U.C.L.A. Law Review

Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement

James E. Pfander

ABSTRACT

Familiar rules limit the federal courts to the adjudication of claims by plaintiffs who seek redress for injuries inflicted by one or more adverse parties. The U.S. Supreme Court has based these requirements of standing and party adverseness on the "case-or-controversy" language of Article III and the history of judicial practice in England, but neither text nor history can bear the weight of justification. While a "controversy" in Article III entails a dispute between parties aligned as specified, new research reveals that the term "case" extends more broadly to encompass what Roman and civilian jurists referred to as noncontentious jurisdiction. Indeed, a variety of noncontentious proceedings—including applications for naturalized citizenship, petitions for the issuance of search warrants, and pension claims—were promptly assigned to the Article III judiciary in the 1790s, and similar matters have been a feature of federal judicial cognizance ever since.

The power of federal courts to exercise noncontentious jurisdiction in "cases" governed by federal law undermines the Court's textual and historical claim that federal courts cannot adjudicate in the absence of injured plaintiffs and adverse parties. Petitions for naturalization, for example, did not seek redress for an injury and did not entail joinder of an opposing party. But the Court can use a more historically defensible construct—that of the litigable interest—to regulate access to federal dockets. Indeed, the eighteenth-century practice of the Scottish Court of Session offers a useful historical model for such a litigable-interest construct. The Court of Session imposed standing rules for private litigants but allowed individuals to vindicate the public interest through an *actio popularis* or public action. Designed to avoid a defect of justice, the Scottish conception of the litigable interest coheres with early definitions of the term "case" in the United States and lays the foundation for a more candid and historically accurate approach to issues of standing—one that would recognize broader power in Congress to assign new work to the federal courts.

AUTHOR

James E. Pfander is the Owen L. Coon Professor of Law at Northwestern Pritzker School of Law.

For comments on earlier versions of this Article, the author thanks Dan Birk, Andy Hessick, Bill Marshall, Caleb Nelson, Bob Pushaw, George Rutherglen, Ann Woolhandler, and the participants at the University of San Diego Conference on Originalism, and the Law faculty workshop at the University of North Carolina. Thanks to the Pritzker library for help with obscure sources.

TABLE OF CONTENTS

> *The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of Article III.*
>
> —Sprint Communications Co. v. APPC Services, Inc.[1]

INTRODUCTION

In defining the scope of the nation's judicial power, the U.S. Supreme Court applies the "case-or-controversy" requirement of Article III, a requirement it has tended to defend in originalist or at least historical terms.[2] Thus, Justice Frankfurter explained: "[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.'"[3] The case-or-controversy requirement now encompasses a range of familiar justiciability limits: only plaintiffs with standing can invoke the judicial power[4] and only in the context of a live dispute between adverse parties.[5] Justices today subscribe to Chief Justice Warren's suggestion that the words "cases" and "controversies" limit the "federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and ensure "that the federal courts will not intrude into areas committed to the other branches of government."[6]

Legal scholars and historians have long debated the degree to which history supports the Court's claim that the case-or-controversy language of Article III, as understood in light of early practice, limits the federal courts to

1. 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting).
2. U.S. CONST. art. III, § 2, cl. 1.
3. Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).
4. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (holding that citizen-suit plaintiffs lacked standing to enjoin alleged violations of a federal environmental statute); Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) (denying standing in citizen-suit claim against the government); *cf.* Allen v. Wright, 468 U.S. 737 (1984) (holding that parents of African American school children lacked standing to compel the IRS to deny tax exemption to racially discriminatory private schools). On the particulars of the injury-in-fact prong of standing, see Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1194–95 (2014), which cites decisional law that requires the plaintiff's injury to be "tangible, specific, present, perceptible, and palpable." *Id.* (internal quotations omitted) (footnotes omitted).
5. *See* Massachusetts v. EPA, 549 U.S. 497, 517 (2007) ("At bottom, 'the gist of the question of standing' is whether petitioners have '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.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
6. Flast v. Cohen, 392 U.S. 83, 95 (1968); *see also infra* notes 230–233 and accompanying text.

the adjudication of claims by litigants seeking redress for concrete, personal injuries. Louis Jaffe argued that the King's Bench permitted "stranger[s]"—those without a personal stake—to invoke the judicial power through petitions for such prerogative writs as mandamus, prohibition, and certiorari.[7] Raoul Berger also made much of the history of stranger litigation, expressing doubt that personal stakes were required in public law litigation.[8] In addition, scholars identified actions brought by bounty hunters as exemplars of public law litigation that went forward in English and early American courts without an injured party at the helm. As Steven Winter and Evan Caminker have observed, such litigation often featured a plaintiff whose only interest was the bounty she would collect at the conclusion of a successful enforcement proceeding.[9] Scholars looking backward at the Court's work often agree that twentieth-century case-or-controversy limits were a response to the concerns of the day, rather than a recognized feature of early Republican conceptions of judicial power.[10]

7. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1035 (1968); *see* Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269–70, 1276–77 (1961) (describing the origins of such prerogative writs as mandamus, certiorari, and prohibition as mainstays of government accountability in England and describing the rise of citizen mandamus proceedings to vindicate the public interest). On public law litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), which describes the rise of a distinctive form of litigation in public law matters as a recent occurrence in the 1970s.

8. *See* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819–21 (1969) (describing the right of strangers in England to seek writs of prohibition and certiorari to test the legality of government action).

9. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396–98 (1988) (drawing on the history of prerogative writs in England in arguing that litigation could proceed without inquiry into standing); Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341 (1989) (describing the history of the 1986 False Claims Act, *see* False Claims Amendments Acts of 1986, Pub. L. No. 99-562, 1001 Stat. 3153, and the questions it raises as to the propriety of allowing private bounty-hunting plaintiffs to enforce public rights without an injury personal to themselves); *see also* Randy Beck, Qui Tam *Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. (forthcoming 2018). *See generally* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1152 (1993) (questioning the U.S. Supreme Court's failure to attend to the history of early federal judicial practice).

10. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996) (describing the ways Brandeis and Frankfurter modified standing law in the twentieth century); *see also* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992) (tracing origins of modern standing law to the efforts of Justices Brandeis and Frankfurter to shield progressive legislation from judicial review); *cf.* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary:*

Others have defended the historical claim at the heart of the Court's case-or-controversy jurisprudence. In one paper, Bradley Clanton observed that many of the so-called strangers who were involved in supervisory writ proceedings were actually interested parties.[11] Ann Woolhandler and Caleb Nelson similarly argued that history does not necessarily defeat standing doctrine.[12] Building on the distinction between public and private actions, Woolhandler and Nelson argue that courts eventually came to impose important limits on the ability of private individuals with no personal stake to appear on behalf of the public to litigate public harms. As Woolhandler and Nelson further relate, the United States early abandoned the English idea of private criminal prosecutions: The Judiciary Act of 1789 vested the prosecutorial power in officers of the executive branch of the federal government.[13] Mandamus practice also evolved, in their telling, at least in some states, to foreclose private parties with no concrete interest from pursuing claims against public officials.[14] They view the tradition of *qui tam* litigation, which was subject to government supervision, as only a modest departure from a dominant perception that matters of public right were to be handled by officials of the government.[15]

Institutionalizing Judicial Restraint, 77 N.Y.U. L. REV. 962, 1004 (2002) (describing the Court's analysis as a "judicially invented gloss on the Constitution").

11. *See* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1008 (1997) (arguing that eighteenth-century cases required those seeking prerogative writs to have standing).

12. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 700–12 (2004) (acknowledging counterexamples but arguing on balance that public actions were not generally available to individuals who lacked some standing or interest).

13. *See id.* at 699–700; *cf.* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2249–50 (1999) ("In short, if—as all concede—the United States can prosecute crimes in the federal courts, then a 'case' within the meaning of Article III must include litigation that is based on nothing more than the 'harm to the common concern for obedience to law,' and the 'abstract . . . injury to the interest in seeing that the law is obeyed.'" (footnote omitted) (quoting FEC v. Akins, 524 U.S. 11 (1998))). *See generally* Judiciary Act of 1789, § 35, 1 Stat. 73.

14. *See In re* Wellington, 33 Mass. (16 Pick.) 87, 105 (1834) (permitting mandamus at the suit of a private individual "only in a case where he has some private or particular interest to be subserved"), *quoted in* Woolhandler & Nelson, *supra* note 12, at 708.

15. Woolhandler & Nelson, *supra* note 12, at 698, 729–31 (describing such actions as relatively uncommon, as largely the product of a single statute, and as creating problems of arbitrary, oppressive, and duplicative enforcement); *cf.* Beck, *supra* note 9, at 16 (demonstrating widespread reliance on *qui tam* litigation in English law, among the colonies of North America, in the newly independent American states, and in the laws adopted by the U.S. Congress during the early Republic).

Recent scholarship on the power of federal courts to entertain voluntary or noncontentious matters reopens the debate over the degree to which early judicial practice incorporated standing rules like those the modern court has ascribed to Article III.[16] Adopting a form of adjudication with roots in Roman and civil law, the U.S. Congress assigned a number of noncontentious 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 seeking to assert or register a claim of right under federal law would typically file a petition in federal court. 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 did not obviously conform to the adverse-party rhetoric that now informs modern restatements of the case-or-controversy requirement.[17] Prominent among early examples of noncontentious jurisdiction, Congress assigned the federal courts responsibility for passing on ex parte petitions by aliens who sought naturalized citizenship under federal law.[18] Other examples abound.[19]

Federal courts in the late eighteenth and early nineteenth centuries took up these noncontentious matters without suggesting that the absence of injuries in fact and adverse parties barred federal adjudication. Indeed, such leading figures as Chief Justice Marshall and Justice Story accorded preclusive effect to naturalization decrees comparable to that assigned to other matters of judicial record.[20] Not only that, Marshall and Story specifically defined the

16. *See, e.g.*, James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1416–17 (2015) (arguing that the willingness of federal courts to exercise noncontentious forms of jurisdiction casts doubt on both the injury and adverse-party requirements).

17. For characteristic restatements of the adverse-party requirement, see *infra* note 36. Also see *Baker v. Carr*, 369 U.S. 186, 204 (1962), which emphasizes importance of "concrete adverseness, which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." For a catalog of instances of noncontentious jurisdiction in the federal courts, see Pfander & Birk, *supra* note 16, at 1361–91.

18. 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 R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 394–95 & nn.155–58 (2010), which describes naturalization practice in federal court under the 1790 act.

19. 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 16, at 1364–65.

20. *Id.* at 1418–25.

Article III reference to "cases" in terms broad enough to encompass naturalization and other noncontentious matters.[21] Unlike modern definitions, Marshall explained that the key to the presence of a "case" in Article III lay in a party who "asserts his rights in the form prescribed by law."[22] 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 little trouble concluding that the submission of an ex parte naturalization petition created a "case" within the judicial power.[23]

Noncontentious 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, a lower federal court might have heard an uncontested application to obtain federal search warrant,[24] to claim a captured vessel as lawful prize,[25] to initiate bankruptcy proceedings,[26] or to claim a government pension.[27] 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*.[28] Even today, noncontentious matters appear on federal dockets, ranging from humble applications for the waiver of Public Access to Court Electronic Records (PACER) fees[29] to top secret petitions for the approval of warrants under the Foreign Intelligence Surveillance Act (FISA).[30]

21. *Id.* at 1424–25.
22. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 819 (1824).
23. *See* Tutun v. United States, 270 U.S. 568, 568 (1926).
24. *See* Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. 199, 207 (specifically authorizing federal courts to hear ex parte applications for search warrants).
25. *See* Pfander & Birk, *supra* note 16, at 1368 (collecting prize cases); *see also* sources cited *infra* notes 127–130.
26. *Id.* at 1371.
27. *Id.* at 1364, 1425.
28. 2 U.S. (2 Dall.) 409, 411 (1792) (reproducing letters explaining circuit court refusal in pension matters to enter judgments that were subject to review by the two political branches).
29. *See In re* Application for Exemption From Elec. Pub. Access Fees by Jennifer Gollan & Shane Shifflett, 728 F.3d 1033, 1039–41 (9th Cir. 2013) (refusing to exercise jurisdiction over an appeal from the denial of an application for waiver of Public Access to Court Electronic Records (PACER) fees); *In re* Carlyle, 644 F.3d 694, 699 (8th Cir. 2011) (similarly refusing to oversee fee reimbursement decisions); United States v. Walton (*In re* Baker), 693 F.2d 925, 927 (9th Cir. 1982) (refusing to oversee fee reimbursement decisions). 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).
30. *See generally* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1871 (2012)). For an account of the FISA warrant

Uncontested bankruptcy petitions dot the judicial landscape,[31] and courts frequently conduct ex parte proceedings in the course of managing their dockets: They approve settlements, issue consent decrees, and enter default judgments.[32] As these examples reveal, modern assignments of noncontentious jurisdiction reflect such varied policy concerns as ease of administration (PACER fees) and the perceived need for independent judicial oversight of executive branch investigations (FISA warrants).

Early definitions of the term "case," coupled with this tradition of noncontentious jurisdiction, cast doubt on the originalist case for the Court's case-or-controversy jurisprudence. Consider the Court's view that any claimant who wishes to invoke the power of the federal courts must allege an injury in fact. The Court's injury-in-fact requirement operates as the first element of its familiar three-part test for standing. To establish standing, the Court explains, a party must show that she has suffered a concrete and particularized injury, that the injury can be traced to the defendant's conduct, and that the court can redress the injury.[33] Plaintiffs invoking the original noncontentious jurisdiction of the federal courts, however, do not seek redress for an injury in fact. They seek to register and gain official recognition of their claim of federal right. To be sure, the trial court's *denial* of a party's noncontentious petition inflicts a concrete injury that may support contentious review in the appellate courts.[34] 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.[35]

process, see David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT'L SECURITY L. & POL'Y 209, 251–52 (2014).

31. *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).

32. *See, e.g.*, FED. R. CIV. P. 23(e) (requiring the district court to approve class action settlements); *id.* 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." 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2688 (3d ed. 2016).

33. *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (reciting the familiar three-part test for standing).

34. 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.

35. 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 AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 86 (7th ed. 2015) (expressing doubt that Congress could assign federal courts claims for "disability benefits under the Social Security Act").

Consider second the Court's suggestion that all proceedings proper for Article III adjudication must feature opposing parties.[36] The requirement of concretely adverse parties 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.[37] Today, the Court frequently speaks of the adverse-party requirement as an element of its case-or-controversy doctrine, albeit an element that may be subject (as Justice Kennedy observed in *United States v. Windsor*[38]) to some degree of prudential relaxation.[39] But while some ancillary forms of noncontentious practice (such as judicial inquisitions associated with the entry of default judgments) could arise from a genuine disagreement between adversaries, original noncontentious applications did not feature opposing parties. The courts were to conduct their own investigation 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,[40] federal

36. *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. Tenn. Valley Auth., 297 U.S. 288, 346 (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." (quoting Chi. & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345) (1892)).

37. Justice Brandeis deployed the adverse-party rule as a limit on the power of federal courts to address constitutional claims. *See Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring). 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. *See, e.g.*, Lord v. Veazie, 49 U.S. (8 How.) 251, 256 (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). For the Court's acceptance that litigants may properly feign disputes, to obtain a clarification of legal rights, see Pfander & Birk, *supra* note 16, at 1433–36.

38. 133 S. Ct. 2675 (2013).

39. *See id.* at 2685–88. One can wonder about the extent to which prudential doctrines survive the Court's recent decision in *Lexmark International, 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. Also see *infra* notes 197–203 and accompanying text.

40. *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 requiring parties to preserve issues for appellate review may have a constitutional underpinning in that it distinguishes "our adversary

courts have long performed such duties in connection with their handling of matters within their noncontentious jurisdiction.

Finally, consider the Court's view that the case-or-controversy requirement establishes a uniform limit on the power of the federal courts that applies with equal force to all nine categories of jurisdiction identified in Article III.[41] 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).[42] *Cases* thus encompass both contentious jurisdiction over criminal and civil matters and noncontentious jurisdiction over claims of federal right.[43] The term *controversies*, by contrast, arguably extends only to civil disputes between parties aligned in opposition to one another as

system of justice from the inquisitorial one"); *cf.* Sims v. Apfel, 530 U.S. 103, 110–11 (2000) (Thomas, J., opinion) (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).

41. *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 564–66 (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* Pac. Ry. Comm'n, 32 F. 241, 255 (C.C.N.D. Cal. 1887) (observing that 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 CALIF. L. REV. 263, 266–67 (1990) (quoting definitions of case and controversy by St. George Tucker and Joseph Story); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 604–17 (1994) (collecting sources in support). 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, 460–64 (1994) (questioning the civil-criminal distinction and arguing instead that federal courts were expected to play a law-exposition role in cases and a dispute-resolution role in controversies).

42. U.S. CONST. art. III, § 2.

43. 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. (1 Wheat.) 264, 378 (1821) (distinguishing between the character of the cause as definitive of cases and the adversarial alignment of the parties as key to controversies); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 260–62 (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).

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 degree to which they treat noncontentious proceedings as appropriate for judicial resolution. These differences may hold the key to such curious features of Article III jurisprudence as the probate and domestic relations exceptions.[44]

If history casts serious doubt on the originalist case for certain elements of the Court's standing analysis, it does not necessarily foreclose a threshold evaluation of the nature of the plaintiff's interest in pursuing an action. Roman law held that an individual could pursue a popular action, or what the Romans called an *actio popularis*, on behalf of the public interest.[45] Anyone could pursue such a claim, but if more than one person stepped forward, some mode of selecting the best plaintiff was settled upon.[46]

---

44. The Supreme Court in the nineteenth century refused to permit the federal courts to hear certain matters relating to domestic relations and the probate of decedents' estates; today, the Court views these much-mooted doctrines as limited in application to jurisdiction based on diversity of citizenship. *See* Marshall v. Marshall, 547 U.S. 293, 307–08 (2006) (limiting the probate exception to claims brought in federal court on the basis of diversity); Ankenbrandt v. Richards, 504 U.S. 689, 695–704 (1992) (defining the domestic relations exception as a product of the interpretation of the statutory grant of diversity jurisdiction). For the history of these exceptions and an argument that they bar the assertion of federal jurisdiction over noncontentious matters of state law, see James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III's Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117, 149 (2016), which urges that while the federal courts have power to administer federal law in uncontested "cases," they cannot adjudicate questions of state family law without a contest between adverse parties configured as a "controversy" within the meaning of Article III, and; James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533, 1558–60 (2014), which traces the probate exception to the inability of the federal courts to hear uncontested questions of state probate law, such as probate petitions in the common form.

45. Consider the description of the Roman public action that appears in *Justinian's Digest*, as edited by Alan Watson, under the heading, "Popular Actions":

> 1. Paul, *Edict, book 8*: We describe as a popular action one which looks to the public interest.
> 2. Paul, *Edict, book 1*: If more than one wish to bring the action, the praetor will choose the most suitable plaintiff.
> 3. Ulpian, *Edict, book 1*: But, if proceedings be brought more than once on the same ground, the common defense of *res judicata* will lie. 1. In the case of popular actions, preference is given to the person who has an interest in bringing the proceedings.
> 4. Paul, *Edict, book 3*: A popular action is granted to a competent person, that is, one whom the edict allows to bring proceedings.

THE DIGEST OF JUSTINIAN 47.23.1–4 (Alan Watson et. al. eds., 1985).

46. *See* James E. Pfander, *Standing to Sue: Lessons From Scotland's* Actio Popularis, 66 DUKE L.J. 1493, 1531–33 (2017); *cf.* 3 WILLIAM BLACKSTONE, COMMENTARIES *219 (expressing concern with repetitive use of public action to harass defendants); *see also* James E. Pfander

In addition, once the popular action went to judgment, the defender was entitled to assert claim preclusion as a bar to duplicative proceedings by other champions of the public interest.[47] William Blackstone, who was learned in both civil and common law,[48] described popular actions in precisely these terms,[49] and such actions were well accepted in the practice of the eighteenth-century Scottish Court of Session.[50] Indeed, Scots practice appears to have anticipated and addressed many of the problems that might arise from an unbridled power in individuals to mount popular actions. One can find in the history of the popular action in Scotland a principled explanation of the need for standing limits and the outlines of an approach to the adjudication of what the Court has come to describe as generalized grievances.[51]

In setting out to interrogate the Court's originalist defense of its standing jurisprudence and to suggest a more cogent, doctrinal alternative, this Article makes a four-part argument. Part I briefly summarizes the evidence that Article III courts once viewed themselves as empowered to exercise noncontentious jurisdiction, highlighting the distinction between original and ancillary proceedings. Part II analyzes the practical challenges such proceedings present to the Court's current injury-in-fact requirement, its adverse-party rule, and its equation of the distinct terms "cases" and "controversies." Part III evaluates the implications of noncontentious jurisdiction for the Court's historically-inflected defense of modern restrictions on the scope of the judicial power.[52] Part IV offers a new synthesis of standing law that uses the construct of the "litigable interest" to tie together the lessons of noncontentious jurisdiction, the Scottish approach to public law litigation, and the Court's recent decision in *Spokeo, Inc. v. Robins*.[53] In the end, history may

& Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1667–69 (2011).

47. *See* Pfander, *supra* note 46, at 1533.
48. *See id.* at 1528–34; Pfander & Birk, *supra* note 46, at 1642–46.
49. *See* Pfander, *supra* note 46, at 1503 n.41.
50. *See id.* at 1521; Pfander & Birk, *supra* note 46, at 1665–67.
51. *See* United States v. Richardson, 418 U.S. 166, 173 (1974) (federal courts are not a forum in which taxpayers may air their "generalized grievances" about the conduct of government) (quoting Flast v. Cohen 392 U.S. 83, 106 (1968)); *see also* Pfander, *supra* note 46, at 1541–54.
52. Thus, the Court has spoken of the "irreducible constitutional minimum of standing" as an "essential and unchanging part" of Article III's case-or-controversy requirement. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). It has also treated historical practice as "well nigh conclusive" on the issue of justiciability (upholding *qui tam* proceedings on this basis against a standing challenge). Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 777–78 (2000).
53. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016); *see also infra* Part IV.A.

well defeat the across-the-board injury-in-fact element of the Court's standing jurisprudence; such a requirement cannot coexist with evidence that those pursuing claims in noncontentious jurisdiction were thought to have litigable interests. But the Scots' handling of the *actio popularis* may provide a useful alternative framework for constructing a model for the private enforcement of commonly held public rights.

I. A BRIEF OVERVIEW OF NONCONTENTIOUS PROCEEDINGS IN FEDERAL COURT

A. Original Proceedings

For simplicity, this Part divides the universe of noncontentious proceedings into two categories: original (taken up here) and ancillary (analyzed in the next two Subparts). In an original noncontentious matter, the court entertains an ex parte application seeking to register or claim a right under federal law. Common noncontentious applications today include requests for waiver of PACER fees, for the recognition of victim status in a criminal proceeding, for the issuance of immunity from prosecution, and for the issuance of instructions to a fiduciary or trustee.[54] On receiving such applications, the court proceeds somewhat like an inquisitorial body or administrative agency: It considers the factual evidence offered in support of the application, it finds and applies relevant law, and it exercises judicial judgment in determining whether the individual applicant qualifies for the order or decree sought.[55] The court may demand more or different evidence, but the proceeding does not typically entail the joinder of an adverse party.[56]

Justice Brandeis explained the practice of original noncontentious jurisdiction, in *Tutun v. United States*,[57] in the course of upholding the power of the federal courts to entertain (as they had since 1790) uncontested applications for naturalized citizenship.[58] Brandeis rejected the view that naturalization was essentially an administrative action and was thus unfit for judicial cognizance:

> The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an

54. *See infra* notes 68–74, 238–240 and accompanying text.
55. *See infra* notes 58–61 and accompanying text.
56. Such procedures took place in connection with the processing of applications for naturalized citizenship and with the consideration of prize claims by courts of admiralty. *See infra* Part II.A.
57. 270 U.S. 568 (1926).
58. *Id.* at 578.

> asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.[59]

For Justice Brandeis, then, the key to the judicial quality of the proceeding lay in the asserted claim of right and the exercise of judicial judgment in determining if the requisite showing had been made—a formulation that, we later will see, has important implications for understanding other instances of noncontentious practice.[60]

Having upheld the judicial cognizability of such applications, Justice Brandeis found that Congress enjoys broad discretion in structuring the assertion of administrative claims against the United States. According to Brandeis: "The United States may create rights in individuals against itself and provide only an administrative remedy."[61] Or it may provide a legal (that is, judicial) remedy but require that individuals first exhaust administrative remedies.[62] Or it may create both administrative and legal remedies and give the individual a choice of which to pursue.[63] Or it may "provide only a legal remedy" in federal court.[64] Brandeis found that, when Congress chooses the last of these paths by creating a regular mode of procedure and when the individual invokes the established procedure in pursuit of a claim of right, "there arises a case within the meaning of the Constitution."[65] A petition for naturalization, Justice Brandeis concluded, "is clearly a proceeding of that character."[66]

---

59. *Id.* (citation omitted).
60. Congress, needless to say, had other administrative structures available: It could assign administration of naturalization petitions to the marshals (as it assigned responsibility for administering the census in the Census Act of 1790, § 1, 1 Stat. 101) or to the clerks of the district courts (as it did for registering copyrights in the Copyright Act of 1790, § 3, 1 Stat. 124). Its choice of personnel may have reflected its considered view of the nature of the judgment required. In the Copyright Act, which was adopted by the same Congress that enacted the Naturalization Act of 1790, ch. 3, 1 Stat. 103, Congress directed parties seeking a copyright to lodge copies of the work with the Secretary of State and the clerk of the district court (rather than with the judge of the court or the court itself). *See* Copyright Act of 1790, § 3, 1 Stat. 124. The Act stated in peremptory terms that the "clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose." *Id.* at 125.
61. *Tutun*, 270 U.S. at 576.
62. *See id.* at 576–77.
63. *See id.* at 577.
64. *Id.*
65. *Id.*
66. *Id.*

Today, one can identify a broad range of proceedings that qualify as original applications for the assertion or recognition of a claim of right on an ex parte basis. Individuals have been authorized to file petitions with the district courts that seek a waiver of the fees normally payable for access to PACER.[67] Similarly, individuals can petition for attorney's fees under the Criminal Justice Act.[68] On frequent occasions, parties file uncontested petitions in an effort to establish, in accordance with law and to a court's satisfaction, that they meet certain threshold requirements for advancing to an adversarial stage of the process. Thus, individuals who wish to challenge the fact or duration of their confinement often begin with the submission of a petition for a writ of habeas corpus, one that the district court may deny without first requiring a response from the custodian.[69] Similarly, petitions for certificates of appealability, filed with a judge of the federal court of appeals, provide a nonadverse predicate to the submission of a formal appeal.[70] Victims of crime may petition for recognition of their status as such and their entitlement to the incidental rights that Congress has conferred on them.[71] Finally, one party may petition the

67. *See* 28 U.S.C. § 1913 (2012) (authorizing district court to waive fees for access to the PACER database). For cases refusing to exercise appellate review of the district court's disposition of such petitions, see *In re Application for Exemption From Electronic Public Access Fees by Jennifer Gollan and Shane Shifflett*, 728 F.3d 1033, 1035–37, 1041 (9th Cir. 2013).

68. *See* 18 U.S.C. § 3006A (authorizing district court to award fees under the Criminal Justice Act). On the availability of appellate review, see *In re Marcum L.L.P.*, 670 F.3d 636, 638 (5th Cir. 2012). Also see *United States v. Stone*, 53 F.3d 141, 143 (6th Cir. 1995), which states: "We agree with the Federal, Seventh, Ninth, Tenth and Eleventh Circuits and hold that § 3006A fee determinations are not appealable orders." For a description of the cases, see Heins, *supra* note 29, 786–87.

69. *See* 28 U.S.C. § 2241 (authorizing individuals to file a petition for a writ of habeas corpus challenging present custody as a violation of federal law). The Prison Litigation Reform Act directs the federal district courts to make threshold assessments of prisoner petitions and to deny those found to lack merit. *See id.* § 1915A(a)–(b) (directing district court to screen petitions). Charles Allen Wright and others report that the district courts have complied with their screening obligation, dismissing frivolous petitions without demanding adverse presentations. *See* 13 WRIGHT ET AL., *supra* note 32, § 3530, at 676–82, 676 n.7.

70. *See* Hohn v. United States, 524 U.S. 236, 248–49 (1998).

71. Under the Crime Victims' Rights Act, victims enjoy certain rights in the criminal process and may petition for their enforcement in what may be noncontentious proceedings. *See* 18 U.S.C. § 3771(a) (conferring such rights as those to be notified of court proceedings, to be heard at public proceedings, to treatment with dignity and respect, and to confer with the government's attorney). The statute declares that the crime victim or representative may assert the rights described in subsection (a) by motion to the district court and further provides that, upon the denial of such motion, the victim may petition for a writ of mandamus. *See id.* § 3771(d). The statute does not call for the victim to name an opposing party in the motion, although many of the proceedings name the district court as the respondent in the mandamus petition. Much victims' rights litigation centers on restitution claims against the criminal defendant and thus qualifies as fully contentious. *See, e.g.*, United

court of appeals to allow discretionary review of the remand of a class action removed under the Class Action Fairness Act.[72] The Supreme Court recently confirmed that such nonadverse petitions for discretionary review present "cases" in the courts of appeal, subject to further review by way of certiorari.[73]

The government frequently institutes uncontested proceedings before a court in connection with its investigation of wrongful conduct. The familiar terms of the Fourth Amendment have long obliged the government to secure a warrant from a neutral and detached magistrate before conducting a search.[74] Today, an Article III court conducts inquisitorial assessments of the government's applications for warrants to engage in certain foreign intelligence surveillance.[75] These proceedings can best be described as original applications for the exercise of noncontentious jurisdiction; the government makes no attempt to notify the target of the search or surveillance and adversary proceedings may or may not occur later. Even if they do, the ex parte decision of the court to issue a warrant offers a measure of protection to the government and the officer who conducts the search.[76] In that sense, then, the court granting a warrant applies judicial judgment in assessing the government's evidentiary showing and enters a judgment that has legal consequences in defining the scope of the government's authority.

States v. Monzel , 641 F.3d 528 (D.C. Cir. 2011) (defining the scope of mandamus review of a crime victim restitution claim).

72. *See* 28 U.S.C. § 1453(c)(1).

73. *See* Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 555 (2014). The Court itself requires parties to file petitions for leave to commence an original proceeding. *See* SUP. CT. R. 17.3.

74. *See* Gerstein v. Pugh, 420 U.S. 103, 117 (1975) (emphasizing the importance of transferring the judgment from the prosecutor to "a neutral and detached magistrate"); Johnson v. United States, 333 U.S. 10, 14 (1948) (holding that probable cause must be determined by a "neutral and detached magistrate"). *See generally* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 120 (1937) (distinguishing between the "sober" judgment of a judicial official in issuing a warrant and the perhaps ill-informed judgment of the "ministerial" officer who executes the warrant, subject to the possibility of "civil and criminal liability" if he exceeds the authority conferred).

75. For a brief summary of the Foreign Intelligence Surveillance Act (FISA), the ex parte warrant process, and proposals for reform through the introduction of an adversary to contest the government's submissions, see Jacob Sommer, *FISA Authority and Blanket Surveillance: A Gatekeeper Without Opposition*, 40 LITIG. 40 (2014). Also, see generally Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1871 (2012)).

76. *See* United States v. Stewart, 590 F.3d 93, 126 (2d Cir. 2009) (upholding the district court's conclusions that "all of the requirements of FISA were satisfied" and that "each of the FISA surveillances was authorized by a FISA Court order that complied with the statutory requirements for such orders and was supported by the statements and certifications required by the statute" (quoting United States v. Sattar, No. 02 CR. 395 JGK, 2003 WL 22137012, at *6 (S.D.N.Y. Sept. 15, 2003)).

Modern original noncontentious jurisdiction depends for its legitimacy on its historical pedigree and on deference to congressional control of federal jurisdiction. In deferring to the power of Congress to make noncontentious assignments, the Court has not attempted to address the apparent tension between its frequent modern restatements of the adverse-party requirements and the absence of adverse parties in a wide range of situations. In cases where that tension has surfaced, as in *Tutun* and *Hohn v. United States*,[77] the Court has consistently upheld the power of Congress to confer noncontentious jurisdiction on the federal courts. Such decisions doubtless represent a combination of considerations, including perhaps most importantly a continuing perception that Congress has broad control over the jurisdiction of the lower federal courts. While earlier work explores the limits of noncontentious jurisdiction and cautions Congress against too-ready reliance on that form,[78] Congress nonetheless occasionally chooses to rely on the special qualities of the federal courts in the administration of the law.

B. Ancillary Proceedings

Federal courts frequently play an inquisitorial role in uncontested proceedings that might be considered ancillary to the resolution of a dispute between parties with adverse interests. Adverse-party contestation may disappear from a proceeding for one of several reasons: One of the parties might fail to enter an appearance, thus defaulting and setting the stage for entry of a default judgment;[79] the parties might agree to a settlement agreement that specifies terms that the court must review and accept (such as a guilty plea[80] or a class action settlement[81]); or the parties might agree to the entry of a consent decree that operates as an injunction enforceable through contempt sanctions.[82] In each situation, the parties have adverse interests, but for one

77. 524 U.S. 236, 248–49 (1998).
78. Pfander & Birk, *supra* note 16, at 1443.
79. Under the Federal Rules of Civil Procedure, the district court may conduct an inquisition before entering a default judgment to satisfy itself as to the proper measure of damages. *See* FED. R. CIV. P. 55(b)(2).
80. On the inquisitorial or noncontentious character of guilty plea practice in the federal courts, see Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003).
81. For an account of class action settlement practice and for doubts about the propriety of judicial approval of prelitigation settlement agreements, see Redish & Kastanek, *supra* note 41, at 547–48, 551–52.
82. For an overview of consent decree practice in which doubts are raised about its uncontested quality, see Michael T. Morley, *Consent of the Governed or Consent of the Government? The*

reason or another do not appear as contestants before the court. Many scholars have questioned the power of the courts to proceed in circumstances where the dispute has run its course.[83]

The Supreme Court, however, has consistently taken the view that the federal courts may entertain uncontested proceedings ancillary to a dispute between adversaries. As the Court has explained in the course of allowing the lower federal courts to handle uncontested equity receiverships, the creditor/plaintiff who institutes such an action has a legal right to certain forms of relief.[84] The fact that the defendant/debtor does not contest the claim cannot deprive the court of the power to grant the plaintiff appropriate relief; otherwise, defendants could block federal remediation by simply agreeing with the claims of the plaintiff.[85] This basic insight explains federal judicial power to proceed with the oversight of matters in the wake of a settlement or a default. Just as the Court has upheld uncontested equity receiverships, so too has it upheld the entry of consent decrees.[86] While such proceedings depend on the presence of adverse interests to ensure that the settlement does not impinge on the rights of third parties, the court's power does not depend on formal contestation.

Bankruptcy represents a special case. While creditors may take a debtor into bankruptcy involuntarily, debtors often file uncontested or voluntary petitions in bankruptcy.[87] In doing so, they seek the benefits that the law can bestow—namely, the entry of an automatic stay and an eventual discharge of their debts (assuming they proceed in good faith). Adverse-party disputes may crop up in the course of bankruptcy administration, but

Problems With Consent Decrees in Government-Defendant Cases, 16 U. PA. J. CONST. L. 637, 644–52 (2014).

83. *See id.* at 657–58; Redish & Kastanek, *supra* note 41, at 605–08; *see also* Ann Woolhandler, *Adverse Interests and Article III*, 111 NW U. L. REV 1025 (2017) (recharacterizing and defending the adverse party rule as best understood to require adverse *interests*).

84. As the Court explained: "It is insisted now that there was no dispute or controversy in that case within the meaning of the [diversity] statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers." *In re* Metro. Ry. Receivership, 208 U.S. 90, 107 (1908).

85. *See* Pope v. United States, 323 U.S. 1, 11 (1944) ("When a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy, upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable.").

86. *See* Swift & Co. v. United States, 276 U.S. 311, 325–26 (1928).

87. On the power to file a voluntary petition, see 11 U.S.C. § 301(a) (2012). Such a petition creates a bankruptcy estate and triggers the automatic stay. *See* 11 U.S.C. §§ 301(b), 362.

the fundamental goal of the petitioner may be to claim a right to discharge that no creditor can fairly contest. Federal courts nonetheless decree in such situations, notwithstanding the arguments of one commentator that Article III's adverse-party rule forecloses such an exercise of the judicial power.[88] One of the risks of bankruptcy flows from these essentially uncontested matters: If no one has an incentive to contest the various administrative actions taken by the bankruptcy court, much will depend on the rigor with which the court performs its inquisitorial duties.[89]

C. Federal Decrees Ancillary to Proceedings in Other Tribunals

Federal courts often play an inquisitorial role as enforcement adjuncts to proceedings before another tribunal. In these cases, the federal courts' role cannot be defended by reference to the need to resolve a dispute between adversaries that would otherwise require federal adjudication. Instead, the proceedings in question seek discovery or other orders in order to facilitate the resolution of a matter (investigative, legislative, or adjudicatory) before a non-Article III court. One example comes from international discovery practice; a party to litigation in a foreign nation may seek letters rogatory to secure the discovery of evidence located in the United States.[90] Courts approving such requests frequently do so in the absence of contestation; the party called upon to make discovery may have, but need not express, an interest adverse to the party seeking the information. Similarly, federal law often confers power on administrative agencies to apply to federal court for the issuance and enforcement of subpoenas, rejecting the once-respectable argument that such proceedings failed to present a case or controversy.[91]

88. Avery, *supra* note 31, at 422–24, 433–35, 437–42 (arguing that much bankruptcy administration—including the handling of executory contracts, administrative expenses, and plan confirmation—cannot be constitutionally handled in federal courts).

89. *See id.* at 408–12 (cataloging the instances of voluntary administration in which the absence of adversary presentations may lead to improper or unsupported decrees).

90. Letters rogatory are request letters of the kind once issued by foreign diplomats; international treaties now regulate the practice of cross-border discovery. *See* Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026–35 (1965) (describing practice under 28 U.S.C. § 1782). For an account of current practice, see Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597 (1990).

91. According to one commentator: "Congress has passed more than 300 administrative subpoena statutes, 'grant[ing] some form of administrative subpoena authority to most federal agencies.'" Robert A. Mikos, *Can the States Keep Secrets From the Federal Government?*, 161 U. PA. L. REV. 103, 117 (2012) (alteration in original) (quoting U.S. DEP'T OF JUSTICE, OFFICE OF

II. NONCONTENTIOUS JURISDICTION AND ARTICLE III

Noncontentious jurisdiction, as described above, casts doubt upon three core elements of modern "case-or-controversy" jurisprudence. First, those who file original petitions for noncontentious relief do not necessarily allege an injury in fact, despite decisions that treat such allegations as essential to the presentation of a case or controversy.[92] Second, original petitioners do not join adverse parties, despite language that treats the adverse-party requirement as one of constitutional dimension.[93] Third, original petitioners may have the right to present noncontentious "cases" arising under federal law to the federal judiciary, but they may not have the same power with respect to "controversies," where state law supplies the rule of decision and the jurisdiction of the federal courts depends on the alignment of parties in opposition to one another. The proposed distinction between cases and controversies departs from the many decisions that have conflated the two terms in speaking of a one-size-fits-all case-or-controversy requirement. This Part summarizes the challenges noncontentious jurisdiction poses to the Court's injury-in-fact and adverse-party rules and to its assumption that these ideas apply with equal force to all "cases" and "controversies" that appear on the jurisdictional menu of Article III.

A. Noncontentious Proceedings and Injury-in-Fact

The Court has frequently reiterated its three-part test for Article III standing and just as frequently emphasized the importance of the first element: injury-in-fact.[94] By emphasizing the injury-in-fact requirement in such familiar cases as *Allen v. Wright*[95] and *Lujan v. Defenders of Wildlife*,[96] the Court

LEGAL POLICY, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES 6); *see also* Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 469, 476–77 (1894) (upholding the power of federal courts to entertain a subpoena to secure discovery for use before the Interstate Commerce Commission on the theory that the application for discovery created a case or controversy before the court). On the early refusal to entertain subpoena enforcement applications, see *In re Pacific Railway. Commission*, 32 F. 241, 257–58 (C.C.N.D. Cal. 1887). Also see Pfander & Birk, *supra* note 16, at 1379–80.

92. *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013).

93. *See supra* note 5 and *infra* note 119 and accompanying text.

94. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (observing that "threatened injury must be *certainly impending* to constitute injury in fact" and that "[a]llegations of *possible* future injury" will not suffice), *quoted by Clapper*, 133 S. Ct. at 1147.

95. 468 U.S 737 (1984).

96. 504 U.S. 555 (1992)

has sought to narrow the universe of potential litigants to those who have a concrete stake in contesting the legality of the defendant's conduct.[97] Rather than permitting those with a generalized grievance, shared with all, to mount claims in federal court, the Court's injury-in-fact requirement forecloses suit by anyone who has not herself suffered a concrete injury. As a practical matter, the injury-in-fact rule serves to restrict the availability of some citizen suits and to protect the executive branch from some agency-forcing litigation that would interfere with law enforcement discretion.[98] This tendency to limit judicial oversight of executive enforcement discretion partly explains the Court's invocation of the separation of powers as a concern that animates its injury-in-fact jurisprudence.[99]

The Court has not only defined standing in terms of a required injury in fact—it has ruled out standing for those who have an evidently concrete interest in the outcome. Thus, the Court found in *Vermont Agency of Natural Resources v. United States* ex rel. *Stevens*[100] that the interest of a *qui tam* relator, a bounty-hunting party suing under the False Claims Act[101] to challenge government fraud, did not confer standing:

> There is no doubt, of course, that as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a "concrete private interest in the outcome of [the] suit." But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. 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

97. *See Lujan*, 504 U.S. at 574–76; *Allen*, 468 U.S. at 754 (denying standing to plaintiff class to the extent they simply sought to assert an interest in having the government comply with the law).

98. In a series of cases, beginning with *Allen*, and continuing in *Lujan*, the Court has made clear that it views with suspicion citizen suits brought to compel a government agency to regulate a third party more rigorously. The oft-expressed linkage between standing and separation of powers reflects this concern with interference in the enforcement discretion of the executive branch. *See Allen*, 468 U.S. at 761 (identifying executive branch primacy in law enforcement, as reflected in the Take Care Clause, as among the reasons why the Court hesitated to permit suit against a government agency to compel it to regulate others); *see also Lujan*, 504 U.S. at 577.

99. *See, e.g.*, *Allen*, 468 U.S. at 750 ("[The] 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.").

100. 529 U.S. 765 (2000).

101. 31 U.S.C. § 3729 (2012).

> 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.[102]

While the Court upheld the cognizability of *qui tam* actions, it did so on the basis that the relator should be viewed as the assignee of the government's interest in redressing the injury the government itself had suffered.[103]

Most parties who assert a claim of right in the form of an original noncontentious application to a federal court have not, perhaps needless to say, suffered an injury-in-fact. Consider the government official petitioning to secure a search warrant. It is certainly conceivable that the target of the search has committed a crime, and it is certainly true that the public prosecutor acts as the public's representative in seeking redress for such harms. But the warrant application does not seek to redress an injury; it seeks only formal legal approval to conduct an investigation. Or consider an alien who is petitioning for the re-cognition of a claimed right to citizenship. Such a petitioner resembles the bounty hunter in *qui tam* litigation: The interest to be vindicated through such an application for citizenship "does not . . . fully materialize until the litigation is completed and the [alien] prevails."[104] The interest that underlies the petition does not arise from any injury inflicted on the alien by a prospective defendant; it simply arises from the decision of Congress to authorize a judicial decree of naturalization when an alien shows that she meets certain specified federal law requirements.

It thus seems clear that the injury-in-fact requirement, as articulated in recent cases, cannot coexist with the acceptance of (injury-free) applications to register or claim a legal right that lie at the heart of the historical practice of noncontentious jurisdiction. The first courts agreeing to naturalize aliens (which federal courts have done since 1790) could not have been applying a thoroughgoing injury-in-fact requirement as a condition of entering the relief sought. It would therefore seem to follow that, in the early Republic, the injury-in-fact requirement was not viewed as an immutable limitation on the power of the federal courts. Indeed, the idea appears to have entered the

102. *Vermont Agency*, 529 U.S. at 772–73 (alteration in original) (citations omitted).
103. *See id.* at 773 ("[T]he assignee of a claim has standing to assert the injury in fact suffered by the assignor.").
104. *Id.*

Court's jurisprudence in 1970.[105] Such a latter-day arrival certainly offers no definitive proof against the wisdom of the injury-in-fact construct; it simply raises questions about the Court's claim that standing doctrine derives from the understandings of the Framers or the original meaning of Article III.

B. Noncontentious Jurisdiction and the Adverse-Party Rule

Unlike the injury-in-fact requirement, the adverse-party requirement enjoys a measure of support in the history of antebellum American litigation. It arose originally as a limit on the use of feigned cases, a procedure by which two parties with a genuine disagreement about the law (and a genuine interest in the outcome) manufactured a dispute to procure the equivalent of a modern-day declaratory judgment. The Court first articulated these limits in *Lord v. Veazie*,[106] approving generally of the use of feigned cases to secure declaratory relief but roundly criticizing the parties for having manufactured a dispute to obtain a decree for use against an unrepresented third party.[107] The solution, according to the Court, was to limit the use of the device to matters involving a "real and substantial controversy between those who appear as adverse parties to the suit."[108] Parties who feigned cases for selfish or collusive purposes—that is, those who lacked genuine adverse interests—were subject to contempt sanctions.[109]

Justice Brandeis articulated a similar concern with feigned cases after recognizing that corporate parties in the *Lochner* Era had contrived disputes over the constitutionality of state and federal law in order to procure declarations of unconstitutionality.[110] Often, the suits in question were

105. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.").

106. 49 U.S. (8 How.) 251 (1850).

107. *See id.* at 255 (describing the use of a feigned case for proper law-clarification purposes as "approved and encouraged" to facilitate the "administration of justice"). Gradually, as declaratory judgments came to be accepted in "cases of actual controversy" between the parties, 28 U.S.C. § 2201 (2012), the feigned case slipped into desuetude. Today, the parties to a genuine disagreement about the legal rules applicable to their circumstances may secure declaratory relief and have little reason to feign a dispute. *See* Pfander & Birk, *supra* note 16, at 1438.

108. *Lord*, 49 U.S. at 255.

109. *See id.*

110. On the use of the adverse-party requirement to limit judicial review to constitutional cases in which the parties joined issue on the question at hand, see *Muskrat v. United States*, 219 U.S. 346 (1911), where the Court refuses to adjudicate a challenge to the federal government's distribution of property to members of the Native American tribe on the ground that the

structured as competing claims by corporate insiders, and failed to name or notify the government officials who were responsible for defending the laws in question from constitutional attack.[111] It was in this context that Brandeis issued his famous proclamation in support of genuinely adversarial proceedings:

> 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. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."[112]

Brandeis's argument against contrived tests of constitutionality proved quite influential. Not only does the adverse-party rule continue to inform constitutional adjudication, but one year after Brandeis wrote, Congress adopted legislation requiring notice to the government anytime private litigation draws into question the constitutionality of state or federal law.[113]

The embrace of the adverse-party requirement reflects deeply held ideas about the legitimacy of judicial review and the importance of adverse presentations to frame the issues for decision. As for legitimacy, the Court's iconic defense of judicial review in *Marbury v. Madison*[114] turned on the Court's claim that such review was essential to enable it to decide a litigated

government held no interest adverse to the claimants. Also see *Pennsylvania v. West Virginia*, 262 U.S. 553, 605–23 (1923) (Brandeis, J., dissenting).

111. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring) (noting a reluctance to allow constitutional challenges by way of stockholder's suit); *cf.* Smith v. Kan. City Title & Tr. Co., 255 U.S. 180, 199–202 (1921) (upholding jurisdiction over private suit to block corporate investment and reaching the merits of challenge to constitutionality of congressional authority). On the use of derivative suits by an out-of-state shareholder to procure access to federal court on the basis of diversity, see John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 266–71 (1981), which discusses *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855).

112. *Ashwander*, 297 U.S. at 346 (quoting Chi. & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

113. *See* Act of Aug. 24, 1937, Pub. L. No. 75-352, § 1, 50 Stat. 751, 751 (1937) (codified as amended at 28 U.S.C. § 2403). For background on the adoption of the statute, see Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65 (1940). Also see Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 HARV. L. REV. 319 (1951).

114. 5 U.S. (1 Cranch) 137 (1803).

dispute.[115] As for the framing of issues, the Court has often reminded us that it performs its function of law-exposition best when the parties to the dispute have the concretely adverse interests necessary to encourage them to make effective opposing arguments.[116] One can certainly raise questions about the degree to which the Court's current management of its (discretionary) appellate docket always conforms to the dispute-resolution (as opposed to the norm-articulation) ideal.[117] But most matters on which the Court opines feature nominal, and often genuinely antagonistic, opponents. One recent case with nominal opposition, that between the United States and Edith Windsor, occasioned a dissent from Justice Scalia, who would have dismissed the proceeding for want of the adverse parties that he understood Article III to require.[118]

The tradition of noncontentious proceedings, however, casts doubt on the view that Article III imposes an inflexible adverse-party requirement that applies to all matters brought before the federal courts. Indeed, in upholding the case-like quality of a nonadverse naturalization petition, Justice Brandeis placed a good deal of emphasis on history and tradition: "The constitutionality of this exercise of jurisdiction has never been questioned. If the proceeding were not a case or controversy within the meaning of Art. III, § 2, this delegation of power upon the courts would have been invalid."[119]

While Justice Brandeis mentioned in passing the possibility that the United States could appear to contest any particular naturalization proceeding, he did not suggest that such an appearance was necessary to permit the proceeding to go forward.[120] Instead, he emphasized the obligation of the court: to

115. *See id.* at 178–80.

116. *See* Poe v. Ullman, 367 U.S. 497, 503 (1961) ("[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed . . . ."); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 469–75 (2008).

117. *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 707–08 (2012) ("[T]he [Supreme] Court still disclaims any freestanding authority to pronounce on issues of constitutional law. . . . A live controversy of some kind must still exist."); *cf.* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1733–35 (2000).

118. *See* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (invalidating the Defense of Marriage Act despite the parties' agreement as to the statute's invalidity); *cf. id.* at 2701 (Scalia, J., dissenting) ("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." (citation omitted)).

119. Tutun v. United States, 270 U.S. 568, 576 (1926).

120. *See id.* at 577.

conduct open proceedings, to examine the petitioner and witnesses under oath, and to enter a judgment. Plainly, then, he expected the court to perform the searching inquiry that we associate with inquisitorial proceedings.

Justice Story said much the same thing in explaining the nature of prize litigation, an offshoot of seagoing warfare in the nineteenth century.[121] During the War of 1812, Congress encouraged Americans sailors to act as privateers by authorizing them to capture ships or prizes owned by British interests with a view toward disrupting the enemy's seagoing commerce.[122] Once a privateer had captured a prize, it was sailed to port for an adjudication. The action began with a libel, filed with the federal district court, which occasioned the seizure of the vessel and notice by publication of the pendency of the proceeding. As soon as the prize arrived in port (and often before any libel was filed), the court's commissioners collected the ship's documents and the crew's answers to a set of standard interrogatories and lodged them with the court. If, on the basis of these written submissions, the court found good prize (in other words, that the ship was owned by British interests or engaged in British commerce), it would so decree.[123] That empowered the marshal to conduct a sale of the vessel and to distribute the proceeds to various interested parties.[124] While it was theoretically possible that an opponent would appear, in many instances the claim of prize was factually sound and no one would appear to contest the matter.[125] Nonetheless, the district court had the power to decree in uncontested matters and its judgment was binding.[126]

Justice Story understood that the procedure used in prize litigation had its roots in civil law and did not rely on the forms and modes of

121. Justice Story was a close student of prize litigation, presiding over many of the issues that arose in New England as the circuit justice for that region and writing the rules of prize litigation that prevailed in the district courts there. *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 100 & n.86, 408 (1985). Justice Story also reportedly ghostwrote a note on prize practice that appeared in Henry Wheaton's first volume of reports. *See* Kevin Arlyck, Forged by War: The Federal Courts and Foreign Affairs in the Age of Revolution 11 n.13, 239 (Sept. 2014) (unpublished Ph.D dissertation, New York University) (on file with author) (attributing to Justice Story the practice note in Wheaton's reports, *On the Practice in Prize Causes*, *in* HENRY WHEATON, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES app. at 494 (Frederick C. Blightly ed., 4th ed. 1883)).

122. *See* Arlyck, *supra* note 121, at 234 (describing the declaration of war and the authorization to issue commissions to privateers).

123. For an account of prize litigation during the War of 1812, see *id.* at 260–66.

124. On the distribution of proceeds, see *id.* at 258–59.

125. *See id.* at 261 (reporting based on archival research that in many instances "libels filed against prizes of war went unopposed").

126. *See* HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 274–76 (1815).

practice associated with the common law.[127] Indeed, he described prize proceedings as "modelled upon the civil law" and indicated that they could not be "more unlike than those in the Courts of common law."[128] Accordingly, Story explained that it was simply not necessary "that the adverse parties should be before the court" in a prize proceeding.[129] Party adverseness was unnecessary because the court itself acted as the "general guardian of all interests which are brought to its notice."[130] One can scarcely find a clearer articulation of the inquisitorial role of a federal court in hearing uncontested matters in the exercise of its noncontentious jurisdiction or a clearer refutation of the idea that Article III inflexibly demands adversary presentations.

C. Noncontentious Jurisdiction and the Meaning of Cases and Controversies

One final point should be made about the Court's handling of the so-called "case-or-controversy" requirement. The Court has repeatedly linked its standing and adverse-party doctrines to Article III's textual reference to "cases" and "controversies," and it has tended to equate the two terms in defining judicial power by reference to historical practice. A representative sample appears in Justice Scalia's opinion in *Vermont Agency of Natural Resources v. United States* ex rel. *Stevens*:[131] "That history is particularly relevant to the constitutional standing inquiry since, as we have said elsewhere, Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"[132] Scalia here echoed Justice Frankfurter's view that "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they

127. On Justice Story's role in prize litigation during the War of 1812, see Arlyck, *supra* note 121, at 232–42.

128. *See id.* at 265 n.81 (quoting Justice Story's opinion in *The Schooner Adeline*, 13 U.S. (9 Cranch) 244, 284 (1815)).

129. Arlyck, *supra* note 121, at 265 (quoting Story's notes on practice in prize cases). Indeed, Arlyck finds that "prize proceedings were largely nonadversarial; that is, in most cases the only parties to the proceedings were the captors seeking condemnation of the vessel and cargo as good prize." *Id.* at 264. Arlyck attributes the lack of adverse-party presentations to the simple notion that the owners had nothing to litigate. *Id.*

130. *See id.* at 265 (quoting Story's account of prize procedure); *see also id.* at 265 n.81 (quoting Justice Story's opinion in *The Schooner Adeline*, 13 U.S. at 284).

131. 529 U.S. 765 (2000).

132. *Id.* at 774 (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 102 (1998)).

arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'"[133]

The history of noncontentious jurisdiction casts doubt on the Court's easy assumption that the terms "cases" and "controversies" mean much the same thing and impose an equally demanding injury-in-fact and adverse-party requirement on all matters brought before the Article III courts. In truth, the history of federal practice suggests a sharp distinction in the meaning of the terms. The examples of original noncontentious jurisdiction from the nineteenth century—naturalization proceedings, prize cases, bankruptcy petitions, warrant applications—all arose under federal law and thus constituted "cases" within the meaning of Article III. When, by contrast, an original application for the exercise of noncontentious jurisdiction was rooted in state law, the federal courts refused to hear the matter. Consider, for example, the so-called probate exception to federal jurisdiction, which forecloses the federal courts from hearing certain probate matters.[134] One can best explain that exception as reflecting the Court's conclusion that matters governed by state law were cognizable in federal court only where a "controversy" or dispute had arisen between citizens of different states.[135] Many probate proceedings begin with an uncontested application for the admission of a will to probate in the common form and thus do not present a controversy within the meaning of Article III.[136]

The suggestion that Article III "cases" embrace original applications for the exercise of noncontentious jurisdiction in matters governed by federal law and that "controversies" encompass only genuine disputes between properly aligned adversaries enjoys surprisingly strong support in the decisional law of the nineteenth century. Consider first Chief Justice Marshall's iconic account in *Osborn v. Bank of the United States*[137] of the meaning of the term "cases" arising under federal law in Article III:

> [Article III's grant of jurisdiction over federal question cases] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that

133. Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).
134. For the Court's most recent attempt to explain the contours of the probate exception, see *Marshall v. Marshall*, 547 U.S. 293 (2006).
135. For a more detailed account of the inability of the federal courts to take cognizance of uncontested state law probate matters, see Pfander & Downey, *supra* note 44.
136. *See id.* at 1538–39; *see also* Gaines v. Fuentes 92 U.S. 10, 21–22 (1875) (describing probate matters as uncontested in "majority of instances").
137. 22 U.S. (9 Wheat.) 738 (1824).

> the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.[138]

Here, Marshall phrases the definition of cases in terms of a claim of right submitted in the form prescribed by law (much the same definition that Brandeis put forward a century later in *Tutun*). He does not limit the exercise of power to parties who have suffered an injury in fact and he does not specify the need for the joinder of an adverse party. Marshall had, after all, presided over challenges to naturalization matters himself, ruling that such judgments were binding judicial decrees not subject to collateral attack.[139]

On the other hand, the Court was unwilling to entertain original noncontentious matters rooted in state law. (Obviously, ancillary noncontentious proceedings governed by state law often take place in the shadow of an adverse-party dispute.) Consider the explanation of the probate exception in *Gaines v. Fuentes*,[140] which arose from the attempted removal to federal court of a state suit concerning the validity of a Louisiana landowner's will. In upholding removal, the Court explained that:

> The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary.
>
> . . . .

138. *Id.* at 819. Chief Justice Marshall's definitions of a "suit" in *Weston v. City Council*, 27 U.S. 449, 464 (1829), which defines suit as "any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him," and in *Cohens v. Virginia*, 19 U.S. (1 Wheat.) 264, 408 (1821), which defines suits as "all cases were [sic] the party suing claims to obtain something to which he has a right," echo these elements. Justice Story's *Commentaries* adopts the same formulation: "A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws, or treaties of the United States, is submitted to the courts by a party who asserts his rights in the form prescribed by law." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1646, at 424 (2d ed. 1851).

139. *See, e.g.*, Spratt v. Spratt, 29 U.S. (4 Pet.) 393, 408 (1830) (treating the naturalization record of James Spratt as conclusive); *see also* Stark v. Chesapeake Ins. Co., 11 U.S. (7 Cranch) 420 (1813) (viewing the judgment of naturalization by the court of record as conclusive); Campbell v. Gordon, 10 U.S. (6 Cranch) 176 (1810) (treating the naturalization record as conclusive); McCarthy v. Marsh, 5 N.Y. 263 (1851) (treating the naturalization record as conclusive).

140. 92 U.S. 10.

> There are, it is true, in several decisions of this court, expressions of opinion that the Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists. . . . [B]ut whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.[141]

Other cases from the period echo this idea that it takes a controversy to ground federal jurisdiction over matters rooted in state probate law.[142]

It thus appears that nineteenth-century jurists distinguished, for adverse-party purposes, between "cases" in Article III (those arising under the constitution, laws, and treaties of the United States and those of admiralty and maritime jurisdiction) and "controversies" between parties specified in Article III. As for cases, nineteenth-century opinion held that a simple application to a federal court to assert a federal claim of right in the forms prescribed by law was all that was required. This formulation was broad enough to encompass both disputes between opposing parties (contentious jurisdiction) and original applications for noncontentious relief, such as petitions for naturalization. Parties invoking federal judicial power over "controversies," by contrast, were seemingly required to present the court with a claim against one of the opposing parties specified in Article III.

The distinctive meaning of the terms fell from view in the twentieth century, as the Court came to equate cases and controversies in the definition of judicial power and to assume that party opposition was essential to both heads of federal jurisdiction. The equation apparently first occurred in an opinion by Justice Stephen Field, riding circuit in California. Justice Field's account follows:

141. *Id.* at 18, 21–22.

142. *See, e.g.*, Ellis v. Davis, 109 U.S. 485, 497 (1883) (linking "[j]urisdiction as to wills, and their probate as such" to the necessity "to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties").

> The judicial article of the constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive that [sic] the latter, and includes only suits of a civil nature. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. *The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication*.[143]

Justice Field first suggested the broad similarity of the terms "cases" and "controversies." Then, after restating and expanding Marshall's definition, Field argued that the term "case" must imply the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.[144]

Modern restatements of the limits of Article III judicial power commonly equate "cases" and "controversies" in speaking of a one-size-fits-all "case-or-controversy" requirement.[145] But such a conflation of the terms fails to acknowledge the historical point that the terms meant something quite different to their early exponents: While a "controversy" connotes a live dispute between adversaries aligned in accordance with Article III, a "case" was thought to encompass a broader array of judicial proceedings. In particular, as Marshall and Story understood, parties asserting a claim of right under federal law were bringing "cases" within the meaning of Article III, even where they sought to register an interest and did not seek redress from an opponent.

143. *In re* Pac. Ry. Comm'n, 32 F. 241, 255 (C.C.N.D. Cal. 1887) (emphasis added) (citations omitted).

144. By using the idea of a controversy to transform Marshall's definition of a "case" into one that requires the existence of an adverse-party dispute, Justice Field thus anticipated Justice Scalia's view in *United States v. Windsor*, where Justice Scalia argued: "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." *Windsor*, 133 S. Ct. 2675, 2701 (Scalia, J., dissenting) (citation omitted)). Justice Field perceived no such dispute in the matter before him; a federal commission was conducting an investigation for regulatory purposes and had not brought suit in federal court against the Pacific Railway. *In re Pacific Railway*, 32 F. at 249–50.

145. *See supra* notes 3–6 and accompanying text.

III. TEXT AND HISTORY IN ARTICLE III SCHOLARSHIP AND LAW

One can identify at least three vantage points from which to evaluate the implications of noncontentious jurisdiction. First, noncontentious jurisdiction promises to inform our understanding of Article III and the world of adjudication that the Framers inhabited. One might refer to this vantage point as fundamentally historical, but the historical understanding might give rise to any number of historical claims about the law of standing.[146] Second, noncontentious jurisdiction tends to cast doubt on the Court's claim that modern elements of standing law stretch back in an unbroken line to the founding. It does not seem immediately obvious how the Court can take account of the history of noncontentious jurisdiction without making some adjustments in its justification of current standing law. Third, the challenge of fully incorporating noncontentious jurisdiction into our understanding of federal judicial practice poses a methodological puzzle for those working to articulate a role for history in constitutional interpretation and in the field of federal courts law.[147] This Part offers a few brief remarks from each of these vantage points.

A. Article III Histories

Article III histories understandably emphasize English common law and the structure of the English court system.[148] But the Framers' conception of the judicial role was surely shaped by a much broader collection of institutional models and jurisprudential traditions. Right on the face of the judicial article, one finds two relatively clear-cut departures from the English model. Article III proclaims that there shall be but "one supreme Court" and thus distinguishes the federal judiciary from an English model in which four coordinate superior courts (King's Bench, Common Pleas, Equity, and Exchequer) and two lesser court systems (admiralty and ecclesiastical courts) jockeyed for business.[149] Further, Article III proclaims that the power of the federal

146. On the many ways we use history to argue about constitutional interpretation, see generally Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015), which catalogues modes of historical argument.

147. *See, e.g.*, *id.*

148. *See, e.g.*, Woolhandler & Nelson, *supra* note 12, at 693–94 & nn.13, 15 (citing Blackstone for understanding of Article III); *see also* sources cited *supra* notes 7–8 (citing English prerogative writ practice as basis for United States' mandamus practice).

149. *See* JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 38–40 (2009).

judiciary, with its "one" supreme court, was to extend to "cases" of law and equity (thus abandoning the sharp distinction between law and equity that characterized both English structure and English practice[150]) and to cases of admiralty and maritime jurisdiction. Evidently, then, the Framers expected the Supreme Court to articulate a unified body of federal law that would reach broadly across legal categories and would encompass both common-law and civil-law proceedings. Hence the comments of Edmund Randolph, a member of the Philadelphia convention's committee of detail and the nation's first attorney general, that "a federal judge in the early Republic had to be not only 'a master of the common law in all its divisions' but also a 'civilian.'"[151]

It may be that the Framers borrowed their notion of a single supreme court not from England but from Scotland, where the Court of Session served as the head of the judiciary and exercised broad power to oversee the work of inferior courts and unify the law. The Scottish Court of Session also enjoyed a measure of constitutional independence (as reflected in the Acts of Union of 1707[152]) and was authorized to hear cases in law and equity.[153] Scottish courts, like their mainland European counterparts, followed Romano-canonical procedure and entertained petitions for relief of a noncontentious character.[154] Evidence that noncontentious jurisdiction appeared on the dockets of the federal courts and was embraced in the early Republic as an appropriate subject of federal judicial power further enriches and complicates the early history of Article III. To be sure, English common law, with its emphasis on adversarial presentations and jury trials, played an important role in shaping early federal dockets. But on the equity and admiralty side of the federal docket, judges in the early Republic played a more active role both in making findings of fact (without the participation of a jury) and in taking on inquisitorial obligations in connection with noncontentious submissions. It does no disservice to Blackstone and English common law to recognize that Scots law and the

150. On the debates that led to the joinder of law and equity in Article III, see Pfander & Birk, *supra* note 46, at 1667–69, which describes the Scots backdrop to the joinder of law and equity in Article III.

151. Pfander & Birk, *supra* note 16, at 1416 (quoting Thomas H. Lee, The Civil Law Tradition in American Constitutional Jurisprudence (Spring 2013) (unpublished manuscript), http://www.law.harvard.edu/faculty/faculty-workshops/lee.faculty.workshop.spring2013.pdf [https://perma.cc/Q6EQ-HEDN]).

152. *See* Pfander & Birk, *supra* note 46, at 1619. The Acts of Union of 1707 collectively refers to the Union with Scotland Act, 1706, 6 Ann., c. 11, art. XIX (Eng.), the and Union with England Act, 1707, c. 7, art. XIX (Scot.).

153. *See* Pfander & Birk, *supra* note 46, at 1665–68.

154. Pfander & Birk, *supra* note 16, at 1406.

civilians also helped to provide legal models and materials on which the Framers were to draw.

Against this background, one can question Justice Frankfurter's decision to privilege the courts "at Westminster" in defining the forms of traditional judicial practice that would have informed the Framers' understanding of federal judicial power. Frankfurter's figure of speech ruled out the English courts of admiralty and ecclesiastical jurisdiction, which sat at Doctor's Commons and were presided over by civilians.[155] Frankfurter's dictum also excluded the Scottish Court of Session, which sat at Parliament House in Edinburgh.[156] This may have been inadvertent. But there is at least some reason to believe that the choice of the English courts at Westminster may have been designed to rule out some features of Scots practice that progressives like Brandeis and Frankfurter found disagreeable. The Court of Session, after all, had long entertained declaratory judgment proceedings, something the English failed to recognize through much of the nineteenth century.[157] The Supreme Court called attention to this disparity in *Cross v. De Valle*,[158] observing that an English "chancellor will not maintain a bill *merely to declare future rights*" and adding that the "Scotch tribunals pass on such questions by '*declarator*,' but the English courts have never assumed such power."[159]

When Justice Brandeis commented on this history in *Willing v. Chicago Auditorium Association*,[160] he chose to cite *Cross* selectively. Expressing doubt that Article III permitted the federal courts to entertain suits for declaratory relief, Brandeis pointed to early equity practice:

> The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so. Resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution and for more than half a century thereafter.[161]

155. G.J. FOSTER, DOCTORS' COMMONS: ITS COURTS AND REGISTRIES, WITH A TREATISE ON PROBATE COURT BUSINESS 6, 11 (1868).
156. *See* JOHN FINLAY, THE COMMUNITY OF THE COLLEGE OF JUSTICE: EDINBURGH AND THE COURT OF SESSION, 1687–1808, at 11–13 (2012) (describing the Court's work at Parliament House in Edinburgh).
157. *See* Pfander, *supra* note 46, at 1513 n.89.
158. 68 U.S. (1 Wall.) 5 (1863).
159. *Id.* at 14–15.
160. 277 U.S. 274 (1928).
161. *Id.* at 289–90 (citations omitted) (citing *Cross*, 68 U.S. at 1, 14–16).

In this striking passage, Justice Brandeis neglected to acknowledge that Scots practice encompassed declaratory proceedings and offered a potential answer to the very constitutional doubts he articulated. While the Court later disavowed his constitutional doubts,[162] Justice Brandeis's emphasis on English practice, together with that of Justice Frankfurter, has continued to obscure the wide range of judicial traditions that may have informed early conceptions of the judicial power in Article III.[163]

B. The Continuity Thesis

The Supreme Court has largely embraced Justice Frankfurter's backward-looking, tradition-based test for justiciability. Indeed, the Court often proceeds on the assumption that the elements of its current standing law stretch in an unbroken line back to the founding period. One recent example of this insistence on continuity with the past, which we might label the Court's "continuity thesis," appears in an opinion by Chief Justice Roberts. In the course of rejecting the idea that federal judicial power might embrace practices that first cropped up decades after the founding, the Chief Justice seemed to deny any capacity for evolutionary change in the diet of the federal courts.[164] Dissenting in *Sprint Communications Co. v. APCC Services, Inc.*[165] from a decision that upheld the standing of an assignee, the Chief Justice explained that the "belated innovations" of the latter half of the nineteenth century "come too late to provide insight into the meaning of Article III."[166]

This view of modern Article III limits as firmly linked to an unbroken historical past puts the Court in a difficult position. Many scholars believe that the "case-or-controversy" doctrine itself arrived rather late on the scene, first

162. As the Court later articulated:

> Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937)

163. Justice Frankfurter later went to great lengths to ensure that the Declaratory Judgment Act, 28 U.S.C. § 2201–2202 (2012), did not broaden the jurisdiction of the federal courts. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673–74 (1950) (calling for jurisdictional analysis not of the well-pleaded complaint for a declaratory judgment, but of that for a coercive claim).

164. *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting).

165 554 U.S. 269.

166. *Id.*

cropping up in the decisional law of the twentieth century.[167] Only later were the elements of the doctrine infused with constitutional status and placed beyond congressional control.[168] From this vantage point, one might thus characterize the Court's standing law as itself the product of what Chief Justice Roberts called "belated innovations."

Apart from historical doubts, scholars have questioned the Court's assumption that the terms "cases" and "controversies" help to define the proper work of the Article III courts. Then a circuit judge, Scalia himself gave voice to such doubts, explaining that the federal courts used the Article III reference to cases and controversies as a way to make standing part of American constitutional law "(for want of a better vehicle)"[169] This formulation was, Scalia candidly observed, not "linguistically inevitable," but he nonetheless defended it as an "accurate description of the sort of business courts had traditionally entertained."[170] In this telling, the case-or-controversy language provides a convenient textual hook on which the Court has hung the law of standing, much the way it hangs other doctrines on the generalities of due process of law.[171]

The Court's devotion to history in defining the role of the federal courts can play an important and disruptive role in the Court's standing jurisprudence. Litigants pursuing *qui tam* litigation under the federal False Claims Act have a concrete interest in the outcome of the litigation in that they

167. *See* Pushaw, *supra* note 41, at 452–57 (tracing the rise of standing and other justiciability doctrines in the twentieth century); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 350 (1995) (tracing justiciability limits to the New Deal period and the emergence of standing doctrine to developments during the Burger and Rehnquist Courts); Winter, *supra* note 9, at 1375–76, 1450–52 (describing a 1922 decision by Justice Brandeis as the first modern standing decision but tracing the birth of standing to the subsequent work of Justice Frankfurter in such cases as *Coleman v. Miller*, 307 U.S. 433 (1939), and *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951)); *see also* Winter, *supra* note 9, at 1455–57 (describing the rise of standing law as the result of a concerted effort by liberal justices to avoid substantive due process claims). For some, the latter-day arrival of modern standing law renders its "eighteenth century British pedigree (or lack thereof) . . . largely beside the point." Re, *supra* note 4, at 1220.

168. *See* Pushaw, *supra* note 41, at 452–53; Re, *supra* note 4, at 1219–20; Stearns, *supra* note 167, at 385–86; Winter, *supra* note 9, at 1451–52.

169. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

170. *Id.*

171. Consider as examples the Court's restriction on the judicial and legislative jurisdiction of the States. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879–81, 886–87 (2011) (holding that due process forbids New Jersey from adjudicating personal injury claim that arose in New Jersey); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822–23 (1985) (holding that due process forbids Kansas from applying its law to those members of a nationwide class action whose claims had no affiliating ties to Kansas).

will receive, if successful, a statutorily authorized bounty. But as the Court was quick to observe in *Vermont Agency of Natural Resources v. United States* ex rel. *Stevens*,[172] such interests do not arise from the injuries in fact needed to establish standing:

> The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. 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.[173]

Confronted by the tension between the undoubted historical pedigree of *qui tam* litigation and its own injury-in-fact jurisprudence, the Court adopted a straddle. It treated the history as "well nigh conclusive" of the propriety of such litigation and dodged the injury-in-fact problem by treating the relator as the assignee of the claim of the federal government, which could surely allege injury in fact.[174] Importantly, however, the Court indicated that history alone could not displace the injury-in-fact requirement.[175]

To the extent one regards the pedigree of noncontentious jurisdiction as similarly "conclusive," the Court may face difficulties in maintaining the view that Article III inflexibly demands both injuries in fact and adverse parties. To be sure, the Court might attempt to resolve the adverse-party problem by characterizing original noncontentious applications as necessarily involving potential adversaries.[176] (Ancillary forms of noncontentious jurisdiction, occurring in the shadow of adverse interests, would appear more readily to entail potential adversaries.) But such a doctrinal workaround does not fit well with other elements of the Court's jurisprudence. Potential adversaries often fail to materialize: Prize litigation in the nineteenth century was conducted in the absence of adverse parties, and most naturalization petitions failed to attract opposition from the federal government. In the absence of actual adversaries

172. 529 U.S. 765 (2000).
173. *Id.* at 772–73 (footnotes and citations omitted).
174. *See id.* at 777, 771 (treating government's injury as assigned to relator).
175. *Id.* at 772 (explaining that an interest unrelated to an injury cannot confer standing); *id.* at 777–78 (explaining that the history of *qui tam* litigation combined with the presence of an injury to the government placed the issue beyond doubt).
176. For arguments to this effect, see Woolhandler, *supra* note 83, at 1032–35.

(as opposed to potentially adverse interests[177]), one cannot easily harmonize noncontentious jurisdiction with the Court's statements on the requirements of Article III—for example, that a "threatened injury must be *certainly impending*" and "[a]llegations of *possible* future injury" will not suffice.[178] If these proclamations hold, then hypothetical future adverseness cannot supply justiciability in a pending case any more than the prospect of hypothetical future injury can confer standing and ripeness in a case where they are lacking.[179]

In any event, the reliance on potential adversaries fundamentally misunderstands the nature of noncontentious jurisdiction and the instrumental justification for the adverse-party rule.[180] As Justice Story explained, prize litigation proceeded on an in rem basis and depended not on the presence of adverse parties but on the willingness of the admiralty judge to conduct the necessary inquisition.[181] Potential adverseness on the part of those who do not actually appear in the proceeding will do little to improve the quality of the judicial inquiry. And that brings us to the instrumental point: Justice Brandeis and Justice Frankfurter insisted on adverse parties in litigation to challenge the constitutionality of progressive legislation in order to improve the quality of the record and to ensure that the government was available to oppose the claims.[182] The purpose was to improve the framework for constitutional litigation and to prevent the use of feigned cases as the vehicle for invalidation.[183] It does not appear immediately obvious how a potential

177. For the suggestion that Article III requires not adverse-party contestation in every case but only adverse interests, see *id.* But note James E. Pfander & Daniel Birk, *Adverse Interests and Article III: A Reply*, 111 NW. U. L. REV. 1067, 1085–95 (2017), which disputes the claim that an adverse interest construct better explains the text and history of Article III and the noncontentious practices that arose under its terms.

178. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990), *quoted by* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013).

179. An intriguing opinion from the Office of Legal Counsel (OLC), rendered in connection with the 1978 adoption of a FISA warrant process, points to the same conclusion. *See* Memorandum from John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel, to Hon. Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978), *reprinted in Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 26–31 (1978) (arguing that the prospect of adversity cannot supply the sort of live dispute that justiciability doctrine requires). The OLC nonetheless concluded that FISA warrants were proper subjects for judicial cognizance by analogy to warrants issued in other settings. *Id.*

180. *See* Pfander & Birk, *supra* note 177, at 1075, 1090–91, 1093–94.

181. *See* Pfander & Birk, *supra* note 16, at 1420 n.349 (quoting Story's view that adverse parties were unnecessary in a prize proceeding because the court acts as the "guardian of all interests").

182. *See id.* at 1437.

183. *See id.* at 1436–37.

adversary can contribute to these instrumental goals. While one can imagine ways to harmonize noncontentious jurisdiction with an Article III preference for adverse parties in constitutional litigation, those solutions will necessarily reject the notion that the adverse-party rule applies inflexibly to all matters that come before the federal courts.[184]

Apart from the tension with the adverse-party rule, proceedings in noncontentious jurisdiction do not seek to redress an injury in fact and would thus appear to run afoul of that bedrock element of the Court's standing jurisprudence. Some petitions (such as those in support of letters rogatory and FISA warrants) merely seek to investigate matters through the issuance of a judicial decree that will authorize the collection of documents, testimony, or foreign intelligence. Some petitions, such as those seeking naturalization, merely sought to register a claim of right under the law as defined. While the petitioners can claim a legal right to the judicial decree (assuming they make the requisite factual showing), they cannot fairly claim that their petition seeks damages or injunctive relief to right a wrong of some sort. Noncontentious claimants thus resemble the False Claim Act bounty hunters in *Vermont Agency* whose acknowledged legal interests were, according to Justice Scalia, incapable of satisfying the injury-in-fact requirement. As Justice Scalia explained, in words that seem equally applicable to noncontentious petitioners, "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."[185] If the Court chooses to honor precedents that allow individuals to pursue noncontentious matters in federal court, it must recognize that its injury-in-fact rule does not apply inflexibly to all cases within federal judicial power. That, in turn, may require the Court to offer a more candid account of history's role.

C. Toward a More Candid Use of History

Reviewing the lessons of this Article so far in terms of originalist discourse, we might conclude that the Court has made an originalist claim about the meaning of Article III's reference to "cases" and "controversies."

184. One solution would be to distinguish the factual nature of the typical noncontentious inquiry from the constitutional issues presented in matters of contentious jurisdiction and declare the adverse-party rule applicable only to the latter. For suggestions in this vein, see Pfander & Birk, *supra* note 16, at 1454–55.

185. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000). Emphasizing the term "interest," one might try to argue that aliens, for example, have an inchoate interest in naturalized citizenship that predates the petition's submission. But that would be true of *qui tam* relators as well.

These terms, the Court has said, should be interpreted to limit federal courts to the adjudication of claims brought by plaintiffs injured by the actions of adverse parties. But this original meaning claim seems unusually weak; the term "controversy" implies a dispute between adversaries, to be sure, but as we have seen, the broader term "case" likely encompassed uncontested applications to register or claim a right under federal law. To the extent the terms were ambiguous, moreover, early practice seems to have settled on an interpretation of the term "case" that encompassed such uncontested proceedings as pension applications, naturalization petitions, warrant proceedings, and prerogative writ applications.[186] Certainly early definitions of the term "case," propounded by Chief Justice Marshall and Justice Story, focused on the assertion of claims of right and thus encompassed both the contentious and noncontentious proceedings of the day.

The absence of originalist support for viewing Article III as imposing firm, across-the-board injury-in-fact and adverse-party requirements certainly offers no definitive proof against the selective use of such constructs. The federal courts often construct a body of doctrine on the basis of considerations other than those relevant to a determination of the original meaning.[187] Once one enters what many call the "construction zone,"[188] a broader range of arguments becomes relevant to the task of constitutional adjudication. One can imagine prudential arguments (like those articulated by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*[189]) against the use of feigned proceedings to challenge federal law on constitutional grounds. One can also articulate concerns with laws that authorize citizens to litigate generalized grievances. Indeed, scholars have questioned the normative wisdom of citizen suit litigation, expressing the worry that those who have suffered no real injury may dispose of the rights of others who have a more concrete stake in the

186. On the liquidation of ambiguous meaning through practice, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 547–53 (2003), which argues that ambiguities in meaning may be clarified or fixed over time.

187. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952) (scope of executive power); Whitney v. California, 274 U.S. 357 (1927) (scope of First Amendment's free speech protection). *See generally* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013) (collecting examples of such construction); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456–58 (2013) (also collecting examples of such construction).

188. *See* Solum, *supra* note 187, at 458, 469–72 (explaining that construction occurs where original public meaning fails to supply answers to constitutional questions).

189. 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

matter.[190] Once these sorts of concerns become embedded in a body of law, stare decisis will often counsel against their too-ready displacement on the basis of originalist historical arguments.[191] In this familiar sense, attention to the justifications that informed the rise of such doctrines may be as important to the construction of workable doctrine as the history that surrounds Article III's adoption and early implementation.[192]

With the more candid use of history, in short, the Court might admit that federal cases do not invariably require the injured plaintiffs and adverse parties upon which it has come to insist. By distinguishing the forms of noncontentious jurisdiction from contentious jurisdiction (where such justiciability constructs were developed and continue to apply), the Court might defend much of its handiwork, albeit on less sweeping terms. But the prospects for a candid discussion of such issues seem relatively remote.[193] The Court and leading exponents of Article III limits on judicial power seem to find it impossible to accept a conception of the case-or-controversy requirement as a latter-day judicial invention rather than an element of the Constitution's original meaning. The Court's originalist jurists may have too great a stake in the portrait of Article III limits to admit that other factors inform their analysis. After all, the originalist enterprise in Article III operates not to empower the political branches in the face of constitutional silence or ambiguity, but to invalidate certain forms of action, often in contexts Congress has seemingly approved.[194] An admission that the originalist case for Article III limits is less

190. *See, e.g.*, Woolhandler & Nelson, *supra* note 12, at 732–33; Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1699–700 (2007) (arguing that standing serves to protect the right of parties to waive or refrain from asserting their commonly-held rights).

191. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817 (1982).

192. For arguments along these lines, see Balkin, *supra* note 187, at 664–66, which describes the range of historical arguments, in addition to original meaning originalism, that can inform interpretive decisions in the construction zone). Also see Fallon, *supra* note 146, at 1787, which states "[T]he challenge for the courts is to figure out how most sensibly to resolve particular disputes in light of history-based considerations that include prior practice, settled expectations, motivating congressional purposes, and other enactment history."

193. Consider in this vein the Court's failure candidly to address the original meaning of the Eleventh Amendment. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54–56 (1996) (admitting that the text of the Eleventh Amendment addressed only claims brought against states on the basis of diversity, but nonetheless holding that the Amendment barred federal question claims as well).

194. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992); *see also* Summers v. Earth Island Inst., 555 U.S. 488, 495–97 (2009) (concluding, despite the existence of a procedural right conferred by Congress, that the environmental group's members' general practice of regularly visiting national parks was insufficient to warrant standing to challenge a forest service action that facilitated the sale of timber on specific lands).

than clear would open the Court to the very criticisms that originalists often level against proponents of a living Constitution.[195]

Indeed, the Court's turn away from prudential standing doctrines in *Lexmark International, Inc. v. Static Control Components, Inc.*[196] may lead to other important changes.[197] The *Lexmark* Court acknowledged that it had previously characterized as prudential at least three elements of standing law: "[T]he general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[198] But this prudential refusal to exercise jurisdiction that was concededly appropriate under applicable law was said to run afoul of the Court's articulation in other cases of the "virtually unflagging" duty of the federal courts to exercise the jurisdiction that Congress has conferred upon them.[199] Just as the Court has been reluctant to recognize rights to sue that Congress has not created,[200] so now it feels obliged to narrow judge-made abstention and other prudential doctrines that stand in some tension with arguments rooted in legislative primacy. To resolve the tension, the Court recharacterized: Henceforth, the ability of one party to satisfy the "zone of interests" test for standing—the matter at hand in *Lexmark*—would be regarded as an issue of statutory interpretation rather than a matter of prudence.[201] By way of contrast, the Court announced, limits on the assertion of generalized grievances were to be regarded as compelled by Article III, despite earlier decisions that grounded such limits in prudential considerations.[202]

195. For an assessment of the standing jurisprudence of one leading originalist, see James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEGAL STUD. 85 (2017), which addresses Justice Scalia's criticisms of living constitutionalism in light of Justice Scalia's use of history in his approach to standing doctrine.
196. 134 S. Ct. 1377 (2014).
197. *See id.* at 1386–88.
198. *Id.* at 1386 (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004)).
199. *Id.* (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).
200. *See* Cort v. Ash, 422 U.S. 66, 78 (1975) (establishing a narrow four-part test for determining whether Congress has provided a private right of action); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 689–709 (1979) (applying *Cort* factors to find that Title IX implied a private right of action).
201. *See Lexmark*, 134 S. Ct. at 1386–88.
202. *Id.* at 1387 n.3 (announcing that generalized grievances "are barred for constitutional reasons, not 'prudential' ones"). The Court refused to characterize third-party standing issues one way or another. *Id.*

Lexmark reveals much about the Court's discomfort with prudential or judge-made standing doctrines. The decision suggests that courts should measure a party's right to sue only against the authoritative text of the legislation creating the right to sue and the constitutional limits of Article III.[203] While the demise of prudential standing limits as one form of federal common law does not necessarily foreclose the development of a more nuanced approach to Article III, neither does it seem likely to bring about the greater historical and doctrinal candor that would enrich this body of law.

The Court should embrace a broader understanding of the judicial business in which federal courts have traditionally engaged; it should abandon its conception of the adverse-party requirement as an inflexible feature of that tradition; and it should recognize that the injury-in-fact and adverse-party rules do not apply to original applications for relief of a noncontentious nature. Acceptance of these elements of history would complicate the task of defending Article III limits, but the body of law that emerged from such a defense would gain something in return: Surprisingly, such a body of law might, as the next Part demonstrates, itself rest comfortably on historical precursors.

IV. A NEW SYNTHESIS: LITIGABLE INTERESTS AS THE MEASURE OF STANDING

In this Part, the Article proposes to formulate a new, more historically defensible basis for the judicial assessment of standing to sue—one that would focus on whether the plaintiff has a "litigable interest," rather than an injury-in-fact. Borrowed from Woolhandler and Nelson,[204] and adapted in light of historical practice, this Article's construct of a litigable interest would encompass claims by those seeking redress for injuries in fact as well as by those noninjured plaintiffs who assert rights in noncontentious jurisdiction, who assert bounty claims, and who bring suit on behalf of the public in appropriate circumstances. Adoption of this Part's litigable interest construct would enable the Court to relax its across-the-board injury requirement and thereby bring the law of standing into better alignment with the increasingly case-specific state of the doctrine.

In developing its litigable interest test, this Part focuses first on *Spokeo, Inc. v. Robins*[205] and Justice Thomas's familiar distinction between public and private rights. While Justice Thomas correctly identified a disparity in the

203. *See id.* at 1388.
204. *See* Woolhandler & Nelson, *supra* note 12, at 708–09, 716–18, 721, 723.
205. 136 S. Ct. 1540 (2016).

doctrine, he takes a too-narrow view of the historical ability of litigants to mount public or popular actions. His error lies in the assumption that the common-law forms of action exhaust the historical forms of litigation in place at the time of the framing.[206] In the Roman or civil-law tradition—a tradition that informed the development of practice in the courts of equity and admiralty[207]—popular actions were available to interested members of the public without any showing of personal injury.[208] After describing Scottish practice in connection with the so-called *actio popularis*, or popular action, this Part suggests that history offers a straightforward basis for regarding private litigants as having a litigable interest in the enforcement of public rights.

A. The Public-Private Distinction in *Spokeo*

The Court's much-anticipated decision in *Spokeo, Inc. v. Robins* addressed Congress's power to authorize private individuals to pursue so-called "no injury" class actions: suits to recover penalties for noncompliance with federal consumer protection laws. Firms supporting Spokeo, an internet search firm that collects financial and other information on individuals, sought a broad ruling foreclosing such claims (and the class actions they engendered).[209] Consumer groups preferred a ruling upholding the Ninth Circuit's decision that individuals always have standing to pursue claims for violation of a statute that confers rights on them personally.[210] On that broad view, litigants would need only allege a violation of the statute without showing any specific injury to themselves. Scholars took heed: The case raised the prospect that the Court might deploy Article III as a constitutional limit on the power of Congress to create new rights enforceable through private litigation. A strict reading of the injury-in-fact rule might also undermine a variety of claims

206. *Id.* at 1550–51 (Thomas, J., concurring) (emphasizing traditional powers of common-law courts); *cf.* Chayes, *supra* note 7, at 1292–96 (identifying an equitable core in public law litigation).
207. *See infra* Part IV.B.
208. *See infra* Part IV.B.
209. *See, e.g.*, Brief for Petitioner, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339), 2015 WL 4148655; Brief of the Chamber of Commerce of the United States of America and the International Association of Defense Counsel as *Amici Curiae* in Support of Petitioner, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339), 2014 WL 2536508; Brief of the Chamber of Commerce of the United States of America et al. as *Amici Curiae* in Support of Petitioner, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339), 2015 WL 4148650.
210. *See, e.g.*, Brief for *Amici Curiae* Lawyers' Committee for Civil Rights Under Law and National Fair Housing Alliance in Support of Respondent, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339), 2015 WL 5316997; Brief of *Amici Curiae* for Public Citizen, Inc., et al. as Amici Curiae Supporting Respondent, *Spokeo*, 136 S. Ct. 1540, (No. 13-1339), 2015 WL 5316998.

(such as those for trespass and nominal damages) that the common law conventionally allowed litigants to pursue without a showing of harm.[211]

The Court reaffirmed the injury requirement,[212] but did less than was hoped and feared. Emphasizing that injuries must be both particularized (or individual) and concrete, the Court vacated the Ninth Circuit decision on the basis that it had failed to give the concreteness requirement sufficient attention.[213] Violation of a statute, without more, would not necessarily result in any injury to Robins, or to the class he proposed to represent.[214] True, Congress can recognize new rights and authorize individuals to sue for their violation.[215] But Spokeo's publication of an individual's incorrect zip code, for example, would not ordinarily cause any harm and was not a proper subject of federal litigation.[216] The Court held that congressional say-so alone will not suffice; harm must be real ("de facto") as well as legally actionable under the statute.[217] Two justices dissented on the ground that Robins's complaint adequately alleged genuine harm resulting from the publication of false information that might hurt his job prospects.[218]

Writing in concurrence with the majority, Justice Thomas expressed a willingness to rethink the monolithic character of the injury-in-fact requirement.[219] Justice Thomas began as did his colleagues: by reaffirming the centrality of history. Standing doctrine was said to limit the judicial power to matters "of the sort traditionally amenable to, and resolved by, the judicial process."[220] For Justice Thomas these limits derived from "the traditional, fundamental limitations upon the powers of common-law courts."[221] Building on scholarship by Woolhandler and Nelson and that by Andrew Hessick,[222]

211. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280–82 (2008) (describing trespass and nominal damage claims as lacking injuries in fact); *see also* Brief of Restitution and Remedies Scholars as Amici Curiae in Support of Respondent, *Spokeo*, 136 S. Ct. 1540 (No. 13–1339), 2015 WL 5302537 (describing a series of restitutionary claims in which the suit seeks to recover the unjust gain to the defendant without regard to the injury suffered by the plaintiff).
212. *See Spokeo*, 136 S. Ct. at 1548.
213. *See id.* 1550.
214. *See id.* at 1549.
215. *See id.*
216. *Id.* at 1550.
217. *See id.* at 1548–50.
218. *Id.* at 1555–56 (Ginsburg, J., dissenting).
219. *Id.* at 1550 (Thomas, J., concurring).
220. *Id.* (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000)).
221. *Id.* at 1550–51 (quoting Honig v. Doe, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting)).
222. *See id.* at 1551, 1553 (first citing Woolhandler & Nelson, *supra* note 12, at 693; then citing Hessick, *supra* note 211, at 317–21).

Justice Thomas explained that the common law evaluated the plaintiff's right to sue "depending on the type of right the plaintiff sought to vindicate."[223] In the arena of private rights, the common-law courts were willing to adjudicate bare allegations of a rights violation, and nothing more.[224] In many instances, as in suits for trespass, infringement of intellectual property, and unjust enrichment, no showing of damage or harm was required and the suit could proceed on the basis of an invasion of legal right.[225]

Justice Thomas explained, however, that for violations of "public rights," "[c]ommon-law courts . . . have required a further showing of injury."[226] Ordinarily, the government alone had authority to vindicate a harm inflicted on the public at large.[227] In the small collection of cases in which private plaintiffs could sue for a violation of public rights, they had to show that the violation caused them some special harm.[228] Here, Justice Thomas invoked the example of nuisance litigation and quoted William Blackstone for the proposition that only claimants who alleged special damage were permitted to proceed on behalf of the public, "lest 'every subject in the kingdom'" "harass the offender with separate actions."[229] Justice Thomas then generalized: The law of standing demands a stronger showing of injury-in-fact as a predicate for public law litigation than for private rights litigation, and it "applies with special force when a plaintiff files suit to require an executive agency to 'follow the law.'"[230] These sorts of public-law claims, according to Justice Thomas, threaten to embroil the judiciary in political disputes and thus occasion the separation-of-powers concerns that underlie the more stringent injury-in-fact requirement.[231] Private suits to enforce private rights, by contrast, do not intrude on the political branches and thus may proceed without a showing of actual injury apart from the violation of the right itself.[232]

Justice Thomas deserves credit for attempting to rationalize the law of standing by recognizing that the Court has applied its injury-in-fact requirement with varying force depending on the context. Scholars have increasingly recognized the fragmentary character of standing law. Evan Lee

223. *Id.* at 1551.
224. *See id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 1551–52.
229. *Id.* at 1551 (quoting 3 BLACKSTONE, *supra* note 46, at *219).
230. *See id.* at 1552.
231. *See id.* at 1552 (identifying separation-of-powers concerns as the justification for a more stringent injury requirement in publications).
232. *See id.* at 1553.

and Josephine Ellis showed that the redressability requirements have been relaxed in procedural rights cases;[233] Richard Fallon traced the very different way the Court has applied standing rules across different substantive areas of law;[234] Hessick drew a distinction between private and public rights litigation and the stringency of the injury-in-fact requirement in those different settings.[235] But two related features of Justice Thomas's approach to standing law pose problems. First, the repeated emphasis on the work of the common-law courts necessarily hides from view the adjudicatory practices of the civil-law-inflected courts of equity and admiralty. Noncontentious jurisdiction was a creature of equity; most common-law proceedings were contested inter partes disputes. By limiting his gaze to common-law practice, Justice Thomas ignored the civilians, and the voluntary forms of adjudication they embraced, just as Justice Brandeis narrowed his historical focus to exclude declaratory judgment practice in Scotland. When it comes to standing, at least in Justice Thomas's telling, it seems that the common law has conquered equity, not the other way around.[236]

The emphasis on common-law forms may blind the Court to noncontentious practices in equity and obscure the very different way in which the civilians managed the right of individuals to judicial process. Consider, in this vein, the distinction Christopher Columbus Langdell drew between the practice in courts of common law and that in courts of equity. Langdell recognized the existence of noncontentious jurisdiction but viewed it as a creature of equity. He thus explained that the "jurisdiction of a court of [common] law is contentious only, that is, it is strictly limited to deciding

233. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 174 (2012).

234. *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1063, 1071–80 (2015).

235. *See* Hessick, *supra* note 211, at 277; *see also Spokeo*, 136 S. Ct. at 1553 (citing Hessick, *supra* note 211, at 317–21).

236. When discussing procedural codes after the merger in 1938, we have become accustomed to thinking of equity as having conquered common law. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987) (providing a history of the drafting of the merger of law and equity in the 1938 Federal Rules of Civil Procedure and emphasizing the degree to which equitable practices came to dominate those of the common law). Both discovery practice and multi-party joinder in the postmerger litigation of our "one form of action," *see* FED. R. CIV P. 2, bear strong equitable influences. *See* Subrin, *supra*, at 922 (identifying pleading, discovery, and joinder as three areas of practice in which the equitable forms of practice were particularly influential in the postmerger procedural rules); *cf.* Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 632–34 (1988) (describing the impact of the new regime on old notions of joinder and discovery).

controversies."[237] By contrast, Langdell explained, the power of the chancellor in a court of equity is not "limited to deciding controversies."[238] To illustrate noncontentious jurisdiction in equity, Langdell invoked the power of the trustee to apply to the chancellor for instructions. Such bills did not, in Langdell's telling, seek to resolve a contest over the trustee's "misconduct" but instead to clarify the nature of the trustee's duty and to secure "the assistance and protection of the court."[239]

If Langdell was right to distinguish common-law proceedings from those in equity, then a mode of historical analysis that focuses solely on common-law practices will give a false picture of judicial power. Common-law assumptions about the nature of the adversary system cannot account for noncontentious proceedings in equity (proceedings that often lacked both an injury in fact and an adverse party). Likewise, too strong an emphasis on common-law forms today may obscure the civilians' historic willingness to embrace the right of private individuals to bring public actions. As noted earlier, the Romans developed a popular action or *actio popularis* that enabled private individuals to sue on behalf of the public interest.[240] The recognition of such a right to sue, though qualified in important respects, provides an important historical precursor to modern public law litigation. The next Subpart briefly recounts the roots of the Scottish version of the *actio popularis*, as it developed in the Scottish Court of Session in the eighteenth century. At a minimum, the history complicates the proposed distinction between private and public rights that informed the work of Woolhandler and Nelson. More intriguingly, the Scottish practice suggests a basis for incorporating a qualified version of the public action into this Article's conception of the litigable interest.

B. Civil Law and the Example of Scotland

The treatment of the Roman law *actio popularis* by the Scottish Court of Session may provide a useful building block for the construction of a more nuanced, historically-inflected body of standing law. The Court of Session served as Scotland's highest court in civil-law matters, exercising jurisdiction over suits in law and equity.[241] By the eighteenth century, Session had long

237. C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING 34 (2d ed. 1883).
238. *Id.* at 40.
239. *Id.*
240. *See supra* notes 45–51 and accompanying text.
241. On the jurisdiction and structure of the Court of Session, see Pfander & Birk, *supra* note 46, at 1653–56. Also see Pfander, *supra* note 46, at 1513–15.

agreed to entertain what Abram Chayes would later describe as "public law" litigation:[242] that is, suits brought to declare and clarify the commonly held or public rights of individuals in cases where government bodies appeared as interested parties.[243] Practice before the Court of Session came to include features that resemble the law of standing that later arose to define and constrain the work of the courts of the United States.

For starters, the Scots developed a separate set of rules that were to govern the standing of parties in the ordinary course of private litigation. The Court of Session framed this standing inquiry in terms of the plaintiff's (or pursuer's) "title" and "interest" to sue.[244] To pursue a claim, a plaintiff was required to show that she had both an interest in the relief being sought and title to pursue the claim.[245] Not everyone with an interest (or something to gain) could initiate an action; instead, Scots law limited court access to those with title, which served as a concept that restricted suit to those with a clear legal right to pursue the claim.[246] Scots private law ruled out third-party standing for those seeking to

242. *See* Chayes, *supra* note 7, at 1302 (highlighting the more active, inquisitorial role of the judge in public law proceedings as compared to the more passive dispute-resolving role of the judge in private law litigation). On the key elements of public law litigation, see *Steffel v. Thompson*, 415 U.S. 452, 463–65 (1974), which identifies: 1) federal question jurisdiction under 28 U.S.C. § 1331 (2012); 2) constitutional tort claims under 42 U.S.C. § 1983; and 3) officer suability under *Ex parte Young*, 209 U.S. 123 (1908), as the cornerstones of modern public law litigation.

243. *See* R.S., *The Scotch Action of Declarator*, 10 L. MAG. 173, 194 (1849) (describing the Scots' declarator and distinguishing Blackstone's emphasis on the importance of adversaries from the Scottish ideas of John Erskine, who saw the need for a declaration of rights before they were denied or called into question). On the willingness of the Scots to allow private parties to interplead with the Crown, see J.D.B. Mitchell, *The Royal Prerogative in Modern Scots Law*, *in* PUBLIC LAW 304, 304 (J.A.G. Griffth ed., Edition 1957), which traces the suability of the Crown in Scotland to legal developments in the 1540s. Lord Kames characterized as an "established maxim, That [sic] the King, with whom the executive part of the law is trusted, has no part of the judicative power." HENRY HOME, LORD KAMES, HISTORICAL LAW-TRACTS 286 (2d ed., Lawbook Exch. Ltd. 2000) (1758).

244. *See* HENRY HOME, LORD KAMES, ELUCIDATIONS RESPECTING THE COMMON AND STATUTE LAW OF SCOTLAND 127, 213, 216 (1777) (defining title as evidence of a right and interest as the receipt of some benefit from the action). Modern sources largely echo Lord Kames in defining title and interest. *See, e.g.*, MUNGO DEANS, SCOTS PUBLIC LAW 170 (1995) (describing title and interest to sue as common-law principles synonymous with standing or *locus standi*).

245. Determination of whether a plaintiff had an interest "was relatively simple [and] required that the actor—either plaintiff or defendant—receive some benefit from the action," whereas "title was frequently used to describe a formal claim to legal ownership of the right in question" and "was a more complicated, or at least more variegated, concept." Pfander, *supra* note 46, at 1516–17.

246. *Cf. supra* Part II.B (discussing how American law limited court access through the adverse-party rule).

enforce the rights of another party, which the Scots, following Roman law, called *jus tertii*.[247]

Despite these private-law standing limits, the Scots recognized an exception for a "popular action," or what the Scots referred to (again following Roman law) as an *actio popularis*.[248] The *actio popularis* authorized any person to pursue a claim on behalf of the public in cases in which a public delict or wrong might otherwise go unredressed.[249] The Scots version of the *actio popularis* empowered an individual to mount a claim, often in an action for a declaratory judgment, when the defendant (often a public body) had impinged on rights held in common by a variety of individuals.[250] None of the would-be plaintiffs had a clear title to sue in cases of such widespread and somewhat

247. *See* KAMES, *supra* note 244, at 214.

248. Lord Bankton, author of a well-regarded eighteenth-century treatise, put the matter this way:

> A division of actions, not to be omitted, is into those, whereby the party interested only can sue; and those in which any person whatever, capable of suing, may prosecute the party, which last are called Popular Actions. Divers of these popular actions took place with the Romans; and some likewise obtain with us, as the prosecution of Invaders of ministers, and that against Usurers, where the parties interested do not sue, and that against Destroyers of the game, &c.

2 ANDREW MCDOUALL, LORD BANKTON, AN INSTITUTE OF THE LAWS OF SCOTLAND IN CIVIL RIGHTS 610 (R. Fleming 1751) (footnote omitted). John Erskine, an influential institutional writer, similarly traced the popular action in Scotland to its roots in Roman law:

> The Romans also divided actions into private and popular. Private actions could not be insisted in by such as had themselves no interest in the issue of the cause; but an actio popularis might have been carried on by any person. Certain actions ex delicto, which are authorised by our law, though they cannot be prosecuted by every one, yet carry a reward to the discoverer of the offence or crime, of a determinate proportion of the penalty; as in usury, in offences against the game, and in those against the statute . . . .

2 JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND 933 (James Ivory ed., R. Fleming 1828) (1773) (citations omitted); *see also* PETER HALKERSTON, A TRANSLATION AND EXPLANATION OF THE PRINCIPAL TECHNICAL TERMS AND PHRASES USED IN MR. ERSKINE'S INSTITUTE OF THE LAW OF SCOTLAND 202 (2d ed. 1829) (describing the *actio popularis* as an import from Roman law).

249. Pfander, *supra* note 46, at 1500.

250. *Id.* at 1527. Another source further explains:

> Members of the public, or members of particular sections of the public, have in certain cases a right to sue actions as such. An action brought by a pursuer in his capacity as a member of the public is known as an actio popularis, and such action is available for the vindication or defence of a public right. Thus any member of the public has a title to sue for declarator of a public right of way, a right of market, a declarator that the navigation of a public navigable river should not be obstructed, a declarator of common use and enjoyment by the public of a piece of land, for removal of a public danger, or nuisance, or to prevent the building of a bridge across a public street by proprietors on opposite sides of the street, and the like.

1 ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND 85–86 (John L. Wark & A.C. Black eds., 1926) (footnotes omitted).

diffuse injury, yet the Court of Session formulated rules enabling one or more of them to pursue the claim in order to avoid a defect of justice. The conception of the Court of Session as a court of equity, acting in the last resort, helped to justify such *actio popularis* proceedings in the eighteenth century.[251] Indeed, the Court of Session seems to have recognized that the rules of standing applicable to private litigation must give way to allow public actions to proceed.[252]

The decision to allow a single champion to step forward on behalf of the public posed a threat of duplicative litigation and necessitated some form of coordination or preclusion. In some circumstances, *actio popularis* decrees were given limited preclusive effect in subsequent litigation, at least where there was a "sufficient identity of interest" between earlier and later litigants.[253] A twentieth-century source states that, for an *actio popularis*:

> [T]he answer to the question as to whether there is such community of interest as to make a previous decision *res judicata* as against the parties to a subsequent action, would appear to depend largely upon whether there is or is not a contract expressed or implied between the parties to the proceedings or their authors or ancestors.[254]

251. The Court of Session took an extremely broad view of its *nobile officium*, or equitable power, to depart from the strict mandates of the law and proceed according to what it considered "just[] and fit." GEORGE MACKENZIE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 233–34 (1694). *Nobile officium* came into play in cases in which "the Law behoved to trust the Discretion and Honesty of the Judge, since all Cases could not be comprehended under known Laws." GEORGE MACKENZIE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 201 (4th ed. 1706). In cases in which law did not provide an established remedy or was otherwise inadequate, the Court of Session had "recourse from strict law to equity, even in the matter of judgment; and in more cases they may recede from the ordinary form and manner of probation, whereof there are many instances commonly known." JAMES DALRYMPLE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 570 (3d ed. 1759). *Nobile officium* was exclusive to the Court of Session, *id.*, having been conferred by the king's injunction that the Court was to "examine, conclude and finally determine, all and sundry complaints, causes and quarrels that may be determined before the King and his Council." *Id.* at 545; *see also* KAMES, *supra* note 243, at 232 (declaring that the *nobile officium* authority of the Court of Session came from a grant from the Privy Council). For a modern account of the origins and current application of the *nobile officium*, see STEPHEN THOMSON, THE NOBILE OFFICIUM: THE EXTRAORDINARY EQUITABLE JURISDICTION OF THE SUPREME COURTS OF SCOTLAND 6–17 (2015), which reviews historical accounts of the origins of what the author describes as an equitable jurisdiction and attributing it partly to the court's broad supervisory powers and partly to its assumption of powers previously exercised by the privy council.

252. Pfander, *supra* note 46, at 1500–01.

253. 7 GREEN'S ENCYCLOPAEDIA OF THE LAW OF SCOTLAND 292 (John Chisholm ed., 1898) (citing nineteenth-century cases) [hereinafter GREEN'S ENCYCLOPAEDIA], *quoted in* Pfander, *supra* note 46, at 1531.

254. GREEN'S ENCYCLOPAEDIA, *supra* note 253, at 292, *quoted in* Pfander, *supra* note 46, at 1591; *see also* LORD CLYDE & DENIS J. EDWARDS, JUDICIAL REVIEW 386 (2000) ("The decision in an *actio*

In an action for a public right-of-way, "where certain parties appear or are called as representing the interests of the general public," the general public is bound by the decision in the earlier suit.[255] But an action by the magistrates of Edinburgh regarding use of a public market was not thought to preclude a second proceeding by members of the general public.

The Court of Session thus struck a balance between competing models of public and private law litigation. Recognizing the importance of title and interest to sue in private matters, Scots law acted to prevent a failure of justice by relaxing those strictures for public actions. At the same time, Scots law qualified the pursuit of public or popular actions to limit the assertion of duplicative claims.

Scots law thus anticipated some features of public law litigation that have made their way into statute books in the United States. The citizen suit provisions of some environmental statutes, for example, authorize a plaintiff to litigate public rights claims against a private defendant.[256] But those statutes qualify the right to sue by providing for a measure of governmental oversight (thereby helping to ensure adequate representation of the public interest).[257] And they may accord a degree of nonparty preclusive effect to the decision, thereby shielding the defendant from the threat of repetitive litigation on the

popularis decided against one member of the public will be *res judicata* against all other members of the public.").

255. GREEN'S ENCYCLOPAEDIA, *supra* note 253, at 292, *quoted in* Pfander, *supra* note 46, at 1591.

256. *See, e.g.*, Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986 § 326, 42 U.S.C. § 11046(a)(1) (2012); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (applying EPCRA's citizen-suit provision).

257. Environmental statutes authorize suits broadly. *See, e.g.*, 33 U.S.C. § 1365(a) (authorizing "any person" to file suit to enforce the Clean Water Act); 42 U.S.C. § 7604(a) (the same authorization in the Clean Air Act). The statutes require the plaintiff to notify the Department of Justice of the proposed commencement of an action and broadly authorize governmental intervention. *See* 42 U.S.C. § 7604(b)–(c). The statutes also limit the ability of private litigants to pursue claims when the government has taken the lead. *See* 33 U.S.C. § 1365(b)(1)(B) (barring commencement of private suit when "Administrator or State has commenced and is diligently prosecuting" an enforcement action); 42 U.S.C. § 7604(b)(1)(B) (barring the same under the Clean Air Act). For a description of the statutory scheme, see *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174–75 (2000).

same claim.[258] That threat, of course, was among those Justice Thomas highlighted in repeating Blackstone's concern with vexatious litigation.[259]

Cases in the United States from the first half of the nineteenth century come at the problem of the public action from a perspective remarkably similar to that of the Scots. In *People* ex rel. *Case v. Collins*,[260] the New York Supreme Court allowed representatives of the public who lacked any specific injury to seek a mandamus to compel the town's commissioners to perform their duty in laying out a local road or highway.[261] The court acknowledged that, in matters of private right, the suitor must show her "title to relief" or face dismissal of the claim as a stranger.[262] In a "matter of mere public right, however, it is otherwise; here the people are the real party . . . ."[263] The courts had long issued mandamus at the suit of representatives of the people at large; after all, "the wrongful refusal of the officers to act is no more the concern of one citizen than another."[264] Distinguishing private from public right, the court quoted with approval the explanation that courts allow such public action proceedings to "prevent a failure of justice."[265] In the end, then, parties without private title or interest were permitted to pursue their claims on behalf of the public as a whole

258. For cases that attempt to sort out problems of preclusive effect in the context of public rights environmental litigation, see *Sierra Club v. Two Elk Generation Partners, Ltd. Partnership*, 646 F.3d 1258, 1271–72 (10th Cir. 2011), a citizen suit under the Clean Air Act barred by the state's prior litigation of alleged environmental violation; *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 473–74 (6th Cir. 2004), a suit in the context of the Clean Air Act; and *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, 382 F.3d 743, 757–65 (7th Cir. 2004), a suit in the context of the Clean Water Act. Also note *Headwaters Inc. v. United States Forest Service*, 399 F.3d 1047, 1050 (9th Cir. 2005), which concluded that claim preclusion did not bar individual from challenging forest service compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370, despite prior litigation in which public's interest was pursued by others. For a clear-eyed criticism of the *Headwaters* decision, see Laura Evans, Note, *Limiting Virtual Representation in* Headwaters Inc. v. U.S. Forest Service*: Lost (Opportunity) in the Oregon Woods?*, 33 ECOLOGY L.Q. 725 (2006). Also see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 288–89 (1992), which urges broader reliance on virtual representation to limit individual right to pursue duplicative public actions. Although the Supreme Court has curtailed the doctrine of virtual representation or nonparty preclusion, it has recognized an exception for litigation under special statutory schemes in which the first proceeding was pursued on behalf of the public. *See* Taylor v. Sturgell, 553 U.S. 880, 895 (2008) (citing Richards v. Jefferson County, 517 U.S. 793, 804 (1996)).

259. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1551 (2016) (quoting 3 BLACKSTONE, *supra* note 46, at *219).

260. 19 Wend. 56 (N.Y. Sup. Ct. 1837).

261. *Id.*

262. *Id.* at 64–65 (emphasis omitted).

263. *Id.* at 65.

264. *Id.*

265. *Id.* (quoting Rex v. White, Cas. t. Hardw. 92).

for reasons essentially identical to those that informed the Scots law of the *actio popularis*.

C. Standing and the Idea of Litigable Interests

How can we best incorporate the lessons of history and modern practice into a body of law that would govern the individual's right to invoke the judicial power of the United States? This Subpart suggests that we can best proceed by abandoning the assumption that the reference to "cases" and "controversies" in Article III imposes an identical standing requirement on all claimants seeking to invoke federal judicial power. While many litigants seek redress for injuries inflicted by an opposing party, eighteenth- and nineteenth-century suitors were often permitted to register claims of right on an ex parte basis in the federal courts of the early Republic. This practice of noncontentious jurisdiction in cases arising under federal law continues in the twenty-first century. Instead of conflating cases and state-law controversies and inflexibly demanding injuries in fact, the Court should ask if the plaintiff can assert a "litigable interest."

The litigable interest formulation would not inflexibly limit the federal courts to the adjudication of claims for redress of injuries. A litigable interest may arise from the infliction of a compensable injury, to be sure, but it can arise in other ways. Modes of litigation vary as well, especially across the law-equity divide. Common-law forms were (as Langdell reminded us) typically contentious and would often entail the assertion of a claim for redress of injuries inflicted by the defendant.[266] Equitable and civil-law forms covered more ground, certainly including suits for redress and prevention of injuries and also encompassing such noncontentious proceedings as the trustee's application for instructions, the petition for appointment of a guardian, the initiation of common form probate proceedings, the administration of an estate, and the assertion of uncontested prize claims.[267] Neither concrete injuries nor adverse parties were essential for these forms of equitable proceeding; it was enough that the party asserted a recognized claim of right. By restoring its earlier emphasis on the assertion of claims of right, the Court could revisit its across-the-board injury requirement. By applying a litigable interest test that takes account of the differences between "cases" and "controversies," moreover, the Court could limit its noncontentious work to

266. *See supra* note 237–240 and accompanying text.
267. *See* Pfander & Birk, *supra* note 16, at 1368, 1371, 1372, 1436, 1457.

federal question "cases" and continue to insist on full adversary proceedings in matters governed by state law (and thereby hold fast to the probate and domestic relations exceptions to Article III).[268]

Apart from the fact that it better coheres with recognized elements of traditional judicial practice, the litigable interest standard nicely matches the linguistic formulations of early accounts of what it means to bring a "case" in federal court. As we have seen, both Chief Justice Marshall and Justice Story explained that a "case" under federal law consists of the assertion of a claim of right in the forms prescribed by law.[269] The litigable interest standard would build on the Marshall-Story formulation by requiring that plaintiffs who wish to invoke the judicial power set up a claim of right (an "interest") in accordance with the forms prescribed by law ("litigable"). The definition would encompass the assertion of claims seeking redress for an injury as well as ex parte claims to a benefit conferred by federal law, such as petitions for naturalized citizenship.

Use of the litigable interest standard would presume substantial deference to Congress's decisions about when federal courts may entertain original applications to register a claim in noncontentious jurisdiction. Such a deferential approach nicely tracks the model Justice Brandeis offered in *Tutun v. United States*.[270] Brandeis explained that Congress has a great deal of discretion in structuring the manner in which individuals claim rights under federal law: Congress can create rights in individuals and provide only an administrative remedy; or require exhaustion of administrative remedies as a prelude to judicial remedies; or it may provide both administrative and judicial remedies and give the individual a choice; or it may provide only a remedy in federal court.[271] When Congress chooses a federal remedy, as in the case of naturalization, and the individual invokes the established judicial mode, Brandeis found that a case arises "within the meaning of the Constitution."[272] In short, when Congress creates a right and a noncontentious mode for the assertion of that right, individuals enjoy a litigable interest in pursuing the right in federal court.

268. *See supra* note 44 (linking Article III's probate and domestic relations exceptions to the inability of the federal courts to hear uncontested proceedings in matters governed by state law).
269. *See supra* note 143 and accompanying text.
270. 270 U.S. 568 (1926); *see also* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 73, 83 (2014) (similarly calling for deference to Congress's decisions about when and by what means an individual can invoke federal judicial power).
271. *Tutun*, 270 U.S. at 576–77.
272. *Id.* at 577.

While one can thus quite readily tailor the litigable interest standard to the assertion of federal claims of noncontentious jurisdiction, the application of the standard to contentious matters will doubtless pose a series of tricky puzzles. We might begin, as the Scots had done and Justice Thomas did in *Spokeo*, by distinguishing the enforcement of private rights from public actions. *Spokeo* appears to present a problem in private rights and thus would seem to call for substantial deference to Congress's power, more perhaps than the majority was willing to grant. The *Spokeo* majority recognized that Congress had created both a federal right to accuracy in credit reportage and a federal right to sue for violations of the right.[273] The majority viewed the actions of Congress as highly influential, at least where those actions promoted de facto injuries (to rights of privacy and reputation) to the status of legal cognizability.[274] But the majority clearly did not regard the claim for violation of a statutory right as sufficient in itself to establish standing, even in the context of private litigation. Beneath the surface of the Court's relatively searching assessment of the plaintiff's standing lay a concern with the use of the so-called "no-injury" class action as a device to aggregate small claims. Such aggregation confronts defendants with substantial liability, perhaps out of proportion in some reckonings to the threat their conduct posed to the reputation of those on whom it reported.

One might argue that class action-style litigation, by creating a bounty for successful claim(s) typically payable to the attorney rather than the class representative, can lead to relatively intensive enforcement efforts in today's world, perhaps more intensive than a federal agency might pursue. Building on this perception, one might also argue that such intensive enforcement interferes with agency enforcement discretion in a way undercuts the ability of the executive to "Take Care" that the laws be faithfully executed.[275] But such an argument fails to recognize the substantial control Congress can properly exercise over the manner in which it divides enforcement authority between federal agencies and private actors.[276] True, the Federal Trade Commission has

273. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016).

274. *See id.* at 1549 (observing that allegation of bare statutory violation, without accompanying harm, will not suffice, but recognizing the importance of congressional judgment in evaluating whether intangible harm meets the test of concrete injury). The remand left open the possibility that the plaintiff could be said to have alleged concrete injuries. *See id.* at 1550. The dissenters thought the requisite allegations had already been made. *Id.* at 1556.

275. The Court has often justified the injury-in-fact requirement of standing doctrine on its view that private enforcement of public actions may interfere with agency enforcement discretion in violation of the Take Care Clause. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992).

276. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 7–9 (2017) (describing the work of consumer rights and other public interest advocates to secure legislation that was meant to

been assigned enforcement authority under the Fair Credit Reporting Act (FCRA), the statute at issue in *Spokeo*.[277] But Congress specifically created a private right of action allowing individuals affected by an erroneous credit report to recover a specified award of damages.[278] Moreover, Congress has on occasion assigned exclusive FCRA enforcement authority to the agency, thereby apparently foreclosing private litigation under the FCRA.[279] So long as one accepts the power of Congress to regulate industry and calibrate enforcement intensity by allocating enforcement authority between federal agencies and private suitors, one has difficulty seeing a role for the Court in treating the congressionally-approved existence of private enforcement authority in *Spokeo* as improperly invading executive discretion.

Nor can one articulate a persuasive argument for judicial leadership in updating the regulatory infrastructure in light of technological change. True, Justice Alito observed in the *Spokeo* majority opinion that the FCRA was enacted "long before the advent of the Internet."[280] But the passage of time does not normally justify the judicial recalibration of remedial systems. For one thing, Congress and the participants in the civil rules advisory process have better access to the kind of information that should inform refinements of credit reporting rules and the class action litigation process. The civil rules process has grown far more open in the past generation, with public meetings and an opportunity for interested parties to comment on proposed rules.[281] Legislative assemblies benefit from the constant demands placed upon them by interested parties who press members to address (and thus to learn about) the latest technological developments.[282] For all of the many virtues the justices

empower private enforcement of federal rights as a way to supplement or bypass agency enforcement).

277. *See* 15 U.S.C. § 1681s (2012) (conferring power on the Federal Trade Commission to enforce the Fair Credit Reporting Act).

278. *See* 15 U.S.C. § 1681n(a).

279. *See id.* § 1681m(h)(8)(B) (declaring that a specific section "shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section").

280. *Spokeo*, 136 S. Ct. at 1545.

281. For a description of this more open rules advisory process and an argument for rule-making primacy in contrast to lawmaking by judicial decree, see generally Lumen Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons From Administrative Law*, 59 UCLA L. REV. 1188 (2012), which describes the modern rulemaking process and arguing that it outperforms the judicial process as a forum for the creation of procedural law.

282. The 115th Congress has been actively considering legislation that would curtail some features of class action litigation, thus tending to confirm the view that legislative attention to the consumer-business balance has not waned over the years. H.R. 985, the Fairness in Class Action Litigation Act of 2017, was introduced on February 9, 2017, by Representative Bob Goodlatte (R-VA), chair of the House Committee on the Judiciary. There was no hearing on the bill held by the Committee on the Judiciary. A markup was held on February 15, 2017,

bring to their job, they do not display special expertise in the technology of data aggregation or the threat it poses to consumer reputation and privacy; indeed, many observers would rate the justices' technological savvy as woefully inadequate.[283] Couple the Court's lack of knowledge with its lack of lawmaking legitimacy and one finds little justification for judicial leadership in updating the Fair Credit Reporting Act or the use of class actions to enforce the Act.[284] When Congress creates litigable interests in private regulatory programs, the Court has little justification for second-guessing that decision.[285]

In the context of public law litigation, where my conclusions remain somewhat preliminary, a more flexible litigable interest standard might better focus the rules of standing. Today, the injury requirement often serves as a limit on the ability of private suitors to mount claims on behalf of the public. When government action implicates the environment, for example, not just anyone can bring suit to protect the habitat of the Nile crocodile or the Asian elephant.[286] Only those with some proximity to the source of environmental degradation can be said to have suffered the kind of injury necessary to allow the suit to proceed.[287] The injury rule thus screens out some litigants who appear to have little personal incentive to bring the suit to a successful conclusion. But notwithstanding its screening function, the rule provides little assurance that the properly "injured" suitor will pursue the claim effectively in court or that the resulting decision will take adequate account of the public interest. By enlarging the inquiry to consider the representational adequacy of the proposed suitor, and making such adequacy a part of the inquiry into the presence of a litigable interest, the Court could focus public law

and the bill was ordered to be reported by a vote of 19–12. *See* H.R. REP. No. 115-25 (2017). On March 9, 2017, the U.S. House of Representatives passed the bill (as amended) by a vote of 220–201; it is now pending in the U.S. Senate where it has been referred to the Committee on the Judiciary. If enacted, H.R. 985 would make dramatic changes in class action practice.

283. *See e.g.*, Karson Thompson, Note, *Luddites No Longer: Adopting the Technology Tutorial at the Supreme Court*, 91 TEX. L. REV. 199, 202–09 (2012) (collecting examples of the Justices' lack of technological sophistication).

284. The argument for congressional primacy flows directly from the long post-New Deal tradition of judicial deference to economic regulation. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (rejecting Due Process and Equal Protection challenges to consumer-protection legislation).

285. *See, e.g.*, *The Supreme Court, 2015 Term—Leading Cases*, 130 HARV. L. REV. 437, 446 (2016) (discussing *Spokeo* and calling for judicial deference to the congressional policy judgment as to individual's right to sue).

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

287. *See id.* at 565–66.

litigation on the factors most likely to protect the public from feckless or duplicative litigation.

Similarly, the litigable interest formulation can accommodate the lessons of Scottish practice. As we have seen, the Scots demanded that litigants establish their title and interest to sue; the suggested inquiry into the presence of litigable interests captures both features of Scots' practice. While title and interest were rather inflexibly required for most private litigation, the Scots relaxed their conception of title and interest to sue to allow individuals to mount popular actions. In doing so, the Scots were embracing a right to sue that arose from equity's concern with providing a remedy for violations of the public's rights that would otherwise escape review.[288] Just as the Scots asked if the claimant had title and interest to sue—an inquiry specific to the nature of the claim asserted—so too might the Court begin to ask if a claimant invoking Article III had asserted a litigable interest, or a claim of right in the form prescribed by law. Such an interest might not invariably require an injury, especially where Congress has taken steps to protect the government's enforcement primacy and the defendant's interest in the avoidance of duplicative litigation.[289]

CONCLUSION

The Court has turned to an idealized eighteenth-century history in the course of constructing its twenty-first century standing law. Consider the epigraph with which this Article begins. With no apparent trace of irony, Chief Justice Robert dismissed the "belated innovations" of the mid-to-late

288. The Court of Session evaluated the merits of the claim at the same time it considered whether to recognize title and interest to pursue a popular action. *See, e.g.*, The Merchant Co. v. Magistrates of Herriot's Hospital (1765), in 8 WILLIAM MAXWELL MORISON, THE DECISIONS OF THE COURT SESSION FROM ITS INSTITUTION UNTIL THE SEPARATION OF COURT INTO TWO DIVISIONS IN THE YEAR 1808, DIGESTED UNDER PROPER HEADS, IN THE FORM OF A DICTIONARY 5752 (1811) (acknowledging the pursuer's lack of conventional title and interest to sue, but emphasizing the absence of an alternative remedy). Under modern class action practice, the federal courts take similar account of the merits in deciding whether to certify the plaintiff class. *See, e.g.*, Wal-Mart Stores, Inc. v. Duke, 564 U.S. 338, 351–52 (2011) (acknowledging that rigorous assessment of class certification may overlap with evaluation of the merits of the plaintiffs' claims).

289. *See* Vt. Agency of Nat. Res. v. Stevens *ex rel.* United States, 529 U.S. 765 (2000) (describing elements of the False Claims Act that gave the federal government a right to supervise the litigation and offered the defendant some protection from duplicative litigation).

nineteenth century courts as coming "too late to provide insight into the meaning of Article III."[290] But the Court's own injury-in-fact and adverse-party requirements represent "belated innovations" of the nineteenth and twentieth centuries—innovations that, by the Chief Justice's own account, appear to have arrived too late to inform the interpretation of Article III. As we have seen, at the relevant time in the late eighteenth and early nineteenth century, federal courts were routinely exercising judicial power over claims of right that did not seek to remedy any injury (factual or otherwise) and did not necessitate the joinder of adverse parties. Federal courts continue to hear such matters today. The ongoing willingness of Congress to provide—and of the federal courts to accept—assignments of noncontentious jurisdiction makes it very hard to see how an across-the-board injury-in-fact or adverse-party requirement could be understood as a historically compelled element of the right of an individual to invoke the judicial power of the United States. Even the Court's invocation of the case-or-controversy requirement as the "vehicle" by which it operationalizes its standing rules represents a "belated innovation" of the mid-to-late nineteenth century and fails to take adequate account of the textual and functional distinctions between those sources of judicial power.

History may well defeat standing law as currently configured. Even if it does not, history surely calls upon the Court to offer a more candid assessment and defense of major elements of its doctrine. The Court might begin by swapping its injury-in-fact requirement for a focus on the presence of a litigable interest. Such an approach would enable the Court to accommodate the noncontentious practices of nineteenth-century federal courts, to honor the distinction between "cases" and "controversies," and to draw lessons from a Scots practice that bears some resemblance to popular litigation in the United States. Under the Scots' way of thinking, individuals seeking naturalized citizenship in the early Republic, and others pursuing the declaration of their rights in noncontentious proceedings, would have been clearly thought to possess title and interest to sue (even though they had suffered no injury in fact). On the other hand, claimants seeking relief in the form of popular or public actions (or what the Supreme Court today has termed generalized grievances) would surely lack conventional title and interest to sue. Yet the Scots allowed such claims to proceed, subject to limits that trace back to Roman law. Those limits sought to identify a proper plaintiff, to ensure the adequacy of

290. Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting).

the public's representation, and to protect defendants by according some preclusive effect to the judgment.[291]

By embracing a less idealized but more complete picture of the many civil-law ideas that informed the Framers' conception of the judicial power, we can construct a suppler and historically defensible set of rules to govern access to federal court. The adoption of a litigable interest standard may well expand the number of claims that the Court will regard as proper for federal adjudication; the relaxation of the adverse-party rule may help to explain much that seems mysterious about federal judicial practice; and the presence of noncontentious matters in federal courts helps to underscore the many ways cases differ from controversies, challenging a century of those terms' conflation. But the litigable interest construct can also be tailored to provide a more defensible set of limits on public law litigation. Far from being belated innovations, in short, civil-law ideas can help us see the past more clearly and vindicate the Court's promise to base its court-access rules on modes of practice familiar to the generation that framed the Constitution.

291. *See supra* note 46.