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# LITIGATING ARTICLE III STANDING: A PROPOSED SOLUTION TO THE SERIOUS (BUT UNRECOGNIZED) SEPARATION OF POWERS PROBLEM

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## INTRODUCTION

At one point or another, every law student likely encounters *Lujan v. Defenders of Wildlife*, in which the Supreme Court succinctly restated the elements of Article III standing[1] before deciding that the plaintiffs lacked it.[2] But what likely escapes notice, even of students fresh out of a Civil Procedure course, is that the *Lujan* Court decided the issue of standing on a motion for summary judgment,[3] rather than on a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court did so even though a challenge to standing unquestionably involves a challenge to subject matter jurisdiction. Moreover, its decision to reject standing came several years after the Eighth Circuit had decided that the plaintiffs had adequately alleged standing to survive a motion to dismiss.[4] In a manner identical to standard treatment of issues on the merits, the *Lujan* Court confirmed that the plaintiff's burden to produce evidence supporting Article III standing progressively increases as litigation proceeds from the motion to dismiss stage to the summary judgment stage and, eventually, to trial.[5] As a result, the parties and courts endured years of litigation only to discover that there was no valid case or controversy in the first place. This outcome was strange because a court's exercise of its

1 504 U.S. 555, 560-61 (1992).
2 *Id.* at 562.
3 *Id.*
4 Defenders of Wildlife v. Lujan, 911 F.2d 117, 125 (8th Cir. 1990).
5 *Lujan*, 504 U.S. at 561.

coercive power over litigants absent a case or controversy violates fundamental separation of powers principles.[6]

To understand the problem, it is helpful to review the role of standing in implementing Article III's case-or-controversy requirement. The case-or-controversy requirement is arguably the most important limitation on federal courts' jurisdiction. It prevents the unelected judiciary from exercising executive or legislative powers, the exclusive province of the politically accountable branches of government,[7] and restricts federal courts to their traditional adjudicatory role.[8] As the Supreme Court recognized in *Marbury v. Madison*, this traditional adjudicatory role was limited to the resolution of real private disputes.[9] In our constitutional democracy, then, the judiciary may make law only as an incident to the resolution of live disputes. Accordingly, the Court has required any plaintiff seeking an Article III federal forum to demonstrate standing by satisfying three criteria: (1) a concrete injury in fact, (2) that is fairly traceable to the defendant's conduct, and (3) that can be redressed by a favorable decision.[10] A generalized injury or a mere desire to see that the law is enforced does not suffice.[11] Under this private-rights model, the plaintiff must establish Article III standing to satisfy the case-or-controversy requirement, thus preserving the delicate balance of separation of powers.

If a federal court exercised its coercive power over a litigant in a proceeding that did not satisfy the case-or-controversy requirement, it would upset this careful balance. True, as a formal matter, a court exercises its coercive power only upon entry of a final judgment. Some might therefore argue that it makes no difference whether a federal court determines standing at the outset of a suit on a Rule 12(b)(1) motion to dismiss or at the close of the far more extended process of pleading, discovery, and summary

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6 The Court continues to employ this approach today. *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1148-50 (2013) (holding that respondents lacked standing because they pleaded a theory of future injury not fairly traceable to the defendant's conduct).

7 In contrast, other limitations on federal jurisdiction are issue-based (e.g., federal question) or party-based (e.g., diversity) and presuppose the existence of a live case or controversy for purposes of Article III. *See infra* Section I.B.

8 *See infra* Section I.A.

9 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.").

10 *See, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976) ("[F]ederal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." (internal quotation marks omitted)).

11 *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 738-40 (1972) (finding a lack of standing because the petitioner could demonstrate only an "interest in a problem" rather than an actual injury).

judgment. But the practical realities of modern litigation suggest that a court exercises coercive power well before final judgment.[12] As the Supreme Court has recognized in nonjurisdictional contexts, even allowing a plaintiff to obtain discovery can coerce a defendant into an *in terrorem* settlement—effectively causing litigants to modify their primary conduct absent a formally coercive court order.[13] The costs and burdens of litigation are likely to influence or even coerce litigant behavior long before the formal resolution of a suit.

When this inescapable reality combines with the foundational separation of powers concerns motivating Article III's case-or-controversy requirement, *Lujan*'s method for determining constitutional standing becomes extremely problematic. By declining to demand the requisite showing of injury in fact, traceability, and redressability at the very outset of a suit, the *Lujan* approach pressures defendants to settle—even in the absence of a genuine case or controversy. For this reason, it is critical to resolve disputes over subject matter jurisdiction (both legal and factual) at the very outset of litigation. It is especially important to do so if the existence of a case or controversy is in doubt, because a court risks straying beyond its judicial role and thus threatening the separation of powers.

Rules 12(b)(1) and 12(h) of the Federal Rules of Civil Procedure together address this concern by (1) allowing litigants to challenge a court's subject matter jurisdiction at any time, (2) prohibiting litigants from waiving challenges to subject matter jurisdiction, and (3) requiring federal courts to raise the issue sua sponte if the parties fail to do so.[14] Although not explicitly permitted by the Rules, it is well established that a court evaluating a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) may look beyond the pleadings and engage in factfinding.[15] This process may involve ordering limited discovery related to issues involving subject matter jurisdiction and making credibility determinations as needed.[16]

The Supreme Court, however, has mysteriously chosen to handle disputes over Article III standing as if Rule 12(b)(1) does not exist.[17] Instead of requiring lower courts to resolve standing issues fully (including any necessary factual determinations) through a Rule 12(b)(1) motion as soon as

12 *See infra* Section II.C.

13 *See infra* text accompanying notes 139-44.

14 FED. R. CIV. P. 12(b)(1) & 12(h); *see also infra* Section II.A.

15 *See* Louisiana Crawfish Producers Ass'n v. Amerada Hess Corp., 919 F. Supp. 2d 756, 761 (W.D. La. 2013) ("[W]ith a jurisdictional inquiry—often couched under 12(b)(1)—the Court can engage in limited fact-finding . . . .").

16 *See infra* notes 97-99 and accompanying text.

17 *See infra* Section II.B.

they are raised, the Court treats standing exactly the way it treats any other issue on the merits. Thus, if the defendant challenges the plaintiff's standing by filing a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court will resolve the motion just as it resolves other Rule 12(b)(6) motions by taking the plaintiff's allegations of standing in the complaint as true. If the defendant chooses to challenge standing by means of a summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure, a court will require the plaintiff to produce enough evidence to enable a reasonable factfinder to find that she has standing. In ruling on summary judgment, a court will construe all evidence in the plaintiff's favor.[18] In other words, just as they do for resolution of issues on the substantive merits, courts impose a progressively shifting burden of proof for issues of standing as litigation proceeds. As a result, courts often fail to determine conclusively whether the plaintiff has Article III standing until the trial stage.

This practice is troubling because it can subject the parties to lengthy and costly litigation even though the plaintiff may ultimately lack Article III standing. By deferring resolution of the standing issue, courts force defendants into a Hobson's choice—either incur the expense of litigation or settle the case—without having conclusively established the existence of a valid case or controversy. Thus, courts effectively force defendants to modify their primary conduct in response to the cloud of federal litigation hanging over them.[19] Under circumstances in which a plaintiff lacks constitutionally authorized standing, a court's exercise of power in a manner that induces settlement violates separation of powers. The Supreme Court seems blissfully unaware of these consequences, even though it readily recognizes the link between separation of powers, the case-or-controversy requirement, and Article III standing in other contexts.

The problem is not confined to waste and inefficiency. The Court's current practice also undermines the constitutional limits of the federal judiciary in our democratic system. The federal judiciary is central to our governmental structure yet, by design, lacks political accountability.[20] To the extent that the federal courts coercively impact the lives of citizens in a manner not incident to the resolution of live disputes, they have exceeded

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18 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (noting that any specific facts the plaintiff sets forth "for purposes of the summary judgment motion will be taken to be true").

19 *See infra* Section II.C.

20 *See* U.S. CONST. art. III, § 1 (guaranteeing salary and tenure of federal judges).

their legitimate role in a democratic society and seriously undermined our constitutionally dictated system of separation of powers.

To remedy this situation, the Court should instruct lower courts to resolve questions about Article III standing as soon as its existence is put into doubt.[21] Specifically, courts should address all factual issues relevant to standing by conducting limited discovery and making credibility determinations without inferences in favor of the plaintiff. This proposal requires all issues of standing to be raised on a Rule 12(b)(1) motion to dismiss rather than on a Rule 12(b)(6) motion to dismiss, a Rule 56 summary judgment motion, or any other motion associated with the merits of the dispute. Such an approach would ensure that a federal court could not continue to exercise coercive power over litigants without a true case or controversy; a court would act like a court (and *only* like a court).

In Part I of this Article, we review federal subject matter jurisdiction limitations, including the case-or-controversy requirement, as manifestations of the separation of powers. In Part II, we describe the puzzling current practice of litigating Article III standing with the Court's "progressively shifting burden" approach that mirrors the resolution of issues on their merits. Because court proceedings can be sufficiently coercive to modify litigants' primary conduct, an exercise of the court's powers in the absence of a true case or controversy violates separation of powers. Part III describes our proposed solution: federal courts should fully resolve challenges to Article III standing immediately pursuant to a motion under Rule 12(b)(1). All other proceedings should cease until the standing issue is resolved. In Part IV, we anticipate and address likely criticisms of our proposed solution, including concerns about litigants' right to have a jury decide all factual issues.

## I. LIMITATIONS ON SUBJECT MATTER JURISDICTION AS MANIFESTATIONS OF THE SEPARATION OF POWERS THEORY

### A. *The Case-or-Controversy Requirement, the Private-Rights Model, and Article III Standing*

Because of the Framers' deep mistrust of the government and government officials, federal courts are courts of limited jurisdiction.[22] Indeed,

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21 Rule 11 of the Federal Rules of Civil Procedure deters frivolous challenges to standing by defendants. *See* FED. R. CIV. P. 11 (authorizing the court to sanction attorneys).

22 *See* THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("If men were angels, no government would be necessary. If angels were to govern men, neither

Madison defined tyranny not just as an abuse of power, but as the simple accumulation of power.[23] One way to prevent such an unacceptable accumulation is to divide governmental power among three different branches.[24] A further protection is to create a system of checks and balances so that each branch can police the other two.[25] The Framers incorporated both into the Constitution and intended prophylactic enforcement of separation of powers principles. Thus, the rules must prevent accumulation of power, no matter how incidental or small, before power is blended in the same hands.[26]

Protection is particularly important when those hands belong to the judiciary: its members, unlike those in the other two branches, are unelected and enjoy life tenure with no possibility of a reduction in salary.[27] That insulation is essential because it allows courts to enforce the countermajoritarian Constitution against the political will of whatever majority happens to command the day.[28] But that insulation also makes it especially harmful

external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

23 *See id.* NO. 47, at 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

24 *See id.* NO. 51, at 323 ("[U]surpations [of power] are guarded against by a division of the government into distinct and separate departments.").

25 *See id.* NO. 51, at 321-22 ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition."); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 462 (1991) (suggesting that the Framers' "severe mistrust of governmental power" led them to implement a system of checks and balances instead of insisting on a strict separation of powers).

26 *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 106 (1995) (concluding that each branch must be able to prevent the others from accumulating enough power to infringe on personal freedom and liberty).

27 *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

28 *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 12 (2d ed. 1990) [hereinafter REDISH, TENSIONS] (noting the importance of the countermajoritarian check but cautioning against undermining the authority of the representative branches). Hamilton dealt with this issue at length:

> [I]ndependence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous

when the judiciary exercises the equivalent of legislative or executive power.[29] Such power should be exercised only by actors who are politically accountable to the electorate.[30] What prevents the federal judiciary from transforming itself into a lawmaker without a democratic backing is the constitutional limitation that federal courts act solely through the adjudicatory process. In other words, the courts possess democratic legitimacy only when their lawmaking is incidental to their traditional adjudicatory function: resolving live disputes.

Article III's case-or-controversy requirement restricts the democratically unaccountable federal courts to a purely adjudicatory role.[31] In *Muskrat v. United States*, the Supreme Court stated that this requirement was intended for "the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. . . . The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."[32] The requirement thus limits the power of federal courts to situations in which adverse litigants submit claims within "the regular course of judicial procedure."[33]

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innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, *supra* note 22, at 469 (Alexander Hamilton).

29 *See* 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 163 (J.V. Prichard ed.,Thomas Nugent trans., G. Bell & Sons 1914) (1748) ("Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control. . . . Were it joined to the executive power, the judge might behave with violence and oppression."). Montesquieu thought that judicial power was "so terrible to mankind" that judgeships and courts should be temporary, "last[ing] only so long as necessity requires," so that people do not have "the judges continually present to their view; [and] they fear the office, but not the magistrate." *Id.* at 164.

30 Excursions beyond the judicial role could also delegitimize the judiciary, thereby limiting its countermajoritarian power. REDISH, TENSIONS, *supra* note 28, at 12.

31 While the phrase "case or controversy" does not actually appear in the Constitution, it is a shorthand used to describe the limits of justiciability. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 300 (1979) (explaining the traditional interpretation of Article III's requirements); *see also* U.S. CONST. art. III, § 2 (listing various "Cases" and "Controversies" to which the "judicial Power shall extend").

32 219 U.S. 346, 357 (1911) (quoting *In re* Pac. Ry. Comm'n, 32 F. 241, 255 (N.D. Cal. 1887)) (internal quotation marks omitted).

33 *Id.* at 356 (discussing Chief Justice Marshall's definition of "case" in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *see also* 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, 563-66 (2006) (describing textual and historical reasons for why adverseness is a core element of Article III's case-or-controversy requirement).

Accordingly, the federal courts cannot take on any duties that are not performed in a "judicial manner,"[34] such as issuing advisory opinions[35] or exercising a "general veto power" over legislative actions not tied to a live dispute between parties.[36] In fact, Justice Frankfurter once described the case-or-controversy requirement as a limitation on the judicial power to the resolution of disputes "that were the traditional concern of the courts at Westminster" and that involved "a concrete, living contest between adversaries."[37]

Because courts have the ability to invalidate democratically enacted legislation without being democratically accountable themselves, the case-or-controversy requirement represents the most important limitation on the power of federal courts in our democratic system.[38] It is of such fundamental importance, as Chief Justice Marshall stated in *Cohens v. Virginia*, that a court would lack the power to remedy even a constitutional violation if the constitutional issue did not present itself for review as part of a proper case or controversy.[39]

The case-or-controversy requirement flows logically from the Supreme Court's longstanding adoption of the private-rights model of the judiciary. This distinctive feature of our constitutional system dates back to at least *Marbury v. Madison*, in which Chief Justice Marshall declared that "[t]he province of the Court is, *solely*, to decide on the rights of individuals."[40] As an incident to deciding these individual rights,

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34 Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.† (1792) ("[N]either the *Legislative* nor the *Executive* branches, can constitutionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner.").

35 *See Muskrat*, 219 U.S. at 354 (describing a 1793 incident in which Thomas Jefferson, then Secretary of State, asked the Justices for a legal opinion that the Court refused to provide "in consideration of the lines of separation drawn by the Constitution between the three departments of government . . . [which] afforded strong arguments against the propriety of extrajudicially deciding the questions alluded to").

36 *Id.* at 357 (discussing the holding in *Marbury*, 5 U.S. (1 Cranch) 137).

37 Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) ("And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law.").

38 *Muskrat*, 219 U.S. at 357 (noting the seriousness of a "court, in the exercise of the judicial power, pass[ing] upon the constitutional validity of an act of Congress").

39 19 U.S. (6 Wheat.) 264, 405 (1821) ("[Article III] does not extend the judicial power to every violation of the constitution which may possibly take place, but to 'a case in law or equity,' in which a right . . . is asserted in a Court of justice.").

40 5 U.S. (1 Cranch) at 170 (emphasis added); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983) (discussing the judicial role and *Marbury v. Madison*'s impact on the Court's articulation of its role in the twentieth century).

> [i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[41]

If individual adversaries each rely on conflicting legal provisions for support, then a court would, in carrying out "the very essence of judicial duty,"[42] need to decide which legal provision controls the outcome. The judicial review power, in other words, exists simply as a byproduct of the judiciary's power to resolve private disputes between individuals, where one individual relies on the Constitution and the other disputes that reliance. Implied is the inverse: the exercise of judicial power untethered to the need to resolve a private dispute is an illegitimate exercise of power.

The private-rights model has become nearly synonymous with the case-or-controversy requirement. Indeed, the two are effectively coextensive under current doctrine.[43] From these premises, the Supreme Court has derived a requirement that every civil plaintiff demonstrate a concrete and particularized injury to meet the case-or-controversy requirement.[44] This "injury in fact" prerequisite has become the core of modern Article III standing doctrine, along with the requirements that the injury be "fairly traceable" to the defendant's conduct and redressable by a favorable decision.[45]

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41 *Marbury*, 5 U.S. (1 Cranch) at 177-78.

42 *Id.* at 178.

43 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-77 (1992) (noting *Marbury v. Madison*'s emphasis on private rights while performing a case-or-controversy standing analysis).

44 *Id.* at 576 (describing the "concrete injury requirement" as "one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches"). Scholars have criticized this development, especially as its origins can be traced to the Court's desire to *expand* the class of plaintiffs with standing to sue. *See, e.g.*, Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 73-74 (1984) (noting that the Court adopted the injury-in-fact requirement in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and that one of the goals in adopting this doctrine was to "liberalize access to the federal courts"). Nevertheless, it is now part of settled doctrine, and we do not intend to revisit the debate here.

45 *Lujan*, 504 U.S. at 560-61 (describing the three elements of standing that form an "irreducible constitutional minimum"); *see also* Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (describing standing as the "threshold question in every federal case"). The Court has also held that standing has prudential elements. These include a ban on raising third-party interests and a requirement that the case fall within the congressionally defined "zone of interests." *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (noting "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked"); *Warth*, 422 U.S. at 499 ("[T]he plaintiff . . . cannot rest his claim to relief on the legal rights or interests of third parties."). In addition, the Article III mootness doctrine requires a *continuing* case or controversy to sustain jurisdiction. *See, e.g.*,

In modern doctrine, the Court has insisted that standing implements the case-or-controversy requirement by limiting federal courts to adjudication of only those "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."[46] This formulation arguably begs the question because it simply restates the definition of case or controversy. But that seems to be the point: just as it has equated the case-or-controversy requirement with the private-rights model, the Court has, for the most part, considered standing doctrine to operationalize the case-or-controversy requirement.[47]

The three-part test for standing also supports the private-rights model.[48] First, the injury–in-fact requirement ensures that courts will not be used to vindicate public rights: an injury must not only be "concrete and particularized," but also "actual or imminent, not conjectural or hypothetical."[49] The Court has clarified that an injury in fact must be individualized so that the plaintiff has a "personal stake in the outcome" of the lawsuit.[50] Second, the traceability requirement guarantees that parties are engaged in a live dispute. Third, the redressability requirement ensures that there is a role for the court in the dispute by precluding any lawsuit that does not resemble a traditional common law action between two private individuals from being heard.

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Arizonans for Official English v. Arizona, 520 U.S. 43, 67-68 & n.22 (1997) (defining the mootness requirement as the "requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)" (internal quotation marks omitted)); *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) (explaining that mootness presents a lower evidentiary bar to the plaintiff than does Article III standing). Ripeness and the political question doctrine are two other "doctrines that cluster about Article III." Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

46 *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (calling standing the "threshold jurisdictional question"). On this logic, the Court has approved standing for qui tam relators because such actions "originated around the end of the 13th century" and enjoyed a "long tradition" in "England and the American Colonies." Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000).

47 *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) ("As we have explained, '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.' . . . 'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006), and Raines v. Byrd, 521 U.S. 811, 818 (1997)).

48 *But see* Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 466-68 (2008) (surveying various criticisms of standing and arguing that standing may not, in fact, serve to maintain a balance of power between the federal branches).

49 *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted).

50 City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

It is no surprise that the injury-in-fact requirement severely limits the number and type of individuals who may bring claims in federal court. Two consequences flow from this limitation. First, by limiting the class of individuals who may raise certain issues, Article III standing doctrine sometimes prevents those issues from ever being litigated.[51] Such issues often involve constitutional challenges that seek to overturn laws enacted by Congress or to invalidate actions taken by the Executive Branch. Accordingly, standing doctrine limits the unelected judiciary's ability to interfere with—that is, to serve as a check on—certain decisions or classes of decisions made by the democratically elected political branches.[52]

Second, the injury-in-fact requirement not only limits which issues get litigated, but also "*when* and *at whose instance*" the issues wind up in court.[53] By enforcing the private-rights model articulated by Chief Justice Marshall in *Marbury*, Article III standing can effectively prevent what Tocqueville called "wanton assaults" on legislation resulting from "the daily aggressions of party spirit."[54] Instead, standing serves to ensure that "the trial of the law" is "intimately unit[ed] . . . with the trial of an individual."[55] A plaintiff must demonstrate "an injury apart from the mere breach of the social contract."[56] The Court has long endorsed this view, denying standing to so-called non-Hohfeldian (ideological) plaintiffs who lack a "personal stake in

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51 *See Steel Co.*, 523 U.S. at 101 ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects."); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). For a more recent iteration of this idea, see *Clapper*, 133 S. Ct. at 1154.

52 *See, e.g.*, *Clapper*, 133 S. Ct. at 1146 ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.").

53 Scalia, *supra* note 40, at 892.

54 *Id.* (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 102 (P. Bradley ed., 1945)).

55 *Id.* (quoting DE TOCQUEVILLE, *supra* note 54).

56 *Id.* at 895. Then-Judge Scalia noted the one glaring exception to this general rule that a generalized injury is insufficient to establish standing—a taxpayer can establish standing to challenge federal taxing and spending programs that are in violation of the Establishment Clause as a result of *Flast v. Cohen*, 392 U.S. 83, 103 (1968). Scalia, *supra* note 40, at 890-91. He then (correctly) predicted the exception's eventual demise. *Id.* at 892 (criticizing the opinion); *see also* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1451 (2011) (Kagan, J., dissenting) (decrying the outcome as "the effective demise of taxpayer standing" granted under *Flast*). Note also that, on relatively rare occasions, the Court has imposed subconstitutional "prudential" limits on standing. *See* discussion *supra* note 45. Our analysis and proposal do not apply to challenges to standing grounded in these prudential limitations.

the outcome of the controversy."[57] In this way, standing is thought to guarantee the existence of "concrete adverseness[,] which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult" legal questions.[58] The Hohfeldian plaintiff requirement also prevents courts from adjudicating issues affecting the majority of the populace, issues that are more properly resolved by democratic political processes.[59]

The inescapable conclusion is that the Court's modern formulation of Article III standing plays a critical role in enforcing the separation of powers. Simply put, by constraining courts to act within Article III's case-or-controversy limit, the standing requirement ensures that courts act like courts. Article III standing prevents courts from exercising an otherwise unchecked and freewheeling power to review legislative and executive action untethered from actual litigants bearing concrete grievances. Put differently, standing effects a structural limitation on federal jurisdiction which prevents courts from issuing advisory opinions or otherwise upsetting the normal majoritarian political processes that are the backbone of our democracy.

### B. *Issue- and Party-Based Limitations on Subject Matter Jurisdiction*

The case-or-controversy requirement is not the only constitutional limitation on the subject matter jurisdiction of federal courts. It is not even the only limitation that implicates separation of powers. Even if a lawsuit satisfies the case-or-controversy requirement, the Constitution would bar a federal court from hearing the suit unless it raises a question of federal law,

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57 Sierra Club v. Morton, 405 U.S. 727, 732 (1972) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982) (emphasizing that the respondent failed to identify a personal injury resulting from the alleged infraction); United States v. Richardson, 418 U.S. 166, 179-80 (1974) (repeating and reasserting the personal stake requirement); Frothingham v. Mellon, 262 U.S. 447, 488-89 (1923) (requiring a direct injury to an individual before one can challenge the constitutionality of a congressional act). *But see* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033-34 (1968) (coining the terms "Hohfeldian" and "non-Hohfeldian," and arguing that "history, logic, and policy" dictate that non-Hohfeldian plaintiffs' claims may be heard without violating the case-or-controversy requirement); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1474 (1988) (noting that the case-or-controversy limitation does not "explicitly require that plaintiffs have a particular stake in the outcome").

58 *Baker*, 369 U.S. at 204; *see also Valley Forge*, 454 U.S. at 472 ("[A] concrete factual context [is] conducive to a realistic appreciation of the consequences of judicial action.").

59 Scalia, *supra* note 40, at 896-97 (highlighting the institutional reasons courts should not adjudicate the rights of the majority).

involves parties from different states, or presents an issue arising under admiralty or maritime jurisdiction, to name just a few examples.[60] These issue- and party-based constitutional grants of jurisdiction are not self-executing; with the exception of the few categories of cases falling within the Supreme Court's original jurisdiction, Congress must affirmatively grant federal jurisdiction by statute.[61] Of course, Congress lacks authority to grant federal courts jurisdiction to hear cases that the Constitution does not authorize. If Congress attempts to do so, the Court will invalidate that grant.[62]

More commonly, however, congressional grants of jurisdiction are stricter than what the Constitution permits. One explanation is that the Court has construed statutory jurisdictional language—even that which echoes constitutional text—more narrowly than the often identical constitutional counterpart. As a result, the statute becomes the limiting factor. Federal question jurisdiction, for example, requires a nonfrivolous federal claim to appear on the face of a well-pleaded complaint.[63] In contrast, the Constitution requires only a federal "ingredient" to support the exercise of jurisdiction.[64] As another example, diversity jurisdiction requires complete diversity among the parties,[65] while the Constitution requires only minimal diversity.[66]

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60 *See* U.S. CONST. art. III, § 2 (listing categories of "Cases" and "Controversies" to which the "judicial Power shall extend").

61 *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) ("[Federal courts] possess only that power authorized by Constitution and statute." (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 357, 377 (1994)) (internal quotation marks omitted)); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

62 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803) (holding that because the jurisdictional authority "given to the supreme court . . . to issue writs of mandamus to public officers, appears not to be warranted by the constitution," the jurisdictional "act of the legislature, repugnant to the constitution, is void"). Jurisdiction-granting statutes can also run afoul of constitutional provisions other than Article III. *See, e.g.*, Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 380-82 (1798) (invalidating a portion of the Judiciary Act of 1789 in light of the Eleventh Amendment); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888 22 (1985) ("*Hollingsworth* may put to flight the conventional wisdom that *Marbury v. Madison* was the first case in which the Supreme Court held an act of Congress unconstitutional.").

63 *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152-54 (1908) (holding that under the Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434, whose modern equivalent is 28 U.S.C. § 1331 (2012), a federal question must appear in a complaint rather than in an anticipated defense).

64 Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824).

65 Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (finding under the Judiciary Act of 1789 that complete diversity among the parties means "that each distinct interest should be

But even setting aside these interpretive techniques, some statutes explicitly remove cases from federal courts that would otherwise be constitutionally authorized.[67] Congress has broad power to engage in such "jurisdiction stripping"[68] and may have a variety of reasons to exercise that power. For example, Congress may want to ease the resource strain on overburdened federal court dockets,[69] avoid disrespecting state courts or governments out of concern for federalism or comity,[70] or prevent certain issues from ever being litigated.[71]

Importantly, the Constitution gives Congress, not the courts, the power to narrow jurisdiction.[72] A federal court that exercises jurisdiction nominally authorized by the Constitution, but not by an act of Congress, thus violates

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represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts," a principle now cemented in 28 U.S.C. § 1332(a) (2012)).

66 State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967) (holding that, in the case of an interpleader, only minimal diversity is required under 28 U.S.C. § 1335 (2012)). Congress can require only minimal diversity by statute in particular situations. *See, e.g.*, 28 U.S.C. § 1332(d)(2)(A) (2012) (requiring minimal diversity for certain class actions).

67 *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187-89 (1943) (upholding the Emergency Price Control Act of 1942's exclusive grant of jurisdiction to the Emergency Court of Appeals during World War II).

68 *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."); REDISH, TENSIONS, *supra* note 28, at 29-30 (arguing that Congress's authority to limit federal jurisdiction is very broad); *see also* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 906 (1984) (tracing Article III's inherent limits back to the debates at the Constitutional Convention); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363-64 (1953) (noting that Congress has "plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in state court"); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 61-68 (1981) (describing the evolving understanding of Congress's ability to control the courts under Article III).

69 *See* Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2475-76 (1998) (describing a system in which federal court jurisdiction can be modified when state courts are available).

70 *See* Theodore J. Weiman, Comment, *Jurisdiction Stripping, Constitutional Supremacy, and the Implications of* Ex Parte Young, 153 U. PA. L. REV. 1677, 1683-85 (2005) (providing a constitutional overview of the traditional theory of jurisdiction stripping).

71 *See* Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*, 9 LEWIS & CLARK L. REV. 363, 368-70 (2005) (arguing that Congress has the power to remove turbulent constitutional issues from federal judicial review by constricting federal court jurisdiction); *see also Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1869) (recognizing unlimited congressional authority in excluding cases from the Supreme Court).

72 *See, e.g.*, Lumen N. Mulligan, *You Can't Go Holmes Again*, 107 NW. U. L. REV. 237, 276-78 (2012) (describing how congressional intent controls the scope of federal question jurisdiction under 28 U.S.C. § 1331 (2012)).

separation of powers from an institutionalist perspective.[73] The question is not whether the Constitution forbids courts from exercising a certain power (it does not); the question is *who* gets to decide how much of the constitutionally possible power the courts get to exercise. Because the Constitution has explicitly given that decisionmaking power to Congress, a court exceeding congressionally defined jurisdictional limits acts unconstitutionally, usurping what is intended to be legislative authority to define those limits.

### C. *Courts as Courts: Contrasting the Case-or-Controversy Requirement with Issue- or Party-Based Limitations on Jurisdiction*

The preceding discussion shows why a court violates separation of powers principles whenever it takes jurisdiction over a case that is beyond the boundaries of its jurisdiction, regardless of whether those boundaries are defined by statute or the Constitution. But there is a key conceptual difference between issue- or party-based limits on federal subject matter jurisdiction and the case-or-controversy requirement that renders a violation of the latter considerably more troubling: when a court violates the case-or-controversy requirement, *it ceases to act like a court*. This is not so when a court violates an issue- or party-based limit. Consider a hypothetical scenario in which a federal court hears a purely state-law tort claim brought by an Illinois plaintiff against two defendants, an Illinois citizen and a New York citizen. Hearing the case would violate the congressionally defined limit on jurisdiction contained in 28 U.S.C. § 1332(a)[74] and would accordingly violate the separation of powers from an institutionalist perspective. But the court would still be acting like a court, performing an adjudicatory role without taking on legislative or executive tasks.[75] By contrast, consider a scenario in which Congress enacts a statute allowing any citizen to sue the presidential administration to compel its adherence to congressional or constitutional limits on spending. A court that heard this "taxpayer suit" would not violate any statutory limit on jurisdiction; in fact, it would be acting in accordance with congressional will. Yet, without a case or controversy,

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73 *See* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 768 (1989) ("The most important insight of the institutionalist perspective . . . is that issues not controlled by the Constitution . . . are to be resolved on the basis of judicial policy assessment only to the extent the representative branches have not already made that policy choice through legislative action.").

74 *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting the diversity statute to require complete diversity between the parties).

75 That the Constitution itself does not forbid the exercise of jurisdiction in this scenario makes this point even more clear. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) (holding that the Constitution requires only minimal diversity).

the court effectively would be delivering an advisory opinion,[76] and it would be acting like something other than a court.

This courts-*qua*-courts distinction between the consequences of violating constitutional—as opposed to statutory—limitations on jurisdiction is important because of the inherently undemocratic nature of the judiciary. Because courts are unaccountable to the electorate, judicial exercise of executive or legislative power would undermine democratic values with little or no recourse available to the public to remedy the usurpation.[77] And this is exactly what happens when the case-or-controversy requirement is violated. By contrast, when a court violates an issue- or party-based statutory limit on jurisdiction, it still acts like a court—just the wrong court. For example, if a federal court took jurisdiction over the state-law tort action described in the hypothetical above, it would be performing the function of the state court where the action should have been filed.[78] Although this would violate federalism principles, it is not as serious of a threat to fundamental democratic values as the exercise of nonjudicial powers by the judiciary.

The Supreme Court has long recognized the superior importance of the case-or-controversy requirement over issue- or party-based limitations on jurisdiction. For example, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, the Court considered whether a statute extending federal diversity jurisdiction to disputes "between citizens of different States, or citizens of the District of Columbia" was consistent with Article III's diversity clause.[79] In *Tidewater*, a District of Columbia corporation sued a Virginia corporation in federal district court based on a state-law insurance contract claim.[80] The district court dismissed the case for lack of subject matter jurisdiction, holding that even though the statute authorized the

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[76] This was largely the scenario in *Frothingham v. Mellon* minus the congressional statute. 262 U.S. 447, 488-89 (1923) (rejecting taxpayer standing). *But see* Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998) ("[T]hat a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes.").

[77] *See* THE FEDERALIST NO. 78, *supra* note 22, at 266 (Alexander Hamilton) ("[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . .").

[78] *See* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 585-86 (1949) (plurality opinion) (noting that because the "[d]efendant concedes that it can presently be sued in some court of law, if not this one," the jurisdictional issue involved "mere mechanics of government and administration" and would not "invade fundamental freedoms or . . . substantially disturb the balance between the Union and its component states").

[79] *Id.* at 584-85 (quoting Act of Apr. 20, 1940, Pub. L. No. 76-463, ch. 117, 54 Stat. 143 (codified as amended at 28 U.S.C. § 1332(e) (2012)).

[80] *Id.*

exercise of jurisdiction, the Constitution did not.[81] The Supreme Court reversed.[82]

Justice Jackson, writing for a plurality, noted that "it was 'generally supposed [by the Framers] that the jurisdiction given [to federal courts] was constructively limited to cases of a Judiciary nature.'"[83] As long as that requirement is satisfied, he reasoned, separation of powers is not offended.[84] The insurance contract dispute was still a "controvers[y] of a justiciable nature, the sole feature distinguishing [it] from countless other controversies handled by the same courts being the fact that one party is a District citizen."[85] To be sure, functionalist concerns—especially those involving the identity of the parties—might make one desire fewer cases to be heard in Article III courts.[86] But those concerns do not necessarily implicate the role of courts as courts. Accordingly, federal courts should be especially cautious when proceeding with litigation if the existence of a true case or controversy is in doubt. That is precisely why litigating standing and surrounding jurisdictional issues implicating the case-or-controversy requirement has vital consequences for separation of powers.

## II. LITIGATING ARTICLE III STANDING: THE PUZZLING CURRENT PRACTICE AND WHY IT UNDERMINES THE SEPARATION OF POWERS

### A. *Jurisdictional Primacy and Rule 12(b)(1)*

Because of the connection between subject matter jurisdiction and the separation of powers, a federal court has a solemn duty to ensure that it has subject matter jurisdiction over a suit. Accordingly, if a court lacks jurisdiction, it must immediately dismiss the case without making any pronouncement

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81 *Id.* at 583.

82 *Id.* at 604.

83 *Id.* at 591 (citation omitted).

84 *Id.* at 591.

85 *Id.* Justice Jackson further noted that Congress had assigned these controversies to a court, not to a legislative body, and thus had not "attempted to usurp any judicial power" for itself. *Id.* Bolstering Justice Jackson's conclusion was the fact that Article III courts in the District of Columbia had long heard cases that could have been heard in Article I courts (such as the Court of Claims); it was "too late" to hold that Article III courts could not perform these and similar judicial functions. *Id.* at 591-92.

86 *See supra* notes 69-71 and accompanying text. In a concurring opinion, Justice Rutledge, joined by Justice Murphy, also found no separation of powers problem and would have simply held that the District of Columbia is a "state" for purposes of Article III's diversity clause. *Tidewater,* 337 U.S. at 624-25 (Rutledge, J., concurring in the judgment).

on the merits.[87] To that end, federal courts have what the Court itself has called a "special obligation" to inquire into subject matter jurisdiction, even if neither party raises the issue.[88] Individual parties, too, may not waive objections to subject matter jurisdiction by consenting to federal jurisdiction where it does not in fact exist.[89] Subject matter jurisdiction is so critical in upholding separation of powers principles that the Supreme Court in *Steel Co. v. Citizens for a Better Environment* emphatically reminded lower federal courts to resolve all issues of jurisdiction before proceeding to the merits, no matter how complicated or thorny such jurisdictional issues might be.[90] Addressing the merits before establishing that there is a valid case or controversy "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."[91]

Since their inception, the Federal Rules of Civil Procedure have provided the procedural vehicle for courts to ensure adherence to Article III through Rule 12(b)(1). That provision, the language of which has remained virtually unchanged since the Rules were first promulgated in 1938,[92] provides for dismissals based on a "lack of subject matter jurisdiction."[93] Furthermore, Rule 12(h)(3) allows a Rule 12(b)(1) motion to be raised "at any time" in the litigation, unlike all of the other defenses listed in Rule 12(b).[94] And, consistent with its history, the Rule authorizes courts to consider subject

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87 *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

88 *See, e.g.*, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." (quoting Mitchell v. Maurer, 293 U.S. 237, 244 (1934))).

89 *See Mitchell*, 293 U.S. at 244 ("[L]ack of federal jurisdiction cannot be waived or overcome by an agreement of the parties."); *cf.* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1986) (stating that individuals may waive the right to be heard in an Article III forum only if the grant of adjudicatory power to a legislative court does not implicate a "structural principle," such as separation of powers or federalism).

90 523 U.S. 83, 94-95 (1998) (rejecting "hypothetical jurisdiction").

91 *Id.* at 94.

92 The original Rule 12(b)(1) provided that a defense based on a "lack of jurisdiction over the subject matter" could be made by motion. FED. R. CIV. P. 12(b) (1938), *in* FEDERAL RULES OF CIVIL PROCEDURE 828 (Kevin M. Clermont ed., 2010).

93 FED. R. CIV. P. 12(b)(1).

94 *Compare* FED. R. CIV. P. 12(h)(3) ("If the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action." (emphasis added)), *with* FED. R. CIV. P. 12(h)(1)–(2) (listing the conditions under which a party waives the other defenses available under Rule 12(b)).

matter jurisdiction sua sponte.[95] These qualities are unique to Rule 12(b)(1); no other motion or issue in civil litigation is forever available to litigants and nonwaivable by the parties.[96]

Rule 12(b)(1) is also distinct because, unlike on motions to dismiss for failure to state a claim under Rule 12(b)(6), courts need not view allegations of subject matter jurisdiction as true. Instead, courts are authorized to engage in limited discovery and factfinding to resolve contested jurisdictional issues.[97] Of course, if the defendant does not challenge any jurisdictional facts, then there may be no need to engage in such an inquiry. But "[i]t is well ingrained in the law that subject-matter jurisdiction can be called into question . . . by challenging the accuracy of the jurisdictional facts alleged."[98] If the defendant challenges the accuracy or existence of jurisdictional facts or if the court, on its own motion, has reason to question them, then the court may "inquire, by affidavits or otherwise, into the facts."[99]

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[95] The original Rule 12(h) provided that "whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(2) (1938) (emphasis added), *in* FEDERAL RULES, *supra* note 92, at 237. In 1966, this provision was renumbered as (h)(3) but otherwise left unchanged. FED. R. CIV. P. 12(h)(3) (1966), *in* FEDERAL RULES, *supra* note 92, at 243. Rule 12(h)(3)'s current language was adopted in 2007. *Id.* at 1.

Perhaps more significantly, the original Rule 12(h) also provided that "[t]he objection or defense . . . shall be disposed of as provided in Rule 15(b)." FED. R. CIV. P. 12(h) (1938), *in* FEDERAL RULES, *supra* note 92, at 237. Rule 15(b) governs amendments to the pleadings made during and after trial and is permissive, allowing courts to reject attempted amendments (though courts generally "should freely permit" amendments). FED. R. CIV. P. 15(b). Accordingly, the original Rule 12(h) seemingly gave courts discretion not to hear tardy objections to subject matter jurisdiction. *See* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1873-74 (2007). The reference to Rule 15(b) was removed in 1966. FEDERAL RULES, *supra* note 92, at 242-43.

[96] *See* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1394, at 551 (3d ed. 2004) ("It is evident from a reading of the text of Rule 8(c), Rule 8(d), and Rule 12(b) that all affirmative defenses and denials must be pleaded by the defendant or, when appropriate, raised by motion under Rule 12(b), or they will be waived." (footnotes omitted)).

[97] *See* 2 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[3], at nn.8-9 (3d ed. 1997) (providing a collection of cases where the courts engaged in factfinding in the context of a 12(b)(1) motion); 11 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.04[3][d][ii], at n.48 (3d ed. 1997); 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 160 n.47 (3d ed. 2004) (collecting cases from every circuit that involved an evidentiary evaluation based on a 12(b)(1) motion).

[98] Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 68 (1987) (Scalia, J., concurring in part and concurring in the judgment).

[99] Land v. Dollar, 330 U.S. 731, 735 n.4 (1947) (distinguishing between a motion to dismiss for failure to state a cause of action and a motion to dismiss for lack of jurisdiction).

On certain challenges to subject matter jurisdiction, lower federal courts routinely follow *Steel Co.*'s principle of "jurisdictional primacy," using Rule 12(b)(1) procedures to fully resolve jurisdictional questions before moving on to the merits.[100] These include issue- or party-based challenges—in other words, disputes over whether a suit arises under federal law or whether the requirements of diversity jurisdiction have been satisfied. Some courts will defer resolution of these jurisdictional questions if the factual issues needed to resolve jurisdiction and the merits of the dispute overlap,[101] but the Supreme Court has never explicitly authorized this practice.[102]

The Court has also begun to define narrowly which elements of a cause of action are jurisdictional, cautioning lower courts against making "drive-by jurisdictional rulings"[103] that fail to distinguish properly between dismissals for failure to state a claim and dismissals for lack of subject matter jurisdiction.[104] Factual challenges to statutory jurisdictional elements,

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100 *See, e.g.*, 2 MOORE ET AL., *supra* note 97, § 12.30[1], at n.4 (collecting cases where the court determined subject matter jurisdiction before evaluating the merits); WRIGHT & MILLER, *supra* note 97, § 1350, at n.4 (same).

101 *See* 2 MOORE ET AL., *supra* note 97, § 12.30[3], at n.10 (collecting cases where the jurisdictional facts and merits were "intertwined"); WRIGHT & MILLER, *supra* note 97, § 1350, at 245-47 ("If, however, a decision of the jurisdictional issue requires a ruling on the underlying substantive merits of the case, the decision should await a determination of the merits either by the district court on a summary judgment motion or by the fact finder at the trial." (footnote omitted)); *see also* Stefania A. Di Trolio, Comment, *Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 SETON HALL L. REV. 1247, 1259 (2003) ("[C]ourts have fashioned an exception to the general rule that courts can decide jurisdictional facts: when jurisdictional facts are 'intertwined with the merits' of the cause of action, the general rule no longer applies.").

102 Some have interpreted the Court's decisions in *Bell v. Hood*, 327 U.S. 678 (1946), and *Land v. Dollar*, 330 U.S. 731 (1947), as obliquely endorsing the practice. In *Bell*, the Court said that federal question jurisdiction exists whenever the plaintiff's right to recover "will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." 327 U.S. at 685. In *Land*, the Court reversed a dismissal for lack of subject matter jurisdiction over a breach-of-contract claim against the U.S. Maritime Commission because the jurisdictional issue and merits of the dispute depended on the validity of the contract. 330 U.S. at 738-39. Accordingly, the lower court should have taken jurisdiction of the case and proceeded to the merits inquiry. *Id.* On the other hand, neither *Bell* nor *Land* held that resolution of the jurisdictional issue could be *deferred* until trial. Rather, both held that subject matter jurisdiction actually existed, thereby allowing the lower courts to proceed to the merits.

103 Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998)) (internal quotation marks omitted).

104 *See, e.g.*, *id.* at 514-16 (holding that Title VII's employee-numerosity requirement of fifteen employees is not jurisdictional and that Congress must clearly state that an element is jurisdictional); *see also, e.g.*, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168-69 (2010) (applying *Arbaugh* to hold that § 411(a) of the Copyright Act is not jurisdictional in nature).

however, rarely overlap with the merits of a case, and courts continue to use Rule 12(b)(1) procedures to evaluate such challenges.[105]

### B. *The Progressively Shifting Burden Approach to Litigating Article III Standing*

In contrast to its handling of issue- and party-based statutory jurisdictional issues, the Supreme Court routinely addresses issues of Article III standing without invoking Rule 12(b)(1). Instead of fully resolving Article III standing whenever it is called into question, the Court inexplicably treats standing as if it were just another merits issue: something to be plausibly alleged in a complaint, supported by some quantum of evidence at summary judgment, and bolstered by a preponderance of evidence at trial.[106] Following the Supreme Court's lead, lower courts routinely defer the resolution of Article III standing whenever there is a factual dispute over its elements. Moreover, unlike with statutory jurisdictional issues, courts do not confine this practice to situations where the factual issues overlap with those needed to resolve the merits.[107] Rather, they defer resolution of standing as a matter of course. Surprisingly, the Supreme Court has explicitly endorsed this approach to litigating Article III standing.

The Court's most frequently cited statement on the matter came in *Lujan v. Defenders of Wildlife*.[108] There, the Court asserted that

> [s]ince [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears

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105 *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 96-97 (2010) (holding that the plaintiffs should have the opportunity to contest the factual basis for the defendant corporation's "citizenship" to defeat removal).

106 Ironically, some of the most vocal *critics* of modern standing doctrine believe that "standing should simply be a question on the merits of plaintiff's claim" and that the Court should "abandon the idea that standing is a preliminary jurisdictional issue." William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

107 When the factual issues do overlap, courts often defer resolving standing, just as they do for other jurisdictional issues. *See* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.15, at n.34 (3d ed. 2004) (collecting cases).

108 504 U.S. 555 (1992). To be sure, the Court's views on litigating standing predate *Lujan*. *See, e.g.*, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 115 (1979) ("[T]he facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art[icle] III. It remains open to petitioners, of course, to contest these facts at trial.").

> the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.[109]

So while a plaintiff may make general factual allegations at the pleading stage, she must present "specific facts," which "will be taken to be true," at the summary judgment stage.[110] Even more surprising was the Court's assertion that "those facts (if controverted) must be 'supported adequately by the evidence adduced at trial,'" unambiguously suggesting that facts that support standing can and should be resolved by a jury in an appropriate case.[111] It is difficult to reconcile this statement with *Steel Co.*'s principle of jurisdictional primacy, which requires courts to resolve all issues of subject matter jurisdiction at the outset of litigation and before proceeding to the merits.[112] More important, given standing's role in enforcing separation of powers,[113] the *Lujan* approach means that a federal court could oversee years of litigation without ever confirming the existence of a valid case or controversy.

The Court has never offered any explanation or justification for adopting this progressively shifting burden approach to litigating Article III standing. Indeed, when the Court has expressly invoked this step-by-step approach to standing challenges, it has failed to acknowledge—even in dissent—the availability or existence of Rule 12(b)(1) motions, even though these motions were expressly designed to resolve challenges to subject matter jurisdiction. For example, the *Lujan* dissenters argued that the plaintiffs had sufficiently raised genuine factual issues so as to preclude summary judgment.[114] Yet they never questioned whether it was appropriate to consider standing on summary judgment in the first place. In *Massachusetts v. EPA*, the Court once again held that the plaintiffs had adequately proved the elements of standing, "at least according to petitioners' uncontested affidavits."[115] The dissenting Justices complained that the "petitioners' 43 standing declarations and accompanying exhibits" were "conclusory" and "conjectur[al]."[116] But they never suggested the option of a limited

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109 *Lujan*, 504 U.S. at 561.

110 *Id.*

111 *Id.* (quoting *Gladstone*, 441 U.S. at 115 n.31). The plaintiffs in *Lujan* sought only a declaratory judgment and injunction, neither of which constitutionally requires a jury.

112 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" (quoting Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884))).

113 *See supra* Section I.A.

114 *Lujan*, 504 U.S. at 589-90 (Blackmun, J., dissenting).

115 549 U.S. 497, 526 (2007).

116 *Id.* at 542 (Roberts, C.J., dissenting). The appeals court below *did* consider such an option but decided it would be "folly" to adopt such an approach because it "would largely duplicate the

evidentiary hearing to determine whether the affidavits and declarations were actually true. In short, the Court effectively treats Article III standing as if Rule 12(b)(1) does not exist.[117]

A framework requiring an increasing burden of production and persuasion as litigation proceeds is uniquely tailored for a resolution of issues on the merits because the evidentiary record, by its nature, will develop over the course of the pleadings, discovery, and trial. This evolving burden necessarily relies on different procedural rules for support. Thus, while a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) requires courts to accept all factual allegations in the complaint as true, a motion for judgment on the pleadings pursuant to Rule 12(c) allows courts to consider all of the pleadings filed up to that point.[118] Similarly, if a court looks beyond the pleadings, it treats the motion to dismiss as a motion for summary judgment under Rule 56,[119] which itself brings in additional procedures along with different burdens of production.[120] For example, the moving party, usually the defendant,[121] bears an initial burden of production to support the motion with a prima facie showing.[122] Although the burden then shifts to the nonmoving party to produce substantial evidence tending

proceedings" on the merits due to the "factual overlap" of the standing and merits issues. Massachusetts v. EPA, 415 F.3d 50, 55 (D.C. Cir. 2005). Accordingly, the appeals court proceeded to evaluate the merits of the dispute without ever making "a definitive ruling as to petitioners' standing." *Massachusetts*, 549 U.S. at 514.

117 As one treatise dryly states, "The procedural means for resolving standing issues are not as clearly defined as might be imagined." WRIGHT ET AL., *supra* note 107, § 3531.15, at 301. Shortly after the Federal Rules of Civil Procedure were first promulgated, the Supreme Court noted that "there is no statutory direction for procedure upon an issue of jurisdiction, [and thus] the mode of its determination is left to the trial court." Gibbs v. Buck, 307 U.S. 66, 71-72 (1939); *see also* Land v. Dollar, 330 U.S. 731, 735 n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, the court may inquire, by affidavits or otherwise, into the facts as they exist." (citation omitted)).

118 *See* FED. R. CIV. P. 12(c) ("After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.").

119 *See* FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

120 *See* Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986) ("[T]he party opposing the motion for summary judgment bears the burden of responding *only after* the party has met its burden." (internal quotation marks omitted)); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) (concluding that granting summary judgment was inappropriate since the defendant did not meet his initial burden of production); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (stating the burden first lies on the moving party per Rule 56).

121 *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 92 (1990) ("Summary judgment is a defendant's motion.").

122 *See* 11 MOORE ET AL., *supra* note 97, § 56.40[1][a], at n.4.

to preclude summary judgment,[123] the court will review the record in the light most favorable to the nonmoving party, drawing all inferences in that party's favor.[124] By contrast, at trial, the court or jury resolves all issues of facts with no deference to either party (with the plaintiff squarely bearing the burdens of production and proof). After the verdict, a motion by the losing party for a new trial under Rule 59 faces an even heavier burden.[125]

By grafting the progressively shifting burden framework onto challenges to Article III standing, the Court has essentially ignored the unique nature and purpose of Rule 12(b)(1). The Rule owes its existence to the need to address subject matter jurisdiction at the outset of litigation in a manner divorced from resolving other issues in the suit. If subject matter jurisdiction is lacking, then the court must immediately dismiss the suit.[126] Accordingly, a Rule 12(b)(1) motion may be made by any litigant and at any time, and courts may make any factual findings and credibility determinations needed to resolve the motion.[127] By contrast, the purpose of summary judgment is decidedly *not* to resolve factual issues. Rather, it is simply to see whether there exists a triable *dispute* over a material factual issue that requires resolution on the merits.[128] Using the progressively shifting burden framework (as exemplified by summary judgment procedures) to resolve issues of Article III standing endorses the idea that the plaintiff is assumed to have standing to pursue litigation through discovery and to trial as long as there continues to be a material dispute over standing. To borrow a phrase from Judge Flaum, "[t]his is a nonsequitur."[129]

To be sure, a court will ostensibly address standing on a Rule 12(b)(1) motion if the case happens to present itself in that posture.[130] For example,

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123 *See Anderson*, 477 U.S. at 249 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.").

124 11 MOORE ET AL., *supra* note 97, § 56.24[2], at n.4.

125 *See* FED. R. CIV. P. 59(a) (reviewing grounds for a new trial); *cf.* Galloway v. United States, 319 U.S. 372, 393 n.29 (1943) ("[T]he moving party receives the benefit of jury evaluation of his own case and of challenge to his opponent's for insufficiency. If he loses on the challenge, the litigation is ended.").

126 *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

127 *See supra* notes 97-99 and accompanying text.

128 *See* 11 MOORE ET AL., *supra* note 97, § 56.24[2] ("[T]he court may not weigh the evidence to resolve factual disputes [or] make credibility determinations . . . .").

129 Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987).

130 "Ostensibly" because, while it purports to be ruling on a Rule 12(b)(1) motion, a court still accepts all of the plaintiff's allegations of standing as true, which is required for evaluating only a Rule 12(b)(6) motion to dismiss for failure to state a claim on the merits.

the defendant in *Steel Co.* filed motions to dismiss pursuant to both Rules 12(b)(1) and 12(b)(6).[131] When the defendant raised the issue of Article III standing for the first time in its petition for certiorari, the Court handled it as if it had been raised as part of the 12(b)(1) motion.[132] However, as in *Lujan*, the Court is equally willing to evaluate standing on a Rule 56 motion for summary judgment. In fact, the Court later confirmed that the outcome in *Lujan* would have been different had it presented itself on a motion to dismiss rather than on a motion for summary judgment.[133] In other words, the Court's use of the progressively shifting burden framework rather than Rule 12(b)(1) to handle Article III standing is not just a theoretical or formalistic problem; it has real-world consequences.[134] In *Lujan*, those consequences included roughly four extra years of litigation in a suit eventually found not to present a valid case or controversy under Article III. Much of this litigation could have been avoided by using Rule 12(b)(1) to evaluate standing in the first place. In short, the Court's declaration in *Steel Co.* that "Article III jurisdiction is always an antecedent question" to be decided at the outset of litigation apparently does not include questions concerning Article III standing—even though the Court was specifically referring to standing when it made that declaration.[135] Not surprisingly, lower courts have reacted in confused and often conflicting ways, including using summary judgment procedures, holding "preliminary hearings," or using a hybrid of different procedures.[136] And the Supreme Court continues

131 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88 (1998).

132 *Id.*

133 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1012-13 n.3 (1992) ("*Lujan*, since it involved the establishment of injury in fact at the *summary judgment stage*, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful."). Notably, Justice Scalia authored the Court's opinions in both *Lujan* and *Lucas*.

134 Recall that, in *Lujan*, the district court granted the defendant's Rule 12(b)(1) motion to dismiss for lack of Article III standing. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992). After the Eighth Circuit reversed, the defendant renewed his challenge to the plaintiffs' standing in a Rule 56 motion for summary judgment. *Id.* This time the district court denied the motion because the Eighth Circuit had already decided the standing issue, making it the law of the case. *Id.* Arguably, the case's unique procedural posture might have induced the Court to invoke the progressively shifting burden approach to resolve Article III standing. That way, just as with issues on the merits, a decision on a motion to dismiss would not be preclusive to a decision on a motion for summary judgment given the different evidentiary burdens. The unique nature of Rule 12(b)(1), however, makes this kind of approach unnecessary.

135 *Steel Co.*, 523 U.S. at 101.

136 *See* WRIGHT ET AL., *supra* note 107, § 3531.15, at 321 nn.22-27 (collecting cases and discussing the various approaches to litigating standing); *see also* 15 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 101.30[1] (3d ed. 1997).

to evaluate Article III standing on summary judgment motions,[137] allowing litigation to proceed through discovery and potentially to trial without the issue being conclusively resolved.

### C. *The Prejudgment Footprint and the Separation of Powers*

The current practice of litigating Article III standing is troubling because of standing's role in implementing the case-or-controversy requirement and ensuring that courts respect the separation of powers. The case-or-controversy requirement is a prerequisite to the exercise of judicial power. Deferring resolution of whether the requirement has been satisfied allows courts to stray beyond their constitutionally permissible role in significant ways. Of course, purely as a matter of legal formalism, one could argue that a constitutional violation occurs only upon entry of a final judgment—and by that point the issue of standing would have been resolved. But the law of procedure is no longer burdened with the myopia of legal formalism. To the contrary, since the adoption of the 1966 amendments to the multiparty devices of the Federal Rules of Civil Procedure, procedural law has looked beyond the narrow confines of formalism and instead focused on practical procedural realities.[138] And, in modern litigation, courts exercise their coercive power over litigants well before final judgment, which, in turn, induces litigants to modify their primary conduct accordingly. In other words, judicial proceedings invariably impose a prejudgment footprint that may significantly alter a defendant's behavior well beyond the walls of the courthouse. Thus, in the event a plaintiff lacks standing, a court's point of departure from constitutionality is pushed to a point earlier in the litigation, well before entry of a final judgment.

In other contexts, courts and commentators have increasingly come to recognize the realities of modern litigation's coercive impact on litigants before final judgment. For example, in cases where discovery is likely to entail significant time and expense, defendants are often coerced into settlements, even when facing "strike suits" that lack merit.[139] Surviving a

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137 *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) (reviewing a Second Circuit decision with that procedural posture).

138 Federal Rules of Civil Procedure 19, 23, and 24 were rooted in concerns over functional issues like expediency and efficiency that were increasingly important to courts and litigants. *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984) ("The 1966 amendments focused on abandoning formalistic restrictions in favor of 'practical considerations' to allow courts to reach pragmatic solutions to intervention problems.").

139 *See* Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 855 (2012) [hereinafter Redish, *Pleading*] (observing how "overly lax pleading standards" likely lead to strike suits).

motion to dismiss on the merits and unlocking the door to discovery may be the plaintiff's ultimate goal because "[a]s waiting time and cost and uncertainty increase, settlement becomes more attractive."[140] That is precisely what animated the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, in which the Court required plaintiffs to plead "enough facts to state a claim to relief that is plausible on its face."[141] The Court reasoned that discovery is expensive, its abuses are nearly impossible to monitor or control, and, therefore, its initiation often coerces defendants into settling "even anemic cases."[142] Moreover, the Court has recognized that mandatory discovery is coercive no matter how expensive it might be. For example, the Court in *Ashcroft v. Iqbal* clarified that *Twombly*'s plausibility pleading standard applies to *all* causes of action subject to Rule 8(a), not just complex or expensive antitrust cases.[143] Requiring the plaintiff's allegations to cross at least the threshold of plausibility, as opposed to mere possibility or conceivability, minimizes the likelihood that defendants will be coerced into settling frivolous cases.[144]

Pleading standards, however, are powerless to protect defendants in situations where plaintiffs who lack standing can plausibly allege that the defendants violated the law. For example, a plaintiff organization could easily satisfy the plausibility pleading standard by alleging that a conveyance of federal land to a religious college violates the Establishment Clause, yet nevertheless lack standing to bring a suit to enjoin the conveyance.[145] Or, as in *Lujan*, a plaintiff could plausibly allege that an Interior Department rule violates the Endangered Species Act, yet lack the requisite imminent injury-in-fact to have standing.[146] Under these circumstances, the *Twombly–Iqbal* standard, on its own, would do nothing to prevent the plaintiffs from

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140 Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 13; *see also* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989) ("Litigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party. . . . The prospect of these higher costs leads the other side to settle on favorable terms.").

141 550 U.S. 544, 570 (2007).

142 *Id.* at 559; *see also id.* at 557-58 (noting that discovery can be extremely expensive in antitrust cases, effectively leading to settlements "*in terrorem*").

143 556 U.S. 662, 684 (2009). This conclusion should not have been surprising given that the Federal Rules of Civil Procedure are supposed to be transsubstantive. *See* 28 U.S.C. § 2072(b) (2012) (providing that procedural rules "shall not abridge, enlarge, or modify any substantive right"). *But see* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

144 Redish, *Pleading*, *supra* note 139, at 858.

145 This is essentially what happened in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 467-68 (1982).

146 Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).

proceeding to potentially burdensome and expensive discovery.[147] Instead, the plaintiffs are in a position to exploit the coercive power of the courts to the substantial detriment of defendants.[148] This is particularly troublesome in a case such as *Lujan*, in which the plaintiffs adequately *alleged* an injury in fact that was revealed to be absent only upon review of affidavits obtained during the course of discovery.[149] But, by then, the defendant had already suffered through discovery and, in retrospect, might have chosen to settle rather than continue to litigate.[150] Importantly, the defendant might have chosen to settle solely because of the coercive cloud of federal judicial proceedings hanging over the defendant. In other words, treating allegations of Article III standing just like allegations on the merits allows courts to exercise their coercive power over litigants, thus causing them to modify their primary conduct, even when there is no case or controversy. That is why the current practice of litigating Article III standing threatens the separation of powers.

Analysis of *Iqbal*, coincidentally, suggests another useful comparison between standing and qualified immunity cases, where the Court has plainly recognized the practical coercive effects of litigation (in general) and discovery (in particular) on litigants' primary conduct. In *Harlow v. Fitzgerald*, for example, the Court altered the legal standard for qualified immunity from a subjective one—whether the particular official bore a "malicious intention"—to an objective one—whether the official's conduct was reasonable—expressly to dispose of cases before discovery would commence.[151] Any inquiry into an official's subjective motivation, the Court feared, would involve "broad-ranging discovery" and multiple depositions, which would be "peculiarly disruptive of effective government."[152] Indeed, a subjective standard would make evaluating immunity difficult, even on summary judgment, thus potentially requiring an official to undergo a full trial.[153] In

147 Indeed, both *Valley Forge* and *Lujan* were ultimately decided on motions for summary judgment. *Lujan*, 504 U.S. at 559; *Valley Forge*, 454 U.S. at 469.

148 *See, e.g.*, FED. R. CIV. P. 37 (providing for court-compelled discovery under threat of sanctions).

149 *Lujan*, 504 U.S. at 564.

150 To be sure, the defendant in *Lujan* was an executive agency so it had unlimited resources to continue the litigation indefinitely. That, of course, is not the case for private defendants who do not have unlimited funds.

151 457 U.S. 800, 815-19 (1982) ("[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.").

152 *Id.* at 817.

153 *See id.* at 816 ("[J]udgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment.").

recognizing that discovery itself can coercively affect primary conduct, the Court also held that an official's conduct must be not merely illegal, but contrary to "clearly established" law, in order for that official to lose qualified immunity.[154] Otherwise, in borderline cases, all accused officials, including those who might ultimately be found innocent, would have to suffer through litigation to be vindicated.

Parallel reasoning applies to issues of Article III standing and the case-or-controversy requirement. As a practical matter, the harmful and potentially coercive nature of litigation is equally strong in every lawsuit—not just those involving government officials. However, separation of powers concerns were a big reason why the Court in *Harlow*, *Mitchell v. Forsyth*,[155] and other cases sought such a demanding standard for abrogating official immunity. Because litigation—or the threat of litigation—could conceivably "dampen the ardor" with which officials discharge their duties or "diver[t] official energy from pressing public issues," subjecting officials to suit would amount to judicial interference with the executive branch.[156]

In standing cases where the case-or-controversy requirement is in doubt, the separation of powers concern is not necessarily judicial interference with the executive and legislative branches, but rather the concern is that the judiciary is overstepping its constitutionally defined boundaries and assuming a nonjudicial role. Just as federal official defendants post-*Harlow* enjoyed an "*immunity from suit* rather than a mere defense to liability,"[157] civil defendants may enjoy immunity from suit in federal court where the relevant plaintiffs lack Article III standing. Either way, courts should ensure that the defendants have lost their immunity before subjecting them to the burdens of discovery and litigation—even if that means resolving some preliminary factual issues.[158]

The immunity analogy demonstrates precisely why the Court's current practice of treating allegations of Article III standing the same way it treats

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154 *See id.* at 818 ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Furthermore, even if an official clearly acted illegally, he would still enjoy qualified immunity as long as the action was not clearly illegal at the time of commission. *See* Mitchell v. Forsyth, 472 U.S. 511, 534-35 (1985).

155 472 U.S. 511.

156 *Harlow*, 457 U.S. at 814 (internal quotation marks omitted); *see also id.* at 822 (Burger, C.J., dissenting) (arguing that separation of powers requires absolute immunity, not merely qualified immunity).

157 *Mitchell*, 472 U.S. at 526.

158 *See id.* at 528, 529 n.10 (reiterating this conclusion even if factual issues "overlap" with questions on the merits).

allegations on the merits is troubling. There is no practical way to "cabin" discovery with "careful case management" once litigation proceeds past the motion to dismiss stage on the merits.[159] Instead, the coercive impact of litigation costs on defendants should lead courts to confirm that a valid case or controversy exists before opening the doors to general discovery.[160] Jurisdictional primacy, then, is not merely a formalist specification of an "order of operations."[161] As the practical perils of modern discovery make clear, it is an essential protection against courts acting unconstitutionally ultra vires—a concern that is particularly important when the existence of a valid case or controversy is challenged. The point is simple: when courts postpone determining whether there is a case or controversy until final resolution of the merits, a federal court will likely have coercively impacted citizen behavior, despite the possible lack of a case or controversy. Such judicial behavior runs contrary to the Constitution's core notions of a judiciary with limited powers.

That the Court intuitively grasps this concept when dealing with issue- or party-based statutory limits on jurisdiction simultaneously makes the conclusion even more obvious and the Court's unexplained refusal to recognize it in the standing context even more puzzling.[162] After all, if a federal court were to violate statutory limits on its jurisdiction, it would still be performing an adjudicatory role. Accordingly, any coercive impact on litigants would resemble the same coercive impact a state court would have imposed. This is not the case, however, when a federal court acts in the absence of a valid case or controversy.[163] Our point is simply that if courts (including the Supreme Court) are hesitant to allow exceptions to statutory

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159 Ashcroft v. Iqbal, 556 U.S. 662, 684-86 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)) (emphasizing the unavoidable burdens and expense of discovery).

160 The modern Federal Rules of Civil Procedure take note of the practical burdens of discovery, including the expenses incurred. *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1485 (2008) (noting the emphasis on practical considerations and "functional analysis" in the 1966 amendments to the rules of civil procedure); *see also* FED. R. CIV. P. 19(a)(1)(B)(i), 23(b)(1)(B) & 24(a)(2) (requiring consideration of joinder, class certification, and intervention issues "as a practical matter"); FED. R. CIV. P. 26, 34 & 36 advisory committee notes (repeating the phrase "as a practical matter").

161 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 111 (1998) (Breyer, J., concurring).

162 For example, the Court has recognized litigation's practical coercive effects in the appellate jurisdictional context, opting for a pragmatic—rather than a formalist—definition of "finality" for purposes of an appeal. *See* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 116-20 (1975) (describing the Supreme Court's endorsement of a pragmatic balancing approach to appealability in the 1950s and 1960s).

163 That said, the Court tends to treat constitutional limits on jurisdiction more carefully than statutory limits. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584-85 (1999) (noting that, because personal jurisdiction is rooted in the Constitution's Due Process Clause, courts may analyze it before addressing statutory limits on subject matter jurisdiction).

limits on jurisdiction, then a fortiori they should be just as hesitant to permit exceptions to constitutional limits. Furthermore, courts should be particularly vigilant when the case-or-controversy requirement implicates Article III standing, which is "perhaps the most important of [the jurisdictional] doctrines."[164]

## III. MODIFYING THE LITIGATION OF STANDING TO PROTECT THE SEPARATION OF POWERS: A PROPOSED SOLUTION

The logical implications of our critique of current judicial practice should by now be apparent: courts must fully resolve all issues of Article III standing using the procedures and standards of proof associated with Rule 12(b)(1) and not any other procedural vehicle designed to resolve the merits of the dispute. In other words, to implement and enforce Article III's case-or-controversy requirement properly, the Court must abandon *Lujan*'s progressively shifting burden framework for litigating Article III standing. Instead, it should instruct lower courts that, whenever the issue of standing is in dispute, they should conclusively resolve all relevant factual issues—sometimes through limited discovery—and make credibility determinations with no presumptions in favor of the plaintiff.[165] Contrary to current practice, which effectively prevents defendants from challenging standing until summary judgment or even trial, this proposed solution would enable defendants to challenge standing at the outset of litigation, before unlocking the doors to general discovery. It would also give effect to prophylactic separation of powers protections and reduce the risk of courts' exercising coercive power absent a true case or controversy.

At some level, this solution is hardly revolutionary because courts usually follow it when evaluating factual challenges to subject matter jurisdiction based on issue- or party-based statutory limits.[166] As Judge Easterbrook stated: "When jurisdiction or venue depends on contested facts—even facts closely linked to the merits of the claim—the district judge is free to hold a hearing and resolve the dispute before allowing the case to proceed."[167] Citing Judge Easterbrook's statement, the Supreme Court confirmed in

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164 Allen v. Wright, 468 U.S. 737, 750 (1984).

165 And, as with any factual findings, an appeals court would set the findings aside only if they are "clearly erroneous." *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . ."); *see also* WRIGHT ET AL., *supra* note 107, § 3531.15, at 342 n.48 (collecting cases that were reviewed de novo).

166 *See* 2 MOORE ET AL., *supra* note 97, § 12.30[1], at n.4 (collecting cases); WRIGHT & MILLER, *supra* note 97, § 1350, at 160 n.4 (same).

167 Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676-77 (7th Cir. 2001).

*Wal-Mart Stores, Inc. v. Dukes* that "[t]he necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation."[168] In *Wal-Mart*, the Court used similar reasoning to justify extending the practice to resolve preliminary matters related to class certification.[169] This extension may be due in part to the Court's recognition in other cases that the simple act of certifying a class can coerce defendants into *in terrorem* settlements.[170] These same concerns are present when litigation proceeds to general discovery. This suggests that courts should not unlock discovery without first confirming the existence of a true case or controversy. At one time, the Court seemingly recognized the potential viability of the proposed solution:

> [I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.[171]

If the Court is right about standing's role in ensuring the separation of powers, and if we are correct about the coercive nature of modern litigation's prejudgment footprint, then fully resolving factual issues related to Article III standing is not merely "within the trial court's power."[172] Rather, it is one of the trial court's constitutional obligations.

As already noted, under the proposed solution, a court may not take allegations of standing in the complaint as true (as it currently *must* do when evaluating standing on a motion to dismiss), nor may it make all inferences and credibility determinations in favor of the plaintiff (as it currently *must* do when evaluating standing on a motion for summary judgment). There is, however, one qualification for this directive: a court is free to make inferences in favor of a *nonprevailing* plaintiff if it would save

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168 131 S. Ct. 2541, 2552 (2011).

169 *Id.* at 2556-57.

170 *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of 'in terrorem' settlements that class actions entail . . . ."); *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1206 (2013) (Scalia, J., dissenting) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high.").

171 Warth v. Seldin, 422 U.S. 490, 501-02 (1975). Of course, the Court in *Warth* preceded this passage by stating its familiar position that "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Id.* at 501.

172 *Id.*

judicial resources. For example, in *Steel Co.* the Court found that the plaintiffs lacked Article III standing.[173] Therefore, construing all facts in the plaintiffs' favor was justifiable because the Court was pointing out the weakness of their bid to prove standing: they would lose *even if* everything they alleged were true. Accordingly, the proposed solution's impact is felt only in situations where a court might rule for the plaintiff if the allegations of standing are taken as true, but possibly rule for the defendant once the real facts are known.[174] It is only in such situations that a court risks exercising its coercive power without an actual case or controversy, which is why it must invoke its full factfinding powers pursuant to Rule 12(b)(1). We should also acknowledge that the proposed solution would not be a panacea for all standing-related issues. It does not eliminate the possibility of an erroneous ruling upholding a plaintiff's standing. Nor does it prevent an eleventh-hour challenge to standing raised on appeal.[175] Instead, its aim is to remove a significant barrier to the ability of defendants to challenge standing at the outset of litigation. That is practically impossible today under the progressively shifting burden approach.

One final point of clarification about our proposed solution: although it utilizes an existing Federal Rule of Civil Procedure, its use springs directly from the Constitution's prophylactic separation of powers protections. And if the Constitution mandates the *use* of Rule 12(b)(1), then it also arguably mandates that Rule's *existence*—or at least the existence of a procedural mechanism similar to it. This conclusion may seem surprising, given that the Federal Rules of Civil Procedure were enacted only in 1938 and that Rule 12(h), in particular, "enshrined not a long-standing practice of the federal courts, but rather one that fully crystallized only in the mid-1930s."[176] But the separation of powers concerns spring from an entirely modern phenomenon—namely, the coercive effect of litigation's prejudgment

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173 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106-07 (1998).

174 As the Court suggested in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012-13 n.3 (1992), *Lujan* was precisely such a case.

175 However, given the importance of standing as an element of the case-or-controversy requirement and separation of powers, it would behoove parties and courts to consider standing at the outset of every lawsuit. Federal courts routinely require parties to file statements asserting the basis for statutory jurisdiction and could require the same procedure for Article III standing. *See, e.g.*, SUP. CT. R. 14(e) (requiring a "concise statement of the basis for jurisdiction" in every petition for a writ of certiorari); FED. R. APP. P. 28(a)(4) (requiring a jurisdictional statement in the appellant's opening brief); FED. R. CIV. P. 8(a)(1) (requiring every pleading in district court to contain "a short and plain statement of the grounds for the court's jurisdiction"). At the very least, this requirement would force parties to think carefully about standing at the outset and clarify to the court whether the issue is in doubt.

176 Collins, *supra* note 95, at 1873.

footprint. A large component of that footprint is liberal (and non-fee-shifted) discovery, which itself was an innovation of the Federal Rules of Civil Procedure.[177] Because the Rules created these separation of powers problems, it should not be surprising that there is a special rule to ameliorate these issues. Put differently, the Constitution has *always* forbidden courts from exercising their coercive power over litigants absent a true case or controversy. Modern developments have caused that coercive power to be exercised earlier in the litigation, which is why Rule 12(b)(1) is currently needed.

## IV. ANTICIPATING CRITICISMS OF THE PROPOSED SOLUTION

It is likely that our proposal will be met with a variety of criticisms and responses. Therefore, in this Part, we anticipate and reply to the most important of them. One such concern is that the proposed solution might infringe on litigants' Seventh Amendment right to a trial by jury. Another is that our proposal may precipitate protracted and inefficient litigation. Finally, a critic might argue that because causation, one of standing's three prongs, is often a key merits issue, a court may require the same level of discovery on a Rule 12(b)(1) motion as at the merits stage. Thus, the criticism would proceed, our proposed solution does not solve the problem of the prejudgment footprint and its coercive effect on litigants. For the reasons discussed below, none of these criticisms justifies abandoning our proposal.

### A. *Seventh Amendment Right to a Jury Trial*

Perhaps the strongest criticism of our proposal is that it could eviscerate the Seventh Amendment right to a jury trial, particularly in cases where facts related to standing and the merits overlap. This is likely to be a common event due to the substantive nature of the standing inquiry as traditionally framed by the Supreme Court. Recall that in order to establish standing, a party must establish facts sufficient to demonstrate (1) injury in fact, (2) traceability, and (3) redressability.[178] The traceability inquiry is most likely to overlap with the merits inquiry. Cognizant of this concern,

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177 *See, e.g.*, Charles E. Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 500 (1949).

178 *See supra* Section I.A.

courts often defer finding jurisdictional facts that overlap with the merits if it would impair the right to a jury trial.[179]

If a court resolves a factual issue related to Article III standing at the outset of litigation, the court's findings will have a preclusive effect on the jury at trial.[180] But this practice in no way implicates the jury trial right because the Seventh Amendment applies only to cases properly within the province of an Article III court. Ever since its decision in *Crowell v. Benson*,[181] the Court has, under certain circumstances, approved the use of non-Article III courts, including administrative agencies, to adjudicate even traditional private-rights cases.[182] A jury trial right has never attached to such non-Article III proceedings.[183] Put differently, the presence of an Article III forum is a necessary, albeit not sufficient, condition for the Seventh Amendment right to apply.[184] If the plaintiff lacks standing, however, there is no case or controversy for an Article III court to adjudicate, and, therefore, the Seventh Amendment right would also not apply.[185]

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179 *See* WRIGHT & MILLER, *supra* note 97, § 1350, at 246 nn.71-72 & 76 (collecting cases); *see also* Di Trolio, *supra* note 101, at 1248 (stating that, under 28 U.S.C. § 1331 (2012), courts "may not decide jurisdictional facts if such facts are intertwined with the merits of the case").

180 *See infra* notes 197-201 and accompanying text.

181 285 U.S. 22 (1932).

182 The Court had long permitted "public rights" cases to be adjudicated in non-Article III forums. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.").

183 *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 194 (1974) (holding that a jury trial right is "generally inapplicable" in administrative proceedings); Katchen v. Landy, 382 U.S. 323, 336-37, 340 (1966) (finding no jury trial right for creditors in bankruptcy proceedings); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937) (holding that there is no jury trial right in statutory proceedings). *But see generally* Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407 (1995) (arguing that the Supreme Court's functionalist jurisprudence has not offered a principled basis for limiting the jury trial right to Article III forums).

184 Even in an Article III forum, the Seventh Amendment applies only to cases sounding in law, not equity, with a minimum amount in controversy. *See* U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."); *see also* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) (evaluating whether a cause of action sounded in law or equity to determine whether a jury trial right attached).

185 Just as Congress does not "hide elephants in mouseholes," Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001), nor did the Framers likely intend the phrase "suit at common law" in the Seventh Amendment to mean anything other than the "suits at common law" already defined and limited by Article III, which the Framers spent considerable effort crafting. *See* Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-56 (1975) (describing the 1787 debates on Article III and the Madisonian Compromise); *see also generally*

In short, whether the court has subject matter jurisdiction is an antecedent question to whether the Seventh Amendment applies. It would therefore put the cart before the horse to enforce a jury trial right before establishing that the plaintiff has standing. Accordingly, a court should determine all facts needed to resolve Article III standing as an initial matter; only if it finds that the plaintiff indeed has standing can a Seventh Amendment jury trial right be triggered.

Of course, one could argue that in such a scenario, the jury trial right would have been infringed in retrospect. If certain facts needed to resolve standing happen to overlap with the merits, the argument goes, then a jury trial right would attach to resolution of those facts. But such an argument is a version of improper bootstrapping because it essentially maintains that there is a Seventh Amendment right to determine whether there is a Seventh Amendment right. This is not a completely implausible argument since such a bootstrapping principle applies to issues of jurisdiction; that is, federal courts plainly have jurisdiction to determine whether they have jurisdiction.[186] Importantly, though, jurisdictional bootstrapping is unavoidable. *Someone* has to determine whether the court has Article III jurisdiction, and if the court itself does not take on this task, it is hard to imagine who else could. That is not the case, however, with the Seventh Amendment issue.[187] The court is always available as an alternative factfinder to the jury.

Furthermore, deferring jurisdictional facts for jury resolution could result in a situation where a court conducts a complete trial only to find that it lacked jurisdiction to hear the case. This is the mirror image of the scenario giving rise to the Seventh Amendment concern: that a court's improper finding on standing could, in retrospect, be found to have undermined a litigant's jury trial right. In the abstract, then, we are left with two irreducibly competing options: one in which a court's favorable resolution on jurisdiction could effectively remove certain issues from the jury's province, and the other in which a jury's finding of a lack of jurisdiction would invalidate all

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AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 207-45 (2005) (analyzing in great detail the language of Article III and what the Framers meant by it).

186 *E.g.*, United States v. United Mine Workers of Am., 330 U.S. 258, 293 (1947) (upholding a district court's power to issue a temporary injunction while it investigated whether it had subject matter jurisdiction over the case).

187 Furthermore, it is highly questionable whether Article III standing presents a "legal," as opposed to equitable, issue within the meaning of the Seventh Amendment. *See* Steven Kessler, Note, *The Right to a Jury Trial for Jurisdictional Issues*, 6 CARDOZO L. REV. 149, 158 (1985) ("There are no English common law precedents supporting the view that a jury trial can be afforded for jurisdictional issues.").

of the proceedings up to that point—including the jury verdict itself. Surely the latter is more harmful to core constitutional precepts than the former. Even putting aside the waste of resources that the latter option would entail, from the standpoint of American democratic theory it is far more troubling for a court to conduct legal proceedings without subject matter jurisdiction than for a court to find jurisdictional facts that might also be dispositive of a merits question.[188] Article III's strictures are nonwaivable precisely because they are structural, prophylactic protections.[189] Prophylactic protections are useless if they can be waived; the effectiveness of any prophylaxis relies on its consistent application. By contrast, the Seventh Amendment offers only a limited, waivable, individual right.[190] To allow the jury trial right to trump Article III's jurisdictional requirements would thus be at odds with the entire structure of our democracy.[191]

Alternatively, one could argue that a jury should be empaneled to decide facts related to the issue of Article III standing at the outset of litigation; if that jury finds jurisdiction, then the case can proceed to discovery on the merits with a separate jury eventually deciding the merits questions at trial.[192] Even putting aside the colossal waste of resources this process would entail, this approach would do nothing to solve the bootstrapping problem because it still wrongly assumes that a jury is required to decide whether a jury is required. It also presents a more fundamental question of juror competence and prejudice. As the ultimate arbiters of the Constitution,

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188 Indeed, deferring questions about standing until trial effectively amounts to an exercise of "hypothetical jurisdiction," which the Supreme Court has emphatically denounced. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

189 *See* Redish & Cisar, *supra* note 25, at 463 (describing the Framers' choice of a prophylactic approach to separation of powers).

190 *See* Kearney v. Case, 79 U.S. (12 Wall.) 275, 281 (1870) ("Numerous decisions, however, had settled that this [Seventh Amendment] right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid.").

191 One might argue that the Seventh Amendment, having been ratified more recently than Article III, amends any conflicting provision in Article III. *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." (citation omitted)). But given the Court's consistent interpretation of the Seventh Amendment as applying only within an Article III tribunal, it makes far more sense—both doctrinally and normatively, from the standpoint of American democratic theory—to conclude that the Seventh Amendment did not amend Article III and that Article III's prophylactic limitations on the judiciary must always be honored. *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 194 (1974) (explaining that the Court's prior decisions "merely stand[] for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication").

192 *Cf.* Kessler, *supra* note 187, at 173-74 (suggesting but then rejecting this possibility in the context of New York state law).

courts are the most competent authorities to enforce Article III. By contrast, jurors may be influenced by various prejudices, including "the social position of the litigants."[193] These juror prejudices might be particularly salient where private citizens bring suit against a governmental agency to enforce the law.[194] Yet it is precisely in such cases that separation of powers concerns are most prevalent because judicial review would essentially allow the courts to interfere with the actions of the executive.[195] Juror sympathies might well improperly tip the scales in favor of standing in such cases.[196] In short, it must be courts, not juries, who ultimately resolve the question of Article III standing.

A corollary of this arrangement is that the court's findings of fact related to standing determinations would necessarily have preclusive effect on the jury's decision of merits-based questions. Otherwise, a court might resolve a factual question one way to find jurisdiction while the jury might resolve the exact same question another way on the question of substantive liability. This will lead to one of two possible results. The first is that the jury finding controls and thus effectively overturns the court's preliminary finding. But if that were true, then the court would retroactively lose jurisdiction and the verdict itself would have to be vacated.[197] This is

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193 Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 502 (1975).

194 For example, jurors may sympathize with the parents of schoolchildren who demand that the IRS comply with its own regulations to revoke the tax-exempt status of racially discriminatory private schools. *See* Allen v. Wright, 468 U.S. 737, 743-45 (1984) (bringing such a complaint).

195 *See* Scalia, *supra* note 40, at 894-96 (arguing that the "the law of standing . . . excludes [courts] from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*"); *see also* Webster v. Doe, 486 U.S. 592, 614 (1988) (Scalia, J., dissenting) ("[I]f one is in a mood to worry about serious constitutional questions the one to worry about is . . . whether Congress could constitutionally *permit* the courts to review all such [executive branch] decisions if it wanted to.").

196 It is true that Article III standing is, in some respects, a question of law that a court, not a jury, must decide. But there are factual findings that bear on the question—for example, whether a plaintiff has a reasonable subjective fear of environmental pollution or whether a plaintiff truly intended to visit endangered species in Asia. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183-85 (2000) (finding injury in fact because the plaintiffs had a reasonable subjective fear of environmental pollution in fishing waters); Lujan v. Defenders of Wildlife, 504 U.S. 555, 564-67 (1992) (finding no injury in fact where the plaintiffs did not have objective evidence of their intent to work with the endangered animals in the affected regions abroad).

197 This is because a lack of subject matter jurisdiction results in dismissal without prejudice, with only a direct estoppel impact on the subject matter jurisdiction issue in future litigation. *See* Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987) ("[A] ruling granting a motion to dismiss for lack of subject matter jurisdiction is not on the merits; its res judicata effect is limited to the question of jurisdiction." (citing Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931))).

precisely the scenario we wanted to avoid, making it incompatible with the proposed solution. The only other possibility is that the jury finding does not control—that is, that the court's finding on jurisdictional facts has internal preclusive effect, thereby preventing the jury from making contrary findings on overlapping issues.

In any event, use of preclusion to bind a jury to a court's prior factfinding has long been deemed consistent with the Seventh Amendment right. As the Court recognized in *Beacon Theaters, Inc. v. Westover*, for example, a bench trial of equitable issues would, "through collateral estoppel, prevent a full jury trial of the [legal claims] which [would be] as effectively stopped as by an equity injunction."[198] For precisely that reason, the Court cautioned district courts that their "discretion is very narrowly limited" to try equitable issues before legal ones, lest collateral estoppel act to remove too many issues from the jury's province.[199] Importantly, the *Beacon Theaters* Court never disputed that any of the court's factfindings related to the equitable issue would have preclusive effect on the jury trying the legal issue; instead, it took this as a given. To be sure, jurisdictional issues, including Article III standing, are not clearly defined as either equitable or legal.[200] But given the stakes for separation of powers outlined above, the resolution of facts required to prove Article III standing would easily constitute "imperative circumstances" that justify giving preclusive effect to those jurisdictional facts.[201]

Although he does not directly address Article III standing, Professor Kevin Clermont proposes one way to avoid jurisdictional issue-preclusion: require different levels of proof for the two questions, with a lower standard of proof for the jurisdictional determination.[202] Specifically, he suggests that to prove jurisdictional facts to the court, a plaintiff need make only a prima facie case; to prove those same facts on the merits to a jury, the plaintiff must satisfy the traditional preponderance standard.[203] Because the standards of proof are different, the court's findings would not have preclusive effect on the jury, just as a civil finding of liability under a preponderance standard is not preclusive for a criminal trial requiring proof beyond a

198 359 U.S. 500, 505 (1959).

199 *Id.* at 510.

200 Kessler, *supra* note 187, at 158.

201 *Beacon Theaters*, 359 U.S. at 510-11.

202 Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 991 (2006) (arguing that using a prima facie standard of proof for jurisdictional facts would avoid undesirable preclusive effects on the merits).

203 *Id.* at 990-91.

reasonable doubt.[204] Although Professor Clermont's ingenuity is admirable, this proposal is not a viable treatment of Article III standing.[205] First, it is somewhat self-defeating. Even Clermont concedes the need for evidentiary hearings to establish jurisdiction to avoid "unfairly and awkwardly forc[ing] the defendant to litigate in a place that turns out to lack" jurisdiction.[206] To say that an evidentiary hearing is needed is to abandon the prima facie standard, which, by definition, looks only to the evidence offered by one side.[207] Furthermore, to require only a prima facie case would defeat the whole point of jurisdictional primacy.[208] This is especially true because of modern litigation's prejudgment footprint. If a preponderance standard of evidence is required to impose a final judgment, it should also be required to exercise prejudgment coercive power.[209] And given the importance of Article III for the separation of powers, the need to ensure subject matter jurisdiction by a preponderance of the evidence is even more compelling.[210] Indeed, the Supreme Court has long required that jurisdictional allegations be supported by a preponderance of the evidence.[211]

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204 *Id.* at 991.

205 Professor Clermont focuses on personal jurisdiction, but he explicitly acknowledges that all of his arguments are equally applicable to subject matter jurisdiction. *Id.* at 1006-07.

206 *Id.* at 993-94.

207 *See* BLACK'S LAW DICTIONARY 1209 (9th ed. 2009) (defining the adverb prima facie as "[a]t first sight; on first appearance but subject to further evidence or information"); *see id.* (defining the adjective prima facie as "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted").

208 *Cf.* Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 288 (1975) ("The preponderance standard . . . seems entirely appropriate for resolving preliminary questions of fact in civil cases. . . . A lower standard of proof for a preliminary fact question would be problematic because of the danger of eroding the protection or incentive allegedly provided by the rule of competency."); *see id.* at 288 n.58 ("Evidentiary rules often may seem arbitrary, but they would seem most irrational if they were established pursuant to a system designed to emasculate them.").

209 *See supra* Section II.C.

210 One could argue that an even higher standard of proof should attach. *Cf.* Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 81-82 (2008) (noting that the preponderance standard stems from a constitutional need to "equal[ly] apportion[] . . . the risk of error" between the plaintiff and the defendant, but that where the stakes are higher, a more demanding "clear and convincing" standard applies).

211 *See* McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (holding that the Jurisdiction and Removal Act of 1875, ch. 137, § 5, 18 Stat. 470, 472, requires "that the party alleging jurisdiction justify his allegations by a preponderance of evidence"); *see also* Hertz Corp. v. Friend, 559 U.S. 77, 96-97 (2010) (citing *McNutt* for the proposition that parties must support allegations of jurisdictional facts "by competent proof"); Collins, *supra* note 95, at 1870-73 (discussing the rise and fall of the prima facie standard in the late nineteenth and early twentieth centuries).

### B. *Inefficiency and Delay*

A second likely criticism of the proposal is that it would result in inefficiency and delay because a court would have to hold a trial before the trial on the merits to evaluate Article III standing.[212] As an initial matter, such functionalist concerns should yield in the face of the structural and prophylactic safeguards to protect separation of powers. It is impossible to weigh the delay and inefficiency in any given case against the potential for a court to act ultra vires in asserting jurisdiction where there is none.[213] Furthermore, this concern is undoubtedly motivated by the implicit, but flawed, assumption that the standing inquiry would somehow be duplicative of the merits inquiry. However, any findings by a court in its standing determination would be given preclusive effect. Accordingly, any additional delay or inefficiency would be limited to the potential overhead costs of parsing jurisdictional issues from merits issues during the initial inquiry into jurisdiction. Even this overhead is likely to be no more burdensome than the alternative: separating purely jurisdictional issues from those overlapping with the merits that are reserved for the jury.[214]

In fact, our proposed solution is just as likely to result in less litigation, thereby obviating any concerns about delay or inefficiency. For example, in *Lujan*, the Court held that the plaintiffs lacked Article III standing on a motion for summary judgment.[215] That holding, issued in June 1992, came nearly four years after the Eighth Circuit first held that the plaintiffs had Article III standing when deciding a motion to dismiss.[216] During that time, the parties continued to litigate the case in the district court, the Eighth Circuit, and eventually the Supreme Court. Under the current approach to litigating Article III standing, this was the only way that the case could have unfolded because—as the Court acknowledged—the plaintiffs had sufficiently alleged Article III standing in the complaint to preclude a motion to dismiss.[217] Under our proposed approach, the defendant's challenge to

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212 *Cf.* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1201 (2013) (rejecting, in the context of class action litigation, the petitioner's argument to include materiality as a preliminary question for class certification because it "would necessitate a mini-trial on the issue of materiality . . . [entailing] considerable expenditures of judicial time and resources").

213 *See* Redish & Cisar, *supra* note 25, at 490-91 (criticizing the functionalist model for analyzing separation of powers).

214 *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 656-62 (2005) (describing the confusing ways in which courts attempt to separate jurisdictional issues from merits issues).

215 Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 (1992).

216 Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1043-44 (8th Cir. 1988).

217 *See supra* note 133 and accompanying text.

standing would have been decided directly on a Rule 12(b)(1) motion to dismiss, potentially saving years of litigation and attendant judicial resources.

### C. *Efficacy of the Proposed Solution*

A final conceivable criticism is that the proposal will not reduce the coercive impact of prejudgment litigation on defendants. Even limited discovery into standing, the argument goes, will often be almost as extensive and expensive as discovery on the merits because the second prong of standing, traceability, is one of the most contested elements on the merits, particularly in mass tort, environmental, and securities fraud cases.[218] Accordingly, defendants, even under our proposed solution, would labor under more or less the same coercive cloud of litigation as they presently do. The incentives to settle before conclusively resolving Article III standing would then remain largely unchanged.

Our response to this criticism is twofold. First, the fact that our proposal allows a court to make all necessary credibility determinations, without any inferences in favor of the plaintiff, suggests that discovery into causation could be short-circuited once enough evidence is collected favoring the defendant. By contrast, traditional summary judgment procedures allow no such short-circuiting.[219] Moreover, a jury's looming presence at the end of traditional discovery and summary judgment briefing can coerce risk-averse defendants into settling.[220] By contrast, a court, not a jury, will resolve the issue of standing at the conclusion of limited discovery under Rule 12(b)(1). Therefore, under our approach, defendants would be less likely coerced into settlement than they are currently since certain procedures would be more favorable to them.

Second, even if causation is a key element on the merits, it is just one of the three necessary prongs of standing and is rarely dispositive. Indeed, as far as we can tell, only once has the Supreme Court ever held that a plaintiff lacks standing solely for want of traceability.[221] Accordingly, limited

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218 *See, e.g.*, Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 347 (2d Cir. 2009) (noting that causation "is an issue best left to the rigors of evidentiary proof at a future stage of the proceedings, rather than dispensed with as a threshold question of constitutional standing"), *rev'd on other grounds*, 131 S. Ct. 2527 (2011).

219 *See supra* notes 120-24 and accompanying text.

220 *See generally* Bruce G. Merritt, *Does a Business Ever Want a Jury?*, LITIGATION, Spring 1990, at 27 (arguing that businesses' fear of juries is widespread but largely unwarranted).

221 *See* Allen v. Wright, 468 U.S. 737, 753 (1984) (finding plaintiff's alleged injury not fairly traceable to the alleged unlawful conduct by the government). In another case, *Warth v. Seldin*, 422 U.S. 490, 514 (1975), the Court found that plaintiffs, a group of taxpayers, failed to satisfy both the traceability prong of constitutional standing and prudential standing requirements as

discovery into the other two prongs, particularly injury in fact, would be sufficient to resolve Article III standing in most cases.

Incidentally, the fact that traceability, a key question on the merits, is rarely dispositive of the standing inquiry raises the question whether causation is misplaced as an element of Article III standing. The concrete and individualized injury-in-fact requirement is clearly tied to the private-rights adjudicatory model.[222] Similarly, redressability ensures that federal courts have the power to award the requested relief. Both of these prongs directly enforce limitations on the power of the judicial branch. Causation, by contrast, appears to ask exactly the question that a trial on the merits is meant to answer: Did the defendant cause the plaintiff's injury? The answer to that question seems irrelevant to whether there is a valid case or controversy, even under the private-rights adjudicatory model. By contrast, whether there exists a plausible causal chain between the defendant's actions and the plaintiff's injuries is a classic merits question suitable for review on a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief. The Court has never offered a clear separation of powers-based justification for the existence of the traceability prong. The closest it came to doing so was in *Allen v. Wright*, where it said:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury "fairly can be traced to the challenged action" of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.[223]

Note that this rationale does not actually depend on an inquiry into causation. Even if the IRS's actions had indisputably caused the plaintiffs' injuries, *Allen* would still have been a suit challenging a "particular" IRS

well. Moreover, in subsequent decisions, such as *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599-600 (2007), the Court has clarified that "taxpayer standing" claims fail to satisfy the individualized injury-in-fact requirement, not the traceability requirement. Accordingly, *Allen* remains the only case in which the Court explicitly and exclusively based its holding that plaintiffs lacked standing on the traceability prong. In addition, *Allen* and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), are the only two cases finding a lack of standing based exclusively on a prong other than injury in fact. *Allen* was decided on the traceability prong, and *Steel Co.* was decided on the redressability prong.

222 *See supra* Section I.A.

223 *Allen*, 468 U.S. at 759-60 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976)).

program "establish[ed] to carry out [the agency's] legal obligations."[224] The Court's separation of powers concerns, therefore, seem more relevant to redressability or justiciability than to the causation prong of Article III standing.[225]

Nevertheless, the Court has unequivocally stated that traceability is an "irreducible" element of standing.[226] Hence, even if discovery, as part of the Rule 12(b)(1) inquiry into causation, winds up having nearly as large a footprint as discovery on the merits, it would still be in pursuit of resolving the antecedent question of whether there is a live case or controversy. Contrast that to the current practice, in which the existence of a case or controversy is *never* resolved at the outset.

## CONCLUSION

That courts and commentators have not realized the serious separation of powers problems inherent in the current practice of litigating Article III standing is not surprising. The intersection of civil procedure and federal jurisdiction is not usually where one looks to find clarity. Yet that does not render the problem any less serious. The Supreme Court has increasingly recognized the coercive nature of modern litigation's prejudgment footprint and has acted in a number of areas, including pleading and class certification, to erect safeguards against it. It is high time it did so in the context of Article III standing.

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224 *Id.* at 759.

225 Indeed, as Justice Stevens pointed out in his dissent, "[The Court's] approach confuses the standing doctrine with the justiciability of the issues that respondents seek to raise. The purpose of the standing inquiry is to measure the plaintiff's stake in the outcome, not whether a court has the authority to provide it with the outcome it seeks . . . ." *Id.* at 790 (Stevens, J., dissenting).

226 Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).