uninjured.<sup>196</sup>

Their second example is *Georgia v. Stanton*, in which the state of Georgia asked the Supreme Court to enjoin federal government enforcement of the Reconstruction Act, arguing that it would "annul and totally abolish the existing State government."<sup>197</sup> The Court denied relief, reasoning:

[T]hese matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.<sup>198</sup>

According to Woolhandler and Nelson, "the Supreme Court's comments on this point reflected its understanding that private plaintiffs had to assert concrete private rights."<sup>199</sup> However, Georgia lost because the *Stanton* Court rejected its legal arguments, not because it failed to show an injury. In other words, it was not that Georgia failed to show some prerequisite necessary to bring its claims, it is that the claims themselves were not the sort of claims the Court believed could render a statute unconstitutional. This is a legal conclusion distinct from a dismissal on standing grounds, which concerns a specific plaintiff's ability to bring their claims and not the validity of the claims themselves.<sup>200</sup> Thus, like the *Marbury*

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Woolhandler and Nelson was probative of the original meaning of Article III, the constitutional law exposed in each case does not serve as a historical antecedent to modern standing doctrine.

195. Woolhandler & Nelson, *supra* note 15, at 712 (citing *Marbury v. Madison*, 5 U.S. 137, 169 (1803)).

196. See *supra* text accompanying notes 30–31.

197. *Georgia v. Stanton*, 73 U.S. 50, 54 (1867).

198. *Id.* at 77.

199. Woolhandler & Nelson, *supra* note 15, at 713.

200. Anticipating this objection, Woolhandler and Nelson contend that "[t]he problem the Justices were discussing was not that the legal issues raised by

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language, the *Stanton* court's decision is not an antecedent to contemporary standing doctrine because it deals only with the sort of claims a court cannot evaluate regardless of plaintiff's injury.

Their third example is *New Hampshire v. Louisiana*.<sup>201</sup> *New Hampshire* concerned the ability of New York and New Hampshire to sue Louisiana in the Supreme Court<sup>202</sup> to recover damages from Louisiana's default on bonds owned by citizens of the two plaintiff states. Because the Eleventh Amendment prevented the bond-holding citizens from suing Louisiana directly in federal court,<sup>203</sup> New York and New Hampshire allowed the citizens to assign their claims to their respective state before seeking recovery in federal court. When the two states sued, the Supreme Court held that the Eleventh Amendment barred the suit because New York and New Hampshire had no interest in the suit distinct from that of their citizen bond-holders.<sup>204</sup>

To Woolhandler and Nelson, this decision demonstrates a historical antecedent to standing doctrine because it shows that "injuries to another private party did not ordinarily suffice to give states standing" and that "states generally could not bring cases to vindicate the private rights of their citizens."<sup>205</sup> Although the latter state-

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the plaintiffs were nonjusticiable, but simply that the plaintiffs were not proper parties to litigate those issues because they did not have the right sort of interests at stake." Woolhandler & Nelson, *supra* note 15, at 715. To justify this conclusion, they note that the Court agreed to consider the constitutionality of the Reconstruction statutes when evaluating writs of habeas corpus from plaintiffs detained pursuant to those statutes. *Id.* (citing *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868) and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)). However, this argument assumes that if a court deems one set of arguments about why a statute is unconstitutional to be nonjusticiable, but finds another set of arguments justiciable, the first determination cannot be considered a dismissal on political questions grounds. This makes no sense. The political questions doctrine concerns which legal claims a court can and cannot evaluate, not which statutes the court can and cannot review. Here, the Court found Georgia's argument that the Reconstruction statutes were unconstitutional because they infringed on Georgia's sovereignty to be nonjusticiable, but found the *Milligan* and *McCordle* plaintiffs' arguments that the Reconstruction statutes were unconstitutional because they authorized unconstitutional detention to be justiciable. The latter determination is not a reason the former determination is not a political questions decision.

201. *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883).

202. The case concerned the states' ability to sue pursuant to the Court's original jurisdiction over suits between states. See U.S. CONST. art. III § 2.

203. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .").

204. *New Hampshire*, 108 U.S. at 91.

205. Woolhandler & Nelson, *supra* note 15, at 715–16. Although New Hampshire and New York are rarely referred to as "private parties," Woolhandler and

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ment is surely correct, its truth stems from a constitutional principle distinct from an injury-in-fact requirement. New York and New Hampshire “could not bring cases to vindicate the private rights of their citizens” because the statutes were a transparent attempt to circumvent the Eleventh Amendment.<sup>206</sup> Even though a lack of a distinct interest—or injury—to the state was dispositive, it was dispositive because it demonstrated that the suit was not really a case between states (thus, violating the Eleventh Amendment), not because it was not a case at all (thus, violating Article III).<sup>207</sup> Therefore, the basis for the *New Hampshire* Court’s decision is not an antecedent to modern standing doctrine because the outcome of the suit turned on the Eleventh Amendment, not Article III.

Woolhandler and Nelson’s fourth example is *Williams v. Hagood*.<sup>208</sup> In that case, a plaintiff asked the Court to enjoin a pair of South Carolina laws, arguing that they unconstitutionally interfered with obligations of a contract to which he was a party. The Court declined, reasoning:

His bill does not aver that he has been injured, or will be injured, by this legislation, or by any act or neglect of the comptroller-general or the county treasurer. It does not aver that the comptroller-general has neglected or refused to perform every duty imposed upon him by the statute under which the revenue-bond scrip was issued . . . . The question presented to the court is, therefore, merely an abstract one; such a one as no court can be called upon to decide, and the bill shows no equity in the complainant.<sup>209</sup>

Woolhandler and Nelson correctly note that the *Williams* suit was dismissed because he failed to show an injury. But they wrongly conclude that this is evidence of standing doctrine in the late nineteenth century.

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Nelson refer to them as such here because “[s]tates were allowed to use the Supreme Court’s original jurisdiction primarily to pursue claims for property, breach of contract, or the like—civil claims of the same sort that an ordinary private litigant might assert.” *Id.* at 713.

206. *New Hampshire*, 108 U.S. at 88–89 (“The language of the [Eleventh] amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted by citizens of one state against another state. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced and are now prosecuted solely by the owners of the bonds and coupons.”).

207. See John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1987 (1983).

208. *Williams v. Hagood*, 98 U.S. 72 (1878).

209. *Id.* at 74–75.

Contrary to Woolhandler and Nelson's conclusion, there is an important distinction between the Court's dismissal of Williams's suit and a modern-day dismissal on standing grounds. Although the Court dismissed Williams's suit because he failed to show injury, failure to show injury was fatal to his case not because of a constitutional background principle requiring all private plaintiffs to show injury, but because the specific vehicle for his suit, a bill in equity, required a showing of injury as a matter of substantive law.<sup>210</sup> As a result, *Williams* says nothing about whether an uninjured plaintiff can bring suit when the law underlying their claim does not require the plaintiff to show injury. So even though *Williams* does invoke the general principle that the Court evaluate a constitutional question if the plaintiff presents no law potentially entitling them to relief,<sup>211</sup> it does not suggest that such a law must incorporate an injury-in-fact requirement.

Finally, Woolhandler and Nelson cite the 1911 case, *Muskrat v. United States*.<sup>212</sup> In *Muskrat*, the Court struck down a law which authorized four individuals to initiate lawsuits against the United States in the Court of Claims to determine the "validity" of a 1906 statute increasing the number of Cherokee citizens sharing in the distribution of Cherokee lands.<sup>213</sup> The law gave several authorized challengers—all Cherokee citizens whose shares of land distribution were reduced by the addition of more beneficiaries—authority to sue the United States to determine whether the law constituted an unconstitutional taking. The Court struck down the statute, finding that the authorized challenge to the redistribution law was not a

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210. *See id.* at 72–75. ("Where a bill shows no equity in the complainant, and contains no averment that he has been injured by certain statutes of a State, this court will not pass upon an abstract question . . . [T]he bill shows no equity in the complaint. Hence it was properly dismissed in the court below, and it must be dismissed here, but without prejudice to the complainant's right to bring and prosecute another suit, when he shall be in a condition to exhibit any equity in himself."); *see also* the following decisions citing *Williams* as authority on the necessary showing for a bill in equity: *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 162 (1914); *Street v. Shipowners' Ass'n of Pac. Coast*, 299 F. 5, 9 (9th Cir. 1924); *Mahr v. Norwich Fire Ins. Soc'y*, 23 Abb. N. Cas. 436, 451 (N.Y. Sup. Ct. Mar. 1889). *Cf.* *Am. Fed'n of State, Cty. & Mun. Emp. v. Dawkins*, 104 So. 2d 827, 830 (Ala. 1958) ("Equity will not entertain a suit merely to vindicate an abstract principle of justice or to determine a dispute which involves neither benefit to be gained nor injury suffered.")

211. *Marbury v. Madison*, 5 U.S. 137, 138 (1803).

212. *Muskrat v. United States*, 219 U.S. 346, 348 (1911).

213. *Id.* (citing 34 Stat. at L. 137, chap. 1876).

justiciable controversy because the defendant, the United States, had no material interest in the suit's outcome.<sup>214</sup>

Woolhandler and Nelson contend that *Muskkrat* represents a historical antecedent to modern standing doctrine. I disagree for two reasons. First, the *Muskkrat* plaintiffs had all the components necessary to satisfy modern standing doctrine: they suffered (1) an injury in the forum of a reduction in property owed to them (2) traceable to the challenged act that (3) would be redressable via an injunction. Had the Court intended to enforce a rule akin to standing doctrine, it would not have dismissed the suit. Second, the animating concern of the *Muskkrat* Court was the fact that the defendant, the United States, had no material interest in the outcome of the suit,<sup>215</sup> a concern that the Court has explicitly held is unrelated to concerns about whether the plaintiff has suffered an injury-in-fact.<sup>216</sup> Whether a defendant has a material interest in a lawsuit's outcome turns on whether a judgment for the plaintiff would adversely affect the defendant's interest. And whether a judgment for the plaintiff would adversely affect the defendant's interest is unrelated to whether the plaintiff has been injured.<sup>217</sup> For instance, the government is no less adversarial to an uninjured plaintiff seeking to enjoin its policies than an injured one.<sup>218</sup> Thus, the underlying logic of the *Muskkrat* decision—that the defendant and the plaintiff must be adverse parties—is not an antecedent to standing doctrine.

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214. *Id.* at 361. (“[The United States] has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question.”).

215. *See generally id.*

216. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 486, (1982) (“[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.”).

217. To be sure, the Court has occasionally argued that the injury-in-fact requirement is necessary to ensure the *plaintiff* has an appropriate stake in the lawsuit. *See, e.g.,* Baker v. Carr, 369 U.S. 186, 204 (1962) (“Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?”). I am not sure I agree, *see* Elliott, *supra* note 37, at 474–75, but regardless, this is a different theory than the one articulated in *Muskkrat* or any other case said to be indicative of the original meaning of Article III.

218. *E.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

C. *Summary of Response to the Originalist Defenders  
of Standing Doctrine*

Neither Leonard and Brant nor Woolhandler and Nelson provide evidence that standing doctrine is consistent with the original meaning of Article III. To make such a case, these authors would have had to cite some instance where a plaintiff lost due to failure to show injury, and the loss was the result of a constitutional background principle of justiciability. Although the two sets of authors cite a combined seven decisions by the Supreme Court—*Hayburn's Case*, Jefferson's request for an advisory opinion on U.S. neutrality, *Marbury*, *Stanton*, *New Hampshire*, *Williams*, and *Muskrat*—none meet both criteria. In both *Hayburn's Case* and *Williams*, the Court dismissed a lawsuit that lacked an injured plaintiff, yet dismissal was not based on any constitutional background principle of justiciability. Conversely, Jefferson's request for an advisory opinion, *Marbury*, *Stanton*, *New Hampshire*, and *Muskrat* all concern constitutional principles of justiciability, but none concern the need for plaintiffs to prove injury. As a result, to the extent that the decisions cited by Leonard and Brant and Woolhandler and Nelson are probative of the original meaning of Article III, they do not suggest that a constitutionalized injury-in-fact requirement was included in that meaning.

#### CONCLUSION

In conclusion, I find it less likely than not that a founding-era interpreter of the Constitution would have found, in the language of Article III, a restriction on the ability of federal courts to adjudicate lawsuits brought by uninjured plaintiffs. A founding-era interpreter would have interpreted Article III's grant of judicial power over cases and controversies to the judicial branch with reference to the practice of English courts, which possessed "judicial power" to hear "cases" brought by uninjured plaintiffs. Moreover, although the Constitution created a substantially different style of governance than that of England, there is no evidence that those changes brought with them an injury-in-fact requirement where none existed in English law. After all, the first three Congresses passed seemingly uncontroversial legislation authorizing relator and qui tam actions by uninjured plaintiffs. Additionally, early nineteenth-century state court decisions and a late nineteenth-century Supreme Court decision issued prerogative writs to plaintiffs vindicating public rights without any apparent concern that issuing the

writs was not a valid act of judicial power or violated principles of separation of powers.

The most plausible reading of the historical evidence suggests that the founding generation understood federal courts to possess the power to adjudicate suits by uninjured plaintiffs. Article III itself would have been understood to neither preclude federal jurisdiction over a case whenever the plaintiff lacked an injury, nor prevent lawmakers from authorizing uninjured plaintiffs to sue. To be sure, throughout the history of the United States, plaintiffs frequently lost because they were unable to prove that they had been injured. However, these losses stemmed from the substantive law underlying the plaintiff's claim, or from the application of constitutional provisions that required the plaintiff to prove injury given the particulars of the case, but that did not require all plaintiffs to prove injury in all cases. Thus, although an injury-in-fact requirement has become an essential part of the Court's contemporary justiciability doctrine, such a requirement is not consistent with the original meaning of Article III.