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Scalia's Legacy: Originalism and Change in the Law of Standing

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ABSTRACT

Perhaps no single Justice fashioned as many changes to the law of standing as that most gifted originalist, Antonin Scalia. It was Justice Scalia who first deployed twentieth century standing rules to invalidate a citizen suit provision; who promoted the prudential rule against the adjudication of generalized grievances to constitutional status; who pressed to constitutionalize the adverse-party rule; who reconfigured informer litigation to preserve the injury-in-fact requirement; and who recently re-packaged the Court's old prudential standing doctrine as a merits-based inquiry into the plaintiff's statutory right to sue. That he has done so much to re-work modern litigation in the name of fidelity to the workways of eighteenth century lawyers "in the English courts at Westminster" testifies to his considerable rhetorical skills. In this essay, I evaluate Justice Scalia's contributions to this important body of jurisdictional law and then step back to consider his legacy.

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I. Introduction

Among the many distinctive features of his jurisprudence,[1] Justice Antonin Scalia expressed a preference for clear rules, for text-based approaches to statutory interpretation, and for a focus on the original meaning of the Constitution as the surest guide to that document's interpretation. He defended originalism at every opportunity, arguing that it best complied with the framers' own view of the interpretive process and best constrained an activist judiciary. By hewing closely to the original meaning, federal judges would avoid the cardinal sin of reading their own policy preferences into the document. That judicial diffidence, in turn, would preserve the lawmaking primacy of the elected branches of government. In the face of constitutional doubts, judges should stay their hands and allow the political branches of government to update governing law to meet the exigencies of the day.[2] Building on these ideas, Justice Scalia mounted withering criticisms of such decisions as *Planned Parenthood v. Casey*[3] (reaffirming the constitutional right to an abortion) and *Obergefell v. Hodges*[4] (recognizing a constitutional right to same-sex marriage). He invariably took the position that, although it was hard to do well, originalism remained the best mode of constitutional interpretation. In time, his view became widely shared, particularly among lawyers, judges and academics who shared his political commitments.

This Essay evaluates one of the key claims of Justice Scalia's jurisprudence, his claim that consistent application of originalist precepts will constrain federal judges and preserve the law-making role of the political branches. This Essay conducts the evaluation by looking closely at Justice Scalia's role in the development of Article III standing doctrine. Article III of the U.S. Constitution defines the jurisdiction of the federal courts by specifying the "cases" and "controversies" to which the judicial power of the United States shall "extend."[5] It does not, however, define the

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1 Justice Scalia conducted an ongoing seminar on interpretive method, both in the law review articles he wrote, see note 2 infra, and in his numerous public appearances. For a useful assessment of Justice Scalia's role in the development of originalist precepts, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 248-49 (2009) (describing Justice Scalia as a leading proponent of the change from original intent to original meaning as the touchstone of originalist inquiry). On the manifold character of originalism, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. Rev. 1 (2009) (emphasizing the many and varied forms of originalist inquiry). For criticisms of Justice Scalia's consistency in adhering to his original meaning construct, see Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 Const. Comment. 383 (2007). On the politics of adherence to originalism, see Robert Post & Reva Siegel, *Originalism as Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545 (2006). For an early and influential criticism of original intent, one that helped push adherents to original meaning, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 907 (1985) (arguing that the framers interpreted the Constitution's language and structure and did not rely on the personal intentions of the participants).

2 For his own account of his originalist, rules-based jurisprudence, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

3 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

4 Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting).

5 U.S. Const., art. III, § 2.

characteristics of the individual claimants who have standing to pursue such claims in federal court. In the absence of any constitutional text on which to base a body of standing law, the Supreme Court has chosen to rely on the "case-or-controversy" requirement of Article III. Thus, some eighty years ago, Justice Felix Frankfurter explained that the federal "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'"[6] In an early law review article, then-Judge Scalia recognized that the emphasis on the case-or-controversy language was misplaced; he expressed a preference for reliance on equally general features of Article III's reference to "judicial power" as a textual predicate for standing limits.[7]

But his position evolved. By the end of his career on the bench, Justice Scalia had come to view the case-or-controversy language as the cornerstone of standing law. Indeed, in a revealing opinion, he argued that the case-or-controversy language imposed a requirement of concrete adverseness between contending parties that he in turn found to be missing in an important challenge to the legality of the Defense of Marriage Act.[8] More importantly, Justice Scalia consistently took a narrow view of Congress's power to confer standing on individuals through the exercise of its legislative authority. His opinion in *Lujan v. Defenders of Wildlife*[9] invalidated a citizen-suit provision that sought to authorize concerned environmentalists to mount legal challenges to agency action. Later decisions argue for similar constraints on congressional power in other settings.[10] Finally, Justice Scalia worked to eliminate prudential doctrines, preferring in the absence of perceived constitutional limits to define the right of individuals to sue by reference to the text of applicable legislation.[11] In all of these settings, Justice Scalia played a leading role in re-shaping jurisdictional law that runs counter to his professed adherence to the method of originalist interpretation.

In tracing the arc of Justice Scalia's standing jurisprudence, this Essay begins with a brief sketch of the law as of the date he arrived on the Court. Next, the Essay describes the many consequential changes the Justice made to standing law. Finally, the Essay evaluates those changes in light of the evidence we can collect about the likely original meaning of Article III of the Constitution. After concluding that Justice Scalia could not justify his standing decisions by reference to his own originalist precepts, the Essay shows that the jurisprudential style or method in his opinions most closely resembles the form of common-law constitutionalism that he was quick to criticize in other settings. He was, in short, something of a living constitutionalist in the realm of standing law and was only too ready to invalidate generous federal legislative grants of standing on the ground that they violated judge-made limits on the right of individuals to sue. One might be tempted to dismiss Justice Scalia's standing doctrine as the work of a hypocrite, but that

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6 Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)

7 *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

8 *See* United States v. Windsor, 133 S. Ct. 2675, 2702 (2013) (Scalia, J., dissenting) (characterizing the adverse-party requirement not as a prudential requirement "that we have invented," but as an "essential element of an Article III case or controversy").

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

10 *See* FEC v. Akins, 524 U.S. 11, 29 (1998) (Scalia, J., dissenting).

11 *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

would miss something essential about the rhetorical power of his legal opinions. By preserving the myth of originalist constitutionalism and avoiding inconvenient historical truths, Justice Scalia performed the inevitable judge's task of fashioning new law out of old. By choosing to deny or obscure his tactics in the standing cases, Justice Scalia could continue to deploy originalist methodology as a sledgehammer in assailing the judge-made law with which he disagreed.

II. Standing Law Before Justice Scalia's Arrival

Our brief evaluation of the law of standing when Justice Scalia took the oath of office in 1986[12] begins with the 1984 decision in *Allen v. Wright*.[13] There, the Court articulated three ideas that were central to the law of standing at the time. First, the Court confirmed that Article III limits the federal courts to handling actual "cases" and "controversies" the better to preserve the separation of powers. Second, the Court identified three elements to the constitutional inquiry: the plaintiff must have suffered a personal injury; the injury must be "fairly traceable" to the challenged action; and relief from the injury must "likely" follow from a favorable decision. Third, the Court maintained a distinction between what it called the prudential standing doctrine, comprised of "judicially self-imposed limits on the exercise of federal jurisdiction," and what it called standing's "core component derived directly from the Constitution."[14]

The Court's application of these principles also illustrated a key feature of its standing jurisprudence, a reluctance to entertain suits aimed at compelling the government to regulate third parties more closely. The plaintiffs sued the Internal Revenue Service, seeking declaratory and injunctive relief that would compel the Service to deny tax-exempt status to the all-White private schools that popped up in the South after courts ordered the desegregation of the public schools. Although the African-American plaintiffs were said to have alleged a proper injury to their right to integrated schooling, the Court found that an order directing the IRS to apply more stringent standards would not necessarily affect the financial viability of the private schools and would not necessarily improve the plaintiffs' prospects for integrated education. The claims failed the fair traceability requirement because the chain of causation running from the IRS rule on tax exemption to an increase in the number of Whites attending public schools was "far too weak."[15] For the Court, the absence of any clear statutory standards to govern the IRS's decision on tax exemption for racially discriminatory schools counseled against judicial involvement; after all, the Court explained, the Constitution assigns the executive responsibility for enforcement of federal law and the plaintiffs' suit proposed to restructure that enforcement role.[16]

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12 Justice Scalia joined the Court in 1986, after having spent four years on United States Court of Appeals for the District of Columbia Circuit and some years before that as a law professor, first at the University of Virginia and, after a hitch in the Justice Department, at the University of Chicago.

13 *See* Allen v. Wright, 468 U.S. 737 (1984).

14 *Allen*, 468 U.S. at 751.

15 *Id.* at 759.

16 *Id.* at 761.

In a second revealing pre-Scalia standing decision, the Court decisively curtailed the doctrine of taxpayer standing. Taxpayers can, of course, challenge the imposition of taxes on themselves, on both statutory and constitutional grounds. But their status as taxpayers does not give them a concrete or personal stake in every government decision to spend federal money; the impact of any expenditure on any particular citizen's tax liability has been regarded as too diffuse to warrant standing.[17] The Warren Court created an exception to this rule in *Flast v. Cohen*, recognizing taxpayer standing to challenge the appropriation of federal money to a religious enterprise in violation of the First Amendment's prohibition against the establishment of religion.[18] In *Valley Forge Christian College v. Americans United for Separation of Church and State*, however, the Court denied standing to challenge the transfer of surplus federal property to a religious institution. There was no specific federal appropriation to challenge, only the exercise of executive discretion in the disposal of surplus property, and therefore the claims were said to fail the *Flast* test.[19] *Valley Forge* underscored the Court's growing reluctance to entertain "generalized grievances," claims on behalf of a large group of citizens who were all similarly affected by proposed government action. It resembled in some respects the Court's earlier refusal to allow citizens to mount challenges either to the congressional practice of keeping the CIA's budget a secret or to the executive's practice of issuing military commissions to sitting members of Congress.[20]

A third set of cases explored the contours of what the Court would describe in *Allen v. Wright* as the prudential standing doctrine. On the view expressed in several cases, standing law included both a core constitutional component and a prudential component. A claim might satisfy the constitutional minima, but still fail the prudential standing test, at least in the absence of a fairly clear signal from Congress. Thus, in *Flast v. Cohen*, Justice Harlan dissented from the majority's decision to grant standing, but added that he would defer to a decision by Congress to allow the claim.[21] Similarly, in *Warth v. Seldin*, the Court paid heed to the counsels of prudence in refusing to permit a challenge to the zoning rules adopted by a city in New York that were said to have foreclosed the construction of low-income housing and thereby to have excluded minority homeowners.[22] But here again, the Court explained that Congress could override that prudential reluctance through the adoption of a statute that clearly authorized such litigation to proceed in federal court. Following Justice Harlan's dissent in *Flast*, the *Warth* Court explained that the ban on the adjudication of generalized grievances was a matter of prudence over which Congress could exercise significant control.[23]

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17 *See* Frothingham v. Mellon, 262 U.S. 447 (1921) (no standing to challenge federal financial support for state programs to reduce maternal and infant mortality).

18 *See* Flast v. Cohen, 392 U.S. 83 (1968).

19 *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

20 *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (no citizen standing to enforce the constitutional prohibition on executive offices for members of Congress); United States v. Richardson, 418 U.S. 166 (1974) (no citizen standing to require Congress to publish a a public account of the expenditure of public money on the CIA).

21 *See* Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting).

22 *See* Warth v. Seldin, 422 U.S. 490 (1975).

23 *Id.* at 499-500.

III. Then-Judge Scalia's Critique of Standing Doctrine

One can learn much about Justice Scalia's broad concerns with the content of standing law from a relatively brief paper, published in 1983 as a revised version of a lecture he delivered at a law school.[24] In the paper, then-Judge Scalia identified three features of standing law as puzzling or in need of repair. First, and most generally, he expressed concern with the willingness of federal courts to move beyond the adjudication of the private law claims of individuals to the public law claims of public interest groups, often in the environmental arena. He thus contrasted the venerable decision in *Marbury v. Madison*, and its emphasis on the role of the courts in deciding on "the rights of individuals," with a recent case that halted the construction of a nuclear power plant at the behest of a loosely affiliated "coordinating commission" that objected to the project.[25] Second, he took issue with the prudential standing doctrine, explaining that the Court had failed to identify its authority "for simply granting or denying standing as its prudence might dictate."[26] He explained that the Court should ask instead whether "a legal right exists" and do so by stressing the intent of Congress. Such an approach would preserve congressional control of the right to sue, and refocus the analysis from one of judicial prudence to one of legislative intent.[27]

Third, and in some ways most significantly, Judge Scalia argued that the federal courts really had no business at all in hearing generalized grievances.[28] These were claims to challenge government action that, as in the taxpayer cases, affected all citizens the same way. The very generality of the injury meant that no individual could claim a concrete, personal and particularized injury of the kind necessary to support standing. Some may feel more strongly about the matter, but then they were free to persuade everyone else of the wisdom of their view.[29] They should do so, Judge Scalia believed, through the democratic process rather than through the courts. Courts should be reserved for those asserting the rights of a minority, rights that cannot be well managed through legislation.[30] It followed that Congress could not confer standing to sue when individuals were seeking redress for a generalized grievance. For Judge Scalia, it was clear, for example, that an environmental claim on behalf of "all who breathe" would receive a fair hearing in the "normal political process" and thus could not claim a place on federal dockets, even were Congress to have passed a law conferring standing in such a case.[31] Judge Scalia thus signaled a willingness to invalidate acts of Congress conferring standing on citizens to litigate

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24 *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, *supra* note 7.

25 *See id.* at 883-85 (contrasting Marbury v. Madison, 5 U.S. 137, 170 (1803) with Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971)).

26 *See* Scalia, *The Doctrine of Standing*, *supra* note 7, at 885-86.

27 *Id.* at 885 (acknowledging that standing "is largely within the control of Congress" and arguing that congressional intent should control).

28 *Id.* at 894-95.

29 *Id.* at 894.

30 *Id.*

31 *Id.* at 895-96.

generalized grievances. Such invalidation was essential, Judge Scalia believed, to the preservation of the properly limited role of the federal courts in a governmental system of coordinate and separate branches.[32]

As for the methodology Judge Scalia used in deriving his criticism of standing law, his essay was primarily structural and doctrinal. While he did invoke the historical example of *Marbury*, and did call for a "return to the original understanding," his essay did not explore the historical origins of standing law at the time of the framing of the Constitution.[33] Early in the essay, he commented briefly on the problems with the textual hook for the development of Article III's standing law. Standing, he explained, had been made a part of Article III through the "case-or-controversy" formulation "(for want of a better vehicle)"; this was "surely not a linguistically inevitable conclusion," but it was nonetheless "an accurate description of the sort of business courts had traditionally entertained."[34] On this view, then, Article III assumed that the federal courts could handle the sorts of matters that courts had traditionally handled. While no text defined or required individual standing, the very idea of a court system exercising judicial power implied limits on the sorts of claims that were proper grist for the judiciary. After this initial brush with history, Judge Scalia leapt forward to 1944, using an administrative law case to illustrate what he regarded as the traditional doctrine of standing as it had evolved by the mid-twentieth century.[35] When at the end of the essay, he called for a return to the venerable old days of strict standing law, he invoked cases from the 1920s and 1930s.[36]

IV. Justice Scalia and Standing Doctrine

Lujan v. Defenders of Wildlife. Of the many standing cases he wrote, Justice Scalia's most far-reaching decision, *Lujan v. Defenders of Wildlife*, tackles several of the problems he had identified in his earlier essay.[37] The suit was brought to challenge the interpretation of a federal environmental consultation requirement; previous administrations had interpreted the law to require inter-agency consultation in an effort to reduce the environmental impact of new programs. The Reagan administration re-interpreted the statute to discontinue consultation as to projects set to take place overseas. As a consequence, federal agencies were offering financial support for development projects affecting the habitat of endangered species (the Nile crocodile, the Asian elephant) without having first evaluated its environmental impact. The public interest group Defenders of Wildlife sued to contest the new interpretation, arguing that the consultation requirement applied to all federal programs, at home and abroad.

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32 Hence, the emphasis on separation of powers in the title of the Essay.

33 *See id.* at 893 (invoking *Marbury*); *id.* at 897-98 (praising more restrictive recent decisions as a "reversion to former theory" and suggesting that future decisions would give greater weight to separation-of-powers concerns).

34 *Id.* at 882.

35 *Id.* at 883 (citing Stark v. Wickard, 321 U.S. 288 (1944).

36 *Id.* at 898 (citing Frothingham v. Mellon, 262 U.S. 447 (1923) and *Ex parte* Levitt, 302 U.S. 633 (1937) as venerable examples of a properly restrained approach to standing law).

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

Justice Scalia viewed the suit as implicating the separation-of-powers concerns that lay at the heart of his conception of standing's function. In curtailing consultation, the government's action threatened an injury that could be considered a kind of generalized grievance; degradation of the environment affects "all who breathe" or all who appreciate animals in their native habitat.[38] What's more, allowing the suit to proceed would put the federal courts in the position of evaluating the degree to which the government should enforce the consultation rules, thus potentially interfering with the executive branch's primacy in deciding how strictly to enforce the law. Finally, the plaintiffs were said to have failed to articulate an injury that a decision in their favor would redress. They argued that, as members of a group who had been to the habitat in years past, they had an ongoing interest in the species' survival. But they all lived in the United States, far from the habitat in question and could not claim an immediate injury.[39] (Justice Scalia also concluded that an order requiring consultation would not necessarily alter the nature of the projects and their potential impact on the affected species, but he garnered only four votes for the proposition that the claimed failed the redressability prong of Article III.[40])

Significantly, Justice Scalia spoke for a majority in concluding that the citizen suit provision of the statute, authorizing any person to sue, was constitutionally invalid in purporting to allow a generalized grievance to proceed in court.[41] The core constitutional restrictions were, according to Justice Scalia, derived from the case-or-controversy requirement of Article III and they restricted the federal courts to suits aimed (as *Marbury* taught) at vindicating the rights of individuals. In this litigation, by contrast, the plaintiffs sought to vindicate the public interest in governmental observance of the Constitution and laws. To be sure, Congress had attempted to convert the public interest into individual rights held in common by all. But such conversion, if permitted, would allow Congress to transfer to private suitors the president's power to enforce the law in violation of the constitutional injunction that the president "take care that the laws be faithfully executed."[42] Thus, with Justice Kennedy's qualified agreement, Justice Scalia succeeded in giving voice to his view that standing imposed constitutional limits on Congress's power to authorize individuals to pursue generalized grievances, especially where the suits in question were seen as interfering with the executive branch primacy in law enforcement and thus threatening the separation of powers. Only those with a constitutionally sufficient injury in fact were free to invoke the citizen suit provisions.[43]

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38 *See Lujan*, 504 U.S. at 573 (characterizing the suit as a generalized grievance).

39 *Id.* at 563-66 (concluding that prior visits to some relevant habitat and non-specific plans to visit again in the future did not establish the connection necessary to satisfy environmental standing).

40 *Id.* at 568-71.

41 *Id.* at 571-78.

42 *Id.* at 577 (quoting the Take Care Clause, U.S. Const., art. II, § 3).

43 Significantly, Justice Scalia acknowledged some fragmentation in standing doctrine, identifying in particular the reluctance of the Court to insist on redressability in cases asserting procedural rights claims. *Id.* at 572 n.7. But those cases did not do away with the injury requirement. Justice Kennedy's concurring opinion took some steps to minimize the potential impact of the decision by reaffirming that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." Id. at 580 (Kennedy, J., concurring).

Vermont Agency of Natural Resources v. United States ex rel. Stevens. Justice Scalia's decision in *Lujan* attracted a good deal of attention, both from a dissenting Justice who characterized it as a "slash and burn" foray through environmental standing law and from a largely critical academic audience.[44] It also triggered a good deal of research into the origins of standing law. Scholars observed that, in contrast to Justice Scalia's assertions, it was not at all uncommon in England, and in the United States of the early Republic, to find private suitors pursuing claims on behalf of the public. Scholars pointed to a variety of public actions, including mandamus and other prerogative writ proceedings, in which litigants could sue without identifying an injury in fact or a specific interest.[45] In addition, scholars pointed to *qui tam* litigation, suits brought by "informers" to recover penalties from those who had submitted false claims to the United States. *Qui tam* informers could not allege a personal injury in fact, but eighteenth century practice in both England and in the United States allowed such suits to proceed. *Qui tam* certainly formed part of the tradition of Anglo-American litigation, and posed a challenge to the claim that only those with an injury in fact could invoke the judicial power of the United States.[46]

Justice Scalia tackled the problem of *qui tam* litigation in *Vermont Agency*, litigation brought to recover a penalty against an agency of the state government for the benefit of the United States and the informer, Jonathan Stevens.[47] Under the terms of the False Claims Act, first enacted in 1863 and reinstated in 1986, informers were required to notify the Department of Justice that a prospective defendant had defrauded the government through the assertion of false claims. On notification, the government could pursue the claim itself or defer to the private litigant. If the action was successful under either scenario, the private informer would keep a share of the penalties assessed against the defendant, and would recover her attorney's fees as well. The action thus presented a challenge to the coherence of standing law. The plaintiff clearly had a concrete stake in the action with the opportunity to secure a bounty as a result of successful litigation. But a bounty, while it created a concrete stake, was not necessarily designed to remedy any personal injury to the plaintiff herself.

Or at least that's how Justice Scalia understood the problem. His opinion explained that "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing." Instead, the "interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right."[48] Justice Scalia found that this crucial connection was missing:

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44 *See Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting). *See generally* Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III,* 91 Mich. L. Rev. 163 (1992); Gene Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L.J. 1141 (1993).

45 *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1988); cf. Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L.J. 816 (1969).

46 *See* Evan H. Caminker, Comment, *The Constitutionality of Qui Tam Actions,* 99 Yale L.J. 341 (1989).

47 *See* Vermont Agency of Natural Resources v. United States *ex rel*. Stevens, 529 U.S. 725 (2000).

48 *Vermont Agency*, 529 U.S. at 772.

> A *qui tam* relator has suffered no such invasion—indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.[49]

Something, it seemed, would have to give.[50]

Justice Scalia resolved the tension between the undoubted pedigree of *qui tam* litigation and his own carefully constructed injury-in-fact requirement with an adroit move. He chose to treat the informer as the assignee of the government's interest in recovering penalties for false claims. The government had doubtless suffered an injury-in-fact and doubtless had standing to sue. The provisions of the False Claims Act could "reasonably be regarded as effecting a partial assignment of the Government's damages claim."[51] Although the Court had not previously recognized the representational standing of assignees, Justice Scalia identified cases that assumed the viability of such litigation including that brought by subrogees. In the end, then, Justice Scalia found "that the United States' injury in fact suffices to confer standing on respondent Stevens."[52]

Having located an injury-in-fact, Justice Scalia turned to the history of *qui tam* litigation both in England and in the courts of the United States:

> *Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution. Although there is no evidence that the Colonies allowed common-law *qui tam* actions (which, as we have noted, were dying out in England by that time), they did pass several informer statutes expressly authorizing *qui tam* suits. . . Moreover, immediately after the framing, the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only.[53]

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49 *Id.* at 772-73. For the byproduct quote, *see Steel Co*., 523 U.S. at 107.

50 Justice Scalia had previously suggested that a bounty would suffice to give the plaintiff a concrete interest in the outcome of litigation, thereby satisfying that portion of justiciability law. See *Lujan*, 504 U.S. at 572-73 (distinguishing the injury claims of the plaintiffs from the "unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff"). But he was later to reject a bounty as the basis for standing. *See Vermont Agency*, 529 U.S. at 773.

51 *Id.* at 773.

52 *Id.* at 774. On this point, the Court was unanimous. But Justice Scalia was unable to locate any prior decisions upholding the right of Congress to provide for an assignment of injuries in fact. And at least some language in prior opinions had assumed that the injury in fact must be personal to the plaintiff. *See*, e.g., *Lujan*, at 581 (Kennedy, J., concurring) (observing that "the party bringing suit must show that the action injures him in a concrete and personal way.").

53 *Id.* at 776-77.

That answered the standing puzzle. Justice Scalia found the history "well nigh conclusive" with respect to the question whether *qui tam* actions were "cases and controversies" of the sort traditionally amenable to, and resolved by, the judicial process.[54] But he was careful to add that it was the history combined with the prior theoretical justification that left "no room for doubt" as to Article III standing.[55]

Steel Co. v. Citizens for a Better Environment. During the 1970s, with the development of prudential standing doctrines that seem in retrospect to turn on an evaluation of relevant statutes, the Court would sometimes assume the existence of its jurisdiction in order to reach the merits of a claim. These cases led to a doctrine of hypothetical jurisdiction, under which the lower federal courts would presume their jurisdiction and then deny a claim on the merits where doing so served to simplify the judicial task.[56] These cases typically arose where the lower court perceived the merits issue to be relatively simple and straightforward and the jurisdictional issue to be quite complex. In dismissing the action without first resolving the jurisdictional issue, the federal courts were careful to refrain from exercising doubtful jurisdiction to impose liability on a defendant; the orders would typically dismiss the plaintiff's action on the merits, resulting in a Rule 12(b)(6) dismissal (for failure to state a claim) rather than a Rule 12(b)(1) dismissal (for lack of subject matter jurisdiction).[57]

Justice Scalia confronted and overthrew this doctrine of hypothetical jurisdiction in *Steel Co. v. Citizens for a Better Environment*.[58] The plaintiff environmental group sued the company for failing to file information about its emissions, in violation of federal environmental law. The perceived standing problems arose from the fact that the defendant company took advantage of the required notice and brought itself into compliance by submitting the required information to federal and state regulatory agencies in advance of the litigation. The plaintiffs nonetheless sought declaratory and injunctive relief as to past violations as well as the imposition of penalties, payable to the federal government, and the costs of litigation. The Court could have resolved the case by finding that the statute did not permit the recovery of these various items in a suit brought after the defendant has come into compliance with federal reporting obligations. Alternatively, the Court could evaluate the plaintiffs' standing under Article III to pursue these claims.

The Court found that sound practice required a threshold evaluation of standing as an issue of subject matter jurisdiction before any assessment of what the statute permitted or required. Jurisdictional issues come first. That, in turn, necessitated a clear distinction between what counted as jurisdictional and what counted as a merits determination. For Justice Scalia, the answer was clear. Interpretation of the statute went to the merits and must await the jurisdictional/standing determination.[59] Justice Scalia therefore proceeded to an evaluation of standing and

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54 *Id.* at 777.

55 *Id.* at 778.

56 *See*, *e.g., United States v. Troescher,* 99 F.3d 933, 934, n. 1 (1996) (characterizing the practice of "assuming" jurisdiction for the purpose of deciding the merits—the "doctrine of hypothetical jurisdiction").

57 For the relevant authority at both the Supreme Court and lower court level, see Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 114-120 (1998) (Steven, J., dissenting) (collecting authority).

58 Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

59 *Steel Co*., 523 U.S. at 93-101.

concluded that, under the specific statutory scheme, none of the remedies sought would redress the injuries on which the plaintiffs based their claim of standing. The action for declaratory and injunctive relief would have no influence on a defendant who admitted prior violations but had come into compliance for the future. The action for the imposition of penalties for past non-compliance would punish the defendant for past violations of the law, but the penalties were payable to the federal government rather than to the plaintiffs. The situation was unlike a standard suit for damages, therefore, in which the plaintiff seeks personal monetary redress for a past violation. Standing was clearly available for that sort of retrospective claim, but here the statute did not authorize the plaintiffs to collect such compensation as a result of any injury they had suffered.[60]

Justice Scalia thus achieved three important goals. He bolstered the rule that the federal courts must always conduct a pre-merits evaluation of the plaintiffs' standing and other elements of subject matter jurisdiction. Second, he called for the separation of jurisdiction and merits, distinguishing statutes that specify the elements of a cause of action and the available remedies from those that confer jurisdiction. Finally, he considerably strengthened the rigor of the required assessment of redressability, ruling that penalties and other costs that flow from successful litigation must bear a causal connection to the injuries on which the plaintiffs base their claimed right to invoke the power of the federal courts. In doing so, he relied on some early decisional law that called for a threshold evaluation of jurisdictional issues, but otherwise appeared to be engaged in standard doctrinal analysis.[61]

Lexmark International, Inc. v. Static Control Components, Inc. Having reworked the rules governing injury in fact and redressability, Justice Scalia took on the doctrine of prudential standing in *Lexmark International, Inc. v. Static Control Components, Inc*.[62] The plaintiff sued the manufacturer of generic replacement toner cartridges for certain printers, alleging copyright violations. Defendant counterclaimed under the Lanham Act, alleging that the plaintiff engaged in false advertising in touting to its customers the importance of using original cartridges. The parties agreed that the false advertising counterclaims met the constitutional test for standing. But that left unresolved whether the defendant, as a competitor, fell within the "zone of interests" protected by the Lanham Act's prohibition against false advertising; perhaps the Act only protected consumers. The zone-of-interests test had arisen as part of administrative law, aimed at determining which parties could bring suit to challenge agency action. It was among the forms of prudential standing doctrine that Justice Scalia had criticized in his 1983 essay.

Justice Scalia rejected the idea of prudential standing, noting that the federal judiciary has a "virtually unflagging" duty to hear cases within its jurisdiction.[63] Instead of treating the zone-of-interests test as a matter of standing doctrine, Justice Scalia re-characterized the inquiry as one into the meaning of the relevant statute.

> Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation,

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60 *Id.* at 102-110.

61 *See, e.g., Steel Co*., 523 U.S. at 95 (quoting Capron v. Van Noorden*,* 2 Cranch 126 (1804)).

62 Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

63 *Lexmark*, 134 S. Ct. at 1386.

> whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. As Judge Silberman of the D.C. Circuit recently observed, prudential standing is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons ha[s] a right to sue under this substantive statute.[64]

In conducting the analysis, Justice Scalia called upon the courts to "apply traditional principles of statutory interpretation." Instead of asking whether "Congress *should* have authorized" the litigation, courts were to focus instead on "whether Congress in fact did so."[65] Justice Scalia drew an analogy to other cases in which the Court has narrowed judicial discretion. Courts cannot recognize a cause of action that Congress has denied; by the same token, they cannot "limit a cause of action that Congress has created merely because 'prudence' dictates."[66]

By cashiering prudential standing doctrine in the context of the zone-of-interests analysis, Justice Scalia raised questions about other doctrines that had sometimes been labeled prudential. Attempting to answer those questions in part in a footnote, Justice Scalia acknowledged that the ban on generalized grievances had sometimes been labeled prudential but was properly understood as an element of Article III's case-or-controversy requirement.[67] As for third-party standing, a doctrine occasionally regarded as prudential in the past, Justice Scalia temporized. He found no reason to pass on the question in the context of the *Lexmark* case, one that did not in any case present a third-party standing question. But the proper characterization of the closely related requirement that federal courts refrain from addressing legal issues other than in the context of a dispute between adverse parties was one that would divide the Court.

United States v. Windsor. Dissenting opinions often sound more strident than consensus-building majority opinion and may more clearly reveal the mind of the Justice. Justice Scalia's dissents from the Court's invalidation of the Defense of Marriage Act (DOMA) in *United States v. Windsor* has both strident and revelatory features.[68] The Court has long held that federal courts can hear only "definite and concrete" controversies that touch upon "the legal relations of parties having adverse legal interests."[69] Doubts as to the presence of adversity had arisen early on, when the government insisted on enforcing DOMA but agreed with its nominal opponent, Edith Windsor, that the law violated her constitutional rights by denying her the beneficial federal tax treatment she would have received had she been the surviving spouse of a man instead of a woman.[70] Yet the opinion by Justice Kennedy for a narrow five-Justice majority simply announced that the disappearance of formal adverseness did not deprive the Court of power to reach

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64 *Lexmark*, 134 S. Ct. at 1387 (internal quotation marks omitted).

65 *Id.* at 1388.

66 *Id.* (citing Alexander v. Sandoval*,* 532 U.S. 275, 286–87 (2001) for its rejection of the recognition of judge-made rights to sue).

67 *Id.* at 1387 n.3 (discussing the proper treatment of generalized grievances and third-party standing).

68 *See* United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013).

69 Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted).

70 Recognizing that party agreement posed a jurisdictional hurdle, the Court appointed an amicus to argue that United States had no standing to appeal from decision below once it concluded, in agreement with Windsor, that DOMA was unconstitutional.

the merits.[71] For the majority, the adverse-party requirement was a prudential element of standing doctrine, appropriately informing the Court's discretion but not inflexibly compelling party opposition as a jurisdictional prerequisite at every stage of every case.[72]

Justice Scalia's sharply worded dissent characterized the adverse-party requirement not as a prudential feature of standing law "that we have invented," but as an independent and "essential element of an Article III case or controversy."[73] Moreover, Justice Scalia attempted to connect the adverse-party restriction to the text of Article III, placing some emphasis on the fact that the term "controversy" connotes a live dispute, or contradiction, between opposing parties.[74] But the Justice failed to address the meaning of Article III's grant of "judicial power" or of its reference to "cases"; both terms have suggested to other readers that federal courts may do more than simply resolve concrete disputes.[75] As for history, Justice Scalia depicted Article III's case-or-controversy limits as a reflection of the traditional notions of adjudication inherited from early Americans and our "English ancestors."[76] He thus invoked Justice Frankfurter's influential claim that the federal "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'"[77] He also cited an important early case in which the Court declined to hear a feigned dispute and threatened with sanctions any lawyers who contrive to present such disputes to the federal judiciary.[78] For Justice Scalia, then, the majority was so keen to address the constitutional question and thereby establish "judicial supremacy" over the other branches that it was willing to ignore limits on the judicial power in order to decide the question.[79]

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Justice Scalia did not win every battle over the way Article III limits the power of federal courts. But judging by the concerns he identified before his arrival on the Court, he broadly succeeded in re-making the law of standing along the lines sketched in his 1983 Essay. For starters, he wrote the opinion in *Lujan* that deployed Article III as a limit on Congress's power to enable citizens to challenge

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71 *See Windsor*, 133 S. Ct. at 2684-89 (evaluating the adverse-party requirement).

72 *Id.* at 2685-88.

73 *Id.* at 2702 (Scalia, J., dissenting).

74 *Id.* at 2701 ("The question here is not whether, as the majority puts it, 'the United States retains a stake sufficient to support Article III jurisdiction,' the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor." (internal citation omitted)).

75 *See, e.g.*, Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447 (1994).

76 *Windsor*, 133 S. Ct. at 2699 (Scalia, J., dissenting). *See also* Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J.) ("courts of Westminster"); Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 290 (1928) (Brandeis, J.) ("English . . . courts").

77 Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)

78 *See Windsor*, 133 S. Ct. at 2703 (quoting Lord v. Veazie, U.S. 251, 49 U.S. (8 How.) 255-56 (1850), which described a contrived dispute as a contempt of court because it was aimed not at clarification of the rights of parties before the court but at curtailing the rights of a non-party).

79 *Id.* at 2698.

federal agency action. While the Court had sounded many of the themes in earlier decisions, *Lujan* was the first to invalidate an act of Congress that purported to authorize broad citizen standing. (*Allen v. Wright*, by contrast, invoked the case-or-controversy limits of Article III but did not invalidate an explicit congressional grant of standing.[80]) In doing so, *Lujan* achieved at least three of Justice Scalia's stated goals: it cut back on environmental standing; it established Article III as a constraint on the extent to which Congress could involve the federal courts in the oversight of the exercise of government enforcement discretion in the public law context; and it firmed up the ban on the exercise of jurisdiction over generalized grievances by framing them as a violation of the separation of powers. While subsequent cases relaxed *Lujan* to some degree,[81] it remained a touchstone of Justice Scalia's jurisprudence.

Justice Scalia's decisions in *Steel Co*. and *Lexmark* may be equally significant. The *Steel Co*. decision imposes a fairly rigid order of operations that requires federal courts to reach and resolve the jurisdictional question of standing before tackling questions on the merits. That virtually guarantees close scrutiny of standing issues, either at the behest of the defendant or on the court's own motion. But the threshold scrutiny will extend only to matters deemed constitutional. *Lexmark* ends the doctrine of sub-constitutional prudential standing, transforming the inquiry into a merits-based assessment of the right to sue. Even there, however, Justice Scalia worked to preserve the constitutional status of the ban on the adjudication of generalized grievances. Finally, in *Vermont Agency*, perhaps his most methodologically revealing opinion, Justice Scalia bowed to the weight of historical practice in upholding the right of informers to sue under the False Claims Act. But by making the theoretical assessment of injury-in-fact essential to the analysis, Justice Scalia sought to prevent historical evidence alone from dislodging that feature of his preferred Article III standing rules.

V. Assessing Justice Scalia's Contributions to the Law of Standing

Judged by the standards of his own oft-expressed views about the proper interpretation of the Constitution, one can ask serious questions about Justice Scalia's standing jurisprudence. In other writing, Justice Scalia championed what he called the original meaning of the Constitution – that is, the meaning reasonably informed members of the legal community would have ascribed to the text at the time it became law. Justice Scalia's brand of originalism thus treated a variety of modes of analysis as potentially relevant to the explication of meaning: he considered text, structure, history, and practice in the course of constructing his interpretation of the Constitution's meaning. As with his treatment of statutory interpretation, moreover,

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80 *See* Allen v. Wright, 468 U.S. 737 (1984).

81 *See* Federal Election Comm'n v. Akins, 524 U.S. 11 (1998) (recognizing voter standing to compel agency enforcement action against AIPAC).

81A For descriptions of Justice Scalia' originalism, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, Duke L.J. 239-98 (2009). *See* also pieces from Allan, Marriott and Waldron in this collection on Scalia's distinct style of jurisprudence.

he remained suspicious of arguments based upon the "intention" of those who drafted and ratified the Constitution. While history can help inform understandings about meaning, he did not give primacy to the intentions of specific framers, except as they shed light on meaning.

Once the original meaning had been identified, Justice Scalia opposed any judicial updating. He objected to the idea of a living Constitution, by which he meant a document that took on new meaning in the hands of modern judicial interpreters. Updating was a task for politicians, not judges. Thus, Congress could certainly change applicable laws, within the limits of its constitutional authority, or the people could update the charter through the amendment process. Judicial updating was contrary, as Justice Scalia often observed, to the idea that the people were to govern themselves. That left the challenge of how to handle precedent and, here, Justice Scalia was a bit cagey. Some precedents he would wipe away, such as the decision recognizing a woman's right to terminate her pregnancy. Other precedents he would accept, such as the constitutionality of the administrative state. He often explained that he was an originalist, not a kook; that he was a faint-hearted originalist willing to go some distance to preserve or reclaim original meaning but perhaps not all the way.[82] Thus, for example, he once admitted that would treat two forms of punishment differently, despite the similarity of their pedigree. Both nose cropping and the death penalty were acceptable forms of punishment when the Eighth Amendment became law in the 1790s but Justice Scalia would treat only the former, not the latter, as cruel and unusual punishment.[83] In adopting a selective approach to past practice and stare decisis, Justice Scalia assured himself some flexibility in deciding when to deploy a strict originalist approach and when to go with the flow of prior cases. Perhaps not so much faint-hearted as opportunistic, Justice Scalia deployed his originalist craft selectively by choosing his battles and biding his time.[84]

Justice Scalia's approach to standing doctrine was decidedly that of accepting prior precedents and working within their framework to reshape the law. His opinions occasionally refer to history and tradition, but they do not set out to discover the original meaning of Article III's extension of judicial power to specified "cases" and "controversies." Rarely, in fact, did Justice Scalia advert to the text at all in any meaningful way, other than to invoke the case-or-controversy rule. Perhaps he recognized that the original meaning of the text could not bear the weight of accumulated doctrine; indeed, his 1983 Essay reveals that he understood the Court's decision to hang the standing doctrine on the case-or-controversy reference more as a matter of convenience than of linguistic necessity.[85] True, he emphasized the importance of a "controversy" in dissenting from the majority's relaxation of the adverse-party requirement in *Windsor*. And he treated the history of *qui tam* litigation as "well-nigh" conclusive of the existence of informer standing. But he

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82 As a result of his faint-heartedness, Randy Barnett characterized Justice Scalia as not really an originalist at all, a conclusion to which many others have come. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism,* 75 U. Cin. L. Rev. 7, 12 (2006).

83 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,* in A Matter of Interpretation 3, 16-18, 37-41 (Amy Gutmann ed., 1997).

84 Thanks to Brian Jones for seeing the opportunism in Justice Scalia's self-description as faint-hearted.

85 *See* notes 24-36 *supra* and accompanying text.

was plainly wrong about the significance of the term "controversy" to the analysis and he allowed history to play only a supportive role in upholding informer litigation rather than a decisive one. The Justice's approach thus appears calculated more to obscure than to clarify the history of Article III, as the next section makes clear.

VI. TEXTUAL AND HISTORICAL PROBLEMS WITH THE CASE-OR-CONTROVERSY REQUIREMENT

Injury-in-Fact. While Justice Scalia was quite insistent that the injury-in-fact requirement was a crucial element of Article III standing limits, the term did not appear in the Court's decisions until 1970.[86] Others have explained how the requirement took hold and came to be accepted as an element of the Court's standing analysis.[87] That alone suggests that the requirement was not part of what Article III meant when it restricted the judicial power to specified cases and controversies. But a brief look at the history of non-contentious jurisdiction in the early Republic confirms that conclusion.[88]

Building on a practice with roots in Roman and civil law, Congress assigned a number of non-contentious matters to the federal courts in the early Republic. These ex parte proceedings did not require the plaintiff to set forth a personal injury in fact; rather, the party would typically file a petition in federal court, seeking to assert or register a claim of right under federal law. Nor was the plaintiff obliged to name a defendant; the proceeding assumed that the court would test the sufficiency of the plaintiff's factual showing in an inquisitorial proceeding that does not obviously conform to the adverse-party rhetoric that now informs modern restatements of the case-or-controversy requirement.[89] Prominent among early examples of non-contentious jurisdiction, Congress assigned the federal courts responsibility for passing on ex parte petitions by aliens who sought naturalized citizenship under federal law.[90] Other examples abound.[91]

Federal courts in the late eighteenth and early nineteenth centuries took up these non-contentious matters without suggesting that the absence of injuries in fact and adverse parties barred federal adjudication. Indeed, such leading figures

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86 Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 159 (1970).

87 *See*, *e.g*., William A. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221 (1988).

88 *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse Party Requirement, and Non-Contentious Jurisdiction,* 124 YALE L.J. 1346 (2015).

89 On the history and early application of non-contentious jurisdiction in the courts of the United States, *see id*. at 1402-16.

90 The practice began in 1790 under a federal statute that assigned naturalization duties to courts of record. For an account, see James E. Pfander & Theresa Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 394-95 & nn. 155-58 (2010) (describing naturalization practice in federal court under the 1790 act).

91 Thus, Congress provided for pension benefit claimants to file ex parte applications in the federal courts, called upon revenue officials to seek by ex parte petition a warrant to search premises suspected harboring tax evading distilleries, and authorized federal courts to issue decrees of good prize in uncontested applications. *See generally* Pfander & Birk, *supra* note 88, at 1361-78.

as Chief Justice John Marshall and Justice Joseph Story accorded preclusive effect to naturalization decrees comparable to that assigned to other matters of judicial record. Not only that, Marshall and Story specifically defined the Article III reference to "Cases" in terms broad enough to encompass naturalization and other non-contentious matters. Unlike modern definitions, Marshall explained that the key to the presence of a "case" in Article III lay in a party's "assertion of his rights in the form prescribed by law." This formulation clearly encompasses the submission of an ex parte claim of right, such as a naturalization petition, and makes no mention of the need for an injury or an opposing party. Building on Marshall's conception, Justice Brandeis, who was otherwise a leading architect of modern limits on justiciability, had no trouble concluding that the submission of an ex parte naturalization petition created a "case" within the judicial power.[92]

Non-contentious jurisdiction was not limited to the naturalization context but extended broadly across a range of administrative-style proceedings. On any particular day in antebellum America, the lower federal courts might hear uncontested applications to obtain a federal search warrant,[93] to claim a captured vessel as lawful prize, to initiate bankruptcy proceedings, or to claim a government pension. In addition, the courts might entertain uncontested applications for habeas or mandamus relief, such as the petition for mandamus that Edmund Randolph brought before the Supreme Court in *Hayburn's Case*.[94] Even today, non-contentious matters appear on federal dockets, ranging from humble applications for the waiver of PACER fees[95] to top secret petitions for the approval of FISA warrants.[96] Uncontested bankruptcy petitions dot the judicial landscape[97] and courts frequently conduct ex parte proceedings in the course of managing their dockets: they approve settlements, issue consent decrees, and enter default judgments.[98]

A careful review of the historical record would seem to refute the injury-in-fact requirement. Plaintiffs invoking the original non-contentious jurisdiction of the federal courts do not seek redress for an injury in fact. They simply seek to

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92 Tutun v. United States, 270 U.S. 568 (1926).

93 *See* 1 Stat. 199 (1791) (specifically authorizing federal courts to hear ex parte applications for search warrants).

94 2 U.S. (2 Dall.) 409 (1792) (reproducing letters explaining circuit court refusal in pension matters to enter judgments that were subject to review by the two political branches)

95 For an account, see Matthew D. Heins, Note, *An Appeal to Common Sense: Why "Unappealable" District Court Decisions Should Be Subject to Appellate Review,* 109 Nw. U. L. Rev. 773 (2015); see also *In re* Application for Exemption, 728 F.3d at 1039-41 (9th Cir. 2013) (refusing to entertain an appeal from the denial of an application for waiver of PACER fees); *In re* Carlyle, 644 F.3d 694, 699 (8th Cir. 2011) (same); United States v. Walton (*In re* Baker), 693 F.2d 925, 927 (9th Cir. 1982) (same).

96 For an account of the FISA warrant process, see David S. Kris, *On the Bulk Collection of Tangible Things*, Lawfare 39 (Sept. 29, 2013), http://www.lawfareblog.com/wp-content/uploads/2013/09/Lawfare-Research-Paper-Series-No.-4-2.pdf [http://perma.cc/X8UT-FED4].

97 *See* Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 Bankr. Dev. J. 397, 449-50 (1996) (arguing that many proceedings in bankruptcy lack party opposition and thus fail Article III's adverse-party requirement).

98 *See, e.g.*, Fed. R. Civ. P. 23(e) (requiring district court to approve class action settlements); *See* Fed. R. Civ. P. 55(c) (directing the district court to conduct an inquest into damages in connection with the entry of a default judgment). As a leading treatise explains, "The hearing [conducted in a default proceeding] is not considered a trial, but is in the nature of an inquiry before the judge." 10A Wright & Miller, Federal Practice and Procedure, § 2688, at 458.

register and gain official recognition of their claim of federal right. To be sure, the trial court's *denial* of a party's non-contentious petition inflicts a concrete injury that will support review in the appellate courts.[99] But the initial petition alleges a claim of right or entitlement to a benefit, under the law as stated, in much the way a party might petition the Social Security Administration for the approval of a benefit claim.[100] One does not seek redress for an injury in submitting a petition to secure a benefit.

The Adverse-Party Requirement. Consider second the claim that all proceedings proper for Article III adjudication must feature opposing parties.[101] The requirement of concretely adverse interests appears to have arisen to counter the use of feigned or contrived proceedings brought by parties for the sole purpose of obtaining an advantageous judicial decision for use in a different setting.[102] (Feigned proceedings were appropriate, historically, as a way to provide the modern equivalent of a declaratory judgment in a case of genuine disagreement among the parties as to the law's meaning or application.[103]) As we saw earlier, Justice Scalia spoke of the adverse-party requirement as an element of the case-or-controversy requirement.[104] But while some ancillary forms of non-contentious practice (such as judicial inquisitions associated with the entry of default judgments) could arise from a genuine disagreement between adversaries, original non-contentious applications did not feature opposing parties. The courts were to conduct their own investigation

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99 Thus, in *Tutun v. United States*, 270 U.S. 568 (1926), the government appeared as an adverse party to argue that the application for naturalization did not present a case within the appellate jurisdiction of the intermediate federal appeals court.

100 The leading casebook on federal jurisdiction argues that such benefit claims clearly lie beyond federal judicial power. *See* Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 86 (7th ed. 2015) (treating *Hayburn's Case* as a decisive rejection of Congress's attempt to treat federal courts as administrative agencies).

101 *See*, *e.g.*, Flast v. Cohen, 392 U.S. 83, 95 (1968) ("In part [the terms 'case' and 'controversy'] 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."); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) ("The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.").

102 Justice Brandeis was a leading architect of the adverse-party rule as a limit on the power of federal courts to address constitutional claims. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) ("The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.").

103 *See*, e.g., Lord v. Veazie, 49 U.S. (8 How.) 251 (1850), (castigating the parties for feigning a dispute aimed at undercutting the rights of parties not brought before the court, but recognizing the validity of a feigned controversy to settle an actual controversy between represented parties, just as an agreed-upon action for a declaratory judgment might proceed today).

104 *See* United States v. Windsor, 133 S. Ct. 2675, 2685-88 (2013). One can wonder about the extent to which prudential doctrines survive the Court's recent decision in *Lexmark Int'l Inc. v. Static Control Components Inc.*, 134 S. Ct. 1377 (2014), which recast prudential standing as an inquiry into the right to sue under the applicable statute and expressed doubt as to continued legitimacy of prudential avoidance doctrines.

of the facts underlying the petition and to enter a judgment in accordance with law. While these inquisitorial duties do not readily conform to an adversarial conception of the judicial role,[105] federal courts have long performed such duties in connection with their handling of matters within their non-contentious jurisdiction. Given the Court's consistent approval of the adjudication of ex parte naturalization petitions, one can hardly argue that contestation by opposing parties operates as an invariable requirement of Article III.

Conflating Cases and Controversies. Finally, consider Justice Scalia's view that the case-or-controversy requirement establishes a unitary limit on the power of the federal courts that cuts across all of the heads of jurisdiction in Article III.[106] Conflation of the two terms has little support in the practice of federal courts in the early Republic or in the text of Article III itself. Article III uses the term *cases* to extend jurisdiction in the broadest terms to subjects of federal interest (cases arising under the Constitution, laws, and treaties; cases of admiralty and maritime jurisdiction; cases affecting ambassadors). *Cases* thus encompass both contentious jurisdiction over criminal and civil matters and non-contentious jurisdiction over claims of federal right.[107] *Controversies*, by contrast, arguably extend only to

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105 *See* Greenlaw v. United States, 554 U.S. 237, 243 (2008) (declaring the norm of the adversary system in civil and criminal cases to be one of reliance on the parties "to frame the issues for decision" and on courts to play "the role of neutral arbiter"); Sanchez-Llamas v. Oregon, 548 U.S. 331, 357 (2006) (distinguishing adversary from inquisitorial systems of procedure in respect of the rules governing procedural default); United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (implying that the rule imposing a procedural default may have a constitutional underpinning in that it distinguishes "our adversary system from the inquisitorial one"). *Cf.* Sims v. Apfel, 530 U.S. 103, 111 (2000) (distinguishing the adversary proceedings of courts from the inquisitorial approach of benefit agencies, such as the Social Security Administration, at which no party opposes the claim for benefits).

106 *See* Martin H. Redish & Andrianna D. Kastenek, *Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process,* 73 U. Chi. L. Rev. 545 (2006) (arguing that the adverse-party requirement applies with equal force to cases and controversies alike). Justice Stephen Field took a similar position, riding circuit. *See In re* Pacific Ry. Comm'n, 32 F. 241 (C.C.N.D. Cal. 1887) (opinion of Field, J.) (cases and controversies alike both connote a dispute or potential dispute between parties). Although a substantial literature discusses the possibly different meanings of cases and controversies in Article III, a consensus has yet to emerge. Some take the view that the broader term "case," encompasses both civil and criminal proceedings, while controversies entail only civil matters. *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal. L. Rev. 263, 266-67 (1990) (quoting definitions of case and controversy by St. George Tucker and Joseph Story) and James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 604-17 (1994) (adding sources to same effect). Others question the civil-criminal distinction and argue that key distinction lies in the nature of the federal judicial role. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447 (1994) (questioning the civil-criminal distinction and arguing instead that federal courts were expected to play a law-exposition in cases and a dispute-resolution role in controversies).

107 The distinction between the federal subject-matter of cases and the party-alignment focus of controversies has been well accepted in the literature. *See*, e.g., Cohens v. Virginia, 19 U.S. 264, 378 (1821) (distinguishing between the character of the cause as definitive of cases and the alignment of the parties as key to controversies); Akhil R. Amar, *A*

civil disputes between parties aligned in opposition to one another as specified in Article III. It appears, in short, that the two categories of jurisdiction differ both in terms of their subject matter and in terms of the character of proceedings they contemplate as appropriate for judicial resolution. While the federal courts can hear non-contentious and ex parte application for the grant of federal benefits and the registration of federal interests, they cannot entertain petitions for recognition of a status governed by state law in the absence of a controversy.[108]

Justice Scalia delivered his opinion in *Windsor* in a federal question "case," but he invoked the idea of contestation embedded in the term "controversy" as the justification for the adverse-party rule. While it may have been appropriate to refrain from issuing a major ruling in the absence of party opposition, Justice Scalia could scarcely (and did not attempt to) argue that the original meaning of Article III was to regard the two terms as synonymous and to impose an across the board requirement of contestation. Indeed, it appears that the conflation of the terms first occurred in the late nineteenth century and was picked up and incorporated into the Court's precedents in the early twentieth century.[109] One might defend the use of the case-or-controversy rubric as a short-hand reference to a whole set of conceptions of the proper role of the federal judiciary. But the enterprise of filling in the meaning of such a unitary construct cannot possibly be defended on original-meaning grounds.

VII. Conclusion

One can hardly overstate either the degree to which Justice Scalia remade the law of Article III standing or the degree to which he did so in the absence of support in the original meaning of the document he set about to apply. The history of non-contentious jurisdiction forecloses any argument that the federal courts were limited to suits brought by those who had suffered an injury in fact. The same history forecloses the claim that Article III invariably requires contestation; in truth, only in the "controversies" between opposing parties specified in Article III can one identify a thoroughgoing adverse-party requirement. Non-contentious "cases" arising under federal law, such as naturalization petitions, could proceed without

Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L. Rev. 205 (1985) (emphasizing the federal subject matter of cases and their greater significance relative to controversies in the framers' conception of the work of the federal judiciary).

108 The inability of the federal courts to entertain state-law applications for registration of status explains in part the origins of the so-called probate and domestic relations exceptions to Article III. *See* James E Pfander & Michael Downey, *In Search of the Probate Exception*, 67 Vand. L. Rev. 1533 (2014) (distinguishing ex parte "common form" probate applications that elude federal judicial power from contested proceedings); James E. Pfander & Emily Damrau, *A Non-Contentious Account of Article III's Domestic Relations Exception*, 92 Notre Dame L. Rev. 117 (2016) (cataloging uncontested family law matters that fall within the scope of the domestic relations exception).

109 *See* Muskrat v. United States, 219 U.S. 246 (1911) (citing In re Pacific Ry. Comm'n, 32 Fed. 241 (C.C. Cal. 1887)). For an account, see Pfander & Birk, *supra* note 88, at 1421-24, 1439-40.

an opponent. Justice Scalia's explication of Article III will surprise the reader not because it does a poor job of refuting evidence of original meaning that cuts against his conclusions but because it fails to express any interest in what the evidence might reveal. While history can play a role in Justice Scalia's jurisprudence, it seems clear that his theoretical conception of the proper elements of the standing inquiry take precedence over original meaning. That, indeed, was the explicit message of his decision in *Vermont Agency*.

Having turned away from original meaning, Justice Scalia proceeded to exercise a form of judicial power that he had been quick to decry in other settings. He deployed his own conception of the proper limits on government action as the basis for invalidating choices made by the political representatives of the people. While he deferred to Congress in *Vermont Agency*, and upheld the propriety of informer litigation, *Lujan* invalidated the citizen-suit provisions of an environmental statute that Congress had adopted to encourage public interest groups to play a more active role in monitoring government enforcement of environmental laws. On Justice Scalia's own description of the proper judicial role, such invalidation seems hard to defend. As an invention of the late twentieth century, the injury-in-fact rule can hardly claim the sort of historical pedigree that would entitle it to be considered a part of the practice of adjudication at the time of the founding.

One can therefore usefully contrast Justice Scalia's attitude toward standing law with his incredulity at the notion that the Fourteenth Amendment's equal protection clause might invalidate state laws that forbid same-sex marriage. He pressed that idea forcefully in his opinion in *Obergefell v. Hodges*, explaining that at the time the Fourteenth Amendment became law in 1868, all of the states banned all marriages except those between one man and one woman and no one regarded such laws as unconstitutional.[110] That was, for Justice Scalia, the end of the story. In the case of standing law, by contrast, Justice Scalia showed scant interest in the practice of Congress and the federal judiciary at the time Article III became law and was implemented by those who participated in its drafting. Instead, much as did the majority in *Obergefell*, Justice Scalia applied an evolving body of precedents loosely organized (as he recognized in 1983) under the heading of the case-or-controversy requirement. Back then, before he joined the Court, he termed the case-or-controversy requirement a "vehicle" for the development of restrictions on the invocation of the judicial power.[111] In modifying that vehicle for the twenty-first century, Justice Scalia dictated a new, more demanding set of terms to Congress, terms far more restrictive than those the horse-and-buggy drafters of Article III would have recognized.

Justice Scalia's treatment of standing doctrine thus more closely resembles the style of common law constitutionalism that he decried in other settings than the brand of originalism he brandished in dissent. One might dismiss his jurisprudence as the work of a hypocrite, but that would be to miss something essential in his craft. After all, his insistence in *Steel Company* on the primacy of jurisdictional inquiry has since gained a broad following on the Court. When he dispatched the doctrine of prudential standing in *Lexmark*, moreover, he wrote for a unanimous Court.

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[110] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) ("in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so").

[111] Scalia, *supra note* 7, at 882.

Scalia was much more, or less, than an unrelenting originalist. He was, first of all, a talented lawyer and gifted legal stylist. On many issues of law, he acted within the existing framework to solve problems and reform the law. Standing law nicely illustrates this evolutionary approach, as he steadily worked to achieve the reform agenda he set out in his law review article. Although he nodded in the direction of the eighteenth-century practices of the courts of Westminster, Justice Scalia was making law for the twenty-first century and was quite willing to reshape the law to meet present needs. He was fortunate that, in most instances, there was no Justice with an originalist agenda on the other side to call attention to his handiwork.