Judge Posner’s 'Practical' Theory of Standing: Closer to Justice Breyer’s Approach to Standing than Justice Scalia’s

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JUDGE POSNER’S “PRACTICAL” THEORY OF STANDING: CLOSER TO JUSTICE BREYER’S APPROACH TO STANDING THAN TO JUSTICE SCALIA’S

Bradford C. Mank*

ABSTRACT

In American Bottom Conservancy v. U.S. Army Corps of Engineers, Judge Richard Posner of the Seventh Circuit questioned three different grounds articulated by the U.S. Supreme Court for the constitutional doctrine of standing in federal courts and instead argued that the “solidest grounds” for the doctrine of standing are “practical.” In part because of his self-described “pragmatic” approach to legal reasoning, Judge Posner’s maverick views may have led Republican presidents to pass him over for being nominated to the Supreme Court in favor of less brilliant but more predictable conservative judges. Judge Posner’s pragmatic or practical approach to standing is closer to Justice Breyer’s “realistic threat” standing test than to the conservative and constitutionally grounded standing jurisprudence of Justice Scalia, although Justice Breyer’s pragmatism is more precedent-oriented than Judge Posner’s. Ultimately, Justice Breyer’s efforts to liberalize existing Article III standing doctrine may prove more fruitful than Judge Posner’s approach of abolishing constitutional standing and replacing it with his proposed alternative “practical” standing test.

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I. INTRODUCTION

In American Bottom Conservancy v. U.S. Army Corps of Engineers, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit questioned three different grounds articulated by the U.S. Supreme Court for the constitutional doctrine of standing in federal courts and instead argued that the “solidest grounds” for the doctrine of standing are “practical.” Judge Posner’s views on standing may carry more weight than most other federal courts of appeals judges because he is the prolific and influential author of at least 30 books and more than 300 articles and book reviews. He is both a highly respected judge and legal scholar. He had taught as a Professor of Law at
the University of Chicago Law School until his appointment to
the Seventh Circuit in 1981 by President Reagan, a Republican,
who sought to appoint conservative judges to the federal courts.6

Professor Posner's early work on law and economics was
perceived as generally supportive of a "conservative" market
approach to legal decisionmaking,7 although the work of any
scholar as prolific as Posner is impossible to characterize by a
single phrase or position. For those who question whether a
judge's work can be accurately characterized as conservative or
liberal, Judge Posner himself has co-authored a leading article
that sought to rank U.S. Supreme Court justices serving between
1937 and 2006 on a conservative to liberal scale.8 In part because
of his self-described "pragmatic" approach to legal reasoning,9
Judge Posner has not consistently adhered to a "conservative"
approach to issues, at least as defined by leading Republican
politicians, and his sometimes maverick views may have led
Republican presidents to pass him over for being nominated to
the Supreme Court in favor of less brilliant but more predictable
conservative judges." It is also possible that Judge Posner is now

__Statistics__, 61 N.Y.U. ANN. SURV. AM. L. 19, 19–21 (2005) ("If obscurity defines the careers
of most judges, notoriety defines that of Judge Richard A. Posner . . . ."); Matthew A.
(2002); Martin H. Redish, The Federal Courts, Judicial Restraint, and the Importance of
Analyzing Legal Doctrine, 85 COLUM. L. REV. 1378, 1378 (1985) (reviewing RICHARD A.
POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)) ("[I]t is difficult to dispute
Posner's impact on the world of legal scholarship. In fact, through his pathbreaking and
highly controversial examination of legal problems in terms of economic analysis, Posner
may now rival [Roscoe] Pound and [Karl] Llewellyn as the academic of the twentieth
century who has most influenced the shape of legal thought." (footnote omitted)); Fred R.
Shapiro, The Most-Cited Legal Scholars, 29 J. LEGAL STUD. 409, 424 tbl.6 (2000) (listing
Posner as the most cited legal authority in American history, eclipsing third-place Oliver
Wendell Holmes by 50 percent).


6. President Reagan, who served in office from 1981 until 1989, stated that his
goal was to appoint a federal judiciary "made up of judges who believe in law and order
and a strict interpretation of the Constitution." David M. O'Brien, The Reagan Judges:
His Most Enduring Legacy?, in THE REAGAN LEGACY, 60, 60–62 (Charles O. Jones, ed.
1988).

See also Roger Parloff, The Negotiator: No One Doubts that Richard Posner Is a Brilliant
Judge and Antitrust Theoretician. Is that Enough to Bring Microsoft and the Government
(describing Posner as a conservative advocate of the Chicago School's market approach
to law and economics).

Statistical Study, 1 J. LEGAL ANALYSIS 775, 781–83 & tbl. 3 (2009) (ranking the most
conservative to least conservative justices).

9. See infra Part III.B.

10. Robert Boynton, Sounding Off, WASH. POST BOOK WORLD, Jan. 20, 2002,
more willing to take bold positions, such as abolishing Article III standing, because he knows that it is unlikely that he will be considered for the Court since he celebrated his 72nd birthday in 2011.11

Because the jurisdictional issue of standing can be result determinative, a judge's approach to standing is quite important.12 Justice Antonin Scalia, who was nominated to the Court by President Reagan, has proposed a restrictive approach to standing. As he declared in a law review article written three years before he joined the Supreme Court in 1986, standing doctrine is a "crucial and inseparable element" of the Constitution's separation of powers principles, and that more restrictive standing rules limit judicial interference with the popularly elected legislative and executive branches.13 However, "his critics argue that he is more concerned with protecting executive branch decisions from lawsuits than protecting congressional prerogatives."14 In Lujan v. Defenders of Wildlife, the Supreme Court, in an opinion by Justice Scalia, invoked constitutional separation of powers principles to require a plaintiff seeking standing in a federal court to prove that she has "suffered an injury in fact," which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."15 By contrast, in his dissenting opinion in Summers v. Earth Island Institute, Justice Stephen Breyer, who was nominated to the Supreme Court by Democratic President Clinton, proposed that the Court adopt a "realistic threat" test for determining when an

available at http://www.robertboynton.com/articleDisplay.php?article_id=75 (reviewing RICHARD A. POSNER, PUBLIC INTELLECTUALS (2001)).


12. See infra Parts II, IV–VI.


injury is sufficiently imminent and concrete for standing. Judge Posner’s pragmatic or practical approach to standing is closer to the probabilistic and liberal standing approach of Justice Breyer than to the conservative and constitutionally grounded standing jurisprudence of Justice Scalia, although there are some differences between the pragmatism of Judge Posner and the more precedent-oriented pragmatism of Justice Breyer.

Conservative judges prefer a constitutional approach to standing even if another approach would reach the same result. For example, Judge Diane Sykes, who was appointed to the Seventh Circuit by President George W. Bush, a Republican, wrote a concurring opinion in *MainStreet Organization of Realtors v. Calumet City* criticizing Judge Posner for using a prudential approach to standing rather than Article III constitutional standing doctrine to deny standing even though the result was the same in that case. Conservative judges commonly believe that constitutional standing doctrine more generally limits suits in federal courts compared to prudential standing barriers. By contrasting Justice Scalia’s separation of powers views on standing with Judge Posner’s practical approach to standing, one can understand why conservative Republicans might be reluctant to nominate Judge Posner to the Supreme Court despite his brilliant record.

This Article will show that Judge Posner’s practical approach to standing doctrine is closer to Justice Breyer’s approach than to Justice Scalia’s. Nevertheless, there are some significant differences between Judge Posner and Justice Breyer. In his dissenting opinion in *Summers*, Justice Breyer tried to ground his “realistic threat” test for standing in the Court’s existing standing jurisprudence and the broader Anglo-American common law tradition. By contrast, Judge Posner in


17. Seeinfra Parts III.A, IV–VI (highlighting strengths and weaknesses, as well as similarities and differences, among Scalia’s, Posner’s, and Breyer’s different approaches).

18. Seeinfra Parts II, IV, VI.

19. Compare *MainStreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 744–49 (7th Cir. 2007) (Posner, J., majority opinion) (arguing plaintiffs met Article III constitutional standing requirements but must be denied standing on prudential standing grounds), with id. at 749–54 (Sykes, J., concurring) (arguing plaintiffs failed to meet Article III constitutional standing requirements).

20. See infra Part VI.


22. Seeinfra Parts III.A, V–VI.

23. See infra Part V.
his *American Bottom Conservancy* opinion was dismissive of the Court's constitutional standing precedent and was arguably too cavalier about ignoring such precedent. \(^4\) Furthermore, Judge Posner failed to explain to what extent his practical approach to standing is similar to or different from the Court's prudential standing doctrine. \(^5\) Ultimately, Justice Breyer's efforts to liberalize existing Article III standing doctrine may prove more fruitful than Judge Posner's approach of abolishing constitutional standing and replacing it with his proposed alternative "practical" standing test. \(^6\)

Part I explains current constitutional and prudential standing doctrine. Part II.A discusses Judge Posner's criticism of current Article III standing doctrine in *American Bottom Conservancy* and his proposed alternative "practical" approach to standing. Part II.B puts his views on standing in the larger context of his pragmatic philosophy of legal decisionmaking. Part III explores Justice Scalia's separation of powers theory of standing. Part IV examines Justice Breyer's precedent-based legal pragmatism and his "realistic threat" standing test in *Summers v. Earth Island Institute*. Part V discusses the dispute between Judge Posner and Judge Sykes about whether the Seventh Circuit should use a constitutional or prudential standing doctrine to deny standing in *MainStreet* and the implications of that debate for *American Bottom Conservancy*. The Conclusion suggests that Justice Breyer's efforts to liberalize existing Article III standing doctrine may prove more fruitful than Judge Posner's approach of abolishing constitutional standing and replacing it with his proposed alternative "practical" standing test.

II. STANDING BASICS

A. Constitutional Standing

Although the Constitution does not explicitly require that a plaintiff possess "standing" to file suit in federal courts, since 1944 the U.S. Supreme Court has inferred from the Constitution's Article III limitation of judicial decisions to "Cases" and to "Controversies" that federal courts must utilize standing requirements to guarantee that the plaintiff has a

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24. *See infra* Part III.A.
25. *See infra* Part III.A.
27. The discussion of standing in Part II relies upon my earlier standing articles cited in footnote 1.
genuine interest and stake in a case.\textsuperscript{28} The federal courts have
jurisdiction over a case only if at least one plaintiff can prove
standing for each form of relief sought.\textsuperscript{29} A federal court must
dismiss a case without deciding the merits if the plaintiff fails to
meet the constitutional standing test.\textsuperscript{30}

Standing requirements are related to broader constitutional
principles. Standing doctrine prohibits unconstitutional advisory
opinions.\textsuperscript{31} Furthermore, standing requirements support
separation of powers principles defining the division of powers
between the judiciary and political branches of government so that
the "Federal Judiciary respects the proper—and properly
limited—role of the courts in a democratic society."\textsuperscript{32} There is
disagreement, however, regarding to what extent separation of
powers principles limit the authority of Congress to authorize
standing to sue in federal courts for private citizens challenging
alleged executive branch underenforcement or nonenforcement of
congressional requirements mandated in a statute.\textsuperscript{33}

\textsuperscript{28} The judicial Power shall extend to all Cases, in Law and Equity, arising under
this Constitution, the Laws of the United States, and Treaties made, or which
shall be made, under their Authority;—to all Cases affecting Ambassadors, other
public Ministers and Consuls;—to all Cases of admiralty and maritime
Jurisdiction;—to Controversies to which the United States will be a party;—to
Controversies between two or more States;—between a State and Citizens of
another State;—between Citizens of different States,—between Citizens of the
same State claiming Lands under Grants of different States, and between a
State, or the Citizens thereof, and foreign States, Citizens or Subjects.

\textsuperscript{29} DaimlerChrysler, 547 U.S. at 352–53; Friends of the Earth, Inc. v. Laidlaw
standing separately for each form of relief sought."); Mank, States Standing, supra note 1, at 1709–10.

\textsuperscript{30} See DaimlerChrysler, 547 U.S. at 340–42 (noting that a "case or controversy is
a prerequisite to reach the merits of the case); Friends of the Earth, 528 U.S. at 180 ("[W]e
have an obligation to assure ourselves that [petitioner] had Article III standing at the
outset of the litigation."); Mank, States Standing, supra note 1, at 1710.

\textsuperscript{31} DaimlerChrysler, 547 U.S. at 340–41; FEC v. Akins, 524 U.S. 11, 23–24 (1998);
Mank, Standing and Future Generations, supra note 1, at 26.

\textsuperscript{32} DaimlerChrysler, 547 U.S. at 340–41 (quoting Allen v. Wright, 468 U.S. 737,
750 (1984)); see also Mank, States Standing, supra note 1, at 1709–10.

\textsuperscript{33} Compare Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–78 (1992)
(concluding Article III and Article II of the Constitution limit Congress's authority to
For constitutional standing, the Court has used a three-part standing test that requires a plaintiff to show that: (1) she has "suffered an injury in fact," which is "(a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical];" (2) "there [is] a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court[;]" and (3) "it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." A plaintiff has the burden of establishing all three prongs of the standing test.

B. The Uncertainties of Prudential Standing

In addition to constitutional Article III standing requirements, federal courts may impose prudential standing requirements to limit unreasonable demands on limited judicial resources or for other judicial policy reasons. The Supreme Court has explained the prudential standing doctrine as follows:

Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a authorize citizen suits by any person lacking a concrete injury), with id. at 602 (Blackmun, J., dissenting) (arguing that the "principal effect" of Justice Scalia's majority opinion's restrictive approach to standing was "to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates"). See also Heather Elliott, The Functions of Standing, 61 STAN. L. REV. 459, 496 (2008) (noting the concern that courts should not use standing doctrine as "a backdoor way to limit Congress's legislative power").

34. Lujan, 504 U.S. at 560–61 (second, third, fourth, and fifth alterations in original) (citations and internal quotation marks omitted); accord Mank, supra note 14, at 23–24.

35. DaimlerChrysler, 547 U.S. at 342 (stating that "parties ... asserting federal jurisdiction" must "carry the burden of establishing their standing under Article III"); Lujan, 504 U.S. at 560–61 (stating also that parties asserting federal jurisdiction must carry the burden of establishing standing under Article III); YACKLE, supra note 14, at 336; Mank, States Standing, supra note 1, at 1710.

36. See, e.g., Bennett v. Spear, 520 U.S. 154, 162–63 (1997) (describing the "zone of interests" standard as a "prudential limitation[ ]" rather than a mandatory constitutional requirement); Flast v. Cohen, 392 U.S. 83, 97 (1968) (stating that prudential requirements are based "in policy, rather than purely constitutional, considerations"); YACKLE, supra note 14, at 318–19 (stating that prudential limitations are policy-based "and may be relaxed in some circumstances").
plaintiffs complaint fall within the zone of interests protected by the law invoked.\textsuperscript{37} Congress may enact legislation to override prudential limitations, but must "expressly negate[ ]" such limitations.\textsuperscript{38} The requirement of express statutory language to override the Court's prudential standing rules probably does not require the extraordinary specificity demanded by a clear statement rule of statutory construction.\textsuperscript{39}

The Supreme Court's prudential standing doctrine is arguably even less defined and more open to interpretation than its constitutional standing doctrine.\textsuperscript{40} In Elk Grove Unified School District v. Newdow, the Supreme Court acknowledged that "we have not exhaustively defined the prudential dimensions of the standing doctrine."\textsuperscript{41} In Newdow, the Court dismissed an Establishment Clause suit brought by the father of an elementary school student challenging the constitutionality of a school district's policy requiring teacher-led recitation of the Pledge of Allegiance.\textsuperscript{42} The Court recognized the prudential standing concerns about the appropriateness of federal courts "entertain[ing] a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."\textsuperscript{43} The child's mother, who was the custodial parent, filed a motion for leave to intervene or to dismiss the complaint, and there were complex issues based in California family law about the father's right to influence his daughter's religious upbringing.\textsuperscript{44} As a result of these family law issues, a majority concluded that the Court should prudentially avoid a case involving family law matters defined by California domestic relations law.\textsuperscript{45} In his


\textsuperscript{38} Bennett, 520 U.S. at 162–66 (explaining that "unlike their constitutional counterparts, [prudential limits on standing] can be modified or abrogated by Congress" and that prudential limitations must be "expressly negated;" and concluding that a citizen suit provision abrogated the zone of interest limitation); Mank, Standing and Statistical Persons, supra note 1, at 676 & n.53.

\textsuperscript{39} YACKLE, supra note 14, at 386 n.493.

\textsuperscript{40} See Gregory Bradford, Note, Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation, 52 B.C. L. Rev. 1065, 1078–79 (2011) (describing prudential standing doctrine as "a malleable framework").

\textsuperscript{41} Newdow, 542 U.S. at 12.

\textsuperscript{42} Id. at 4–5.

\textsuperscript{43} Id. at 17–18.

\textsuperscript{44} Id. at 13–17.

\textsuperscript{45} Id. at 12–18.
concurring opinion, Chief Justice Rehnquist, who was joined by Justices O'Connor and Thomas, complained that the majority had invented a novel prudential standing principle based on “ad hoc improvisations” to dismiss a troublesome case rather than developing “general principles” for the doctrine of prudential standing.\(^\text{46}\) The \textit{Newdow} decision demonstrates that there is sometimes considerable disagreement on the Court about how to apply prudential standing principles.\(^\text{47}\)

Additionally, the line between constitutional Article III standing doctrine and prudential standing doctrine is often unclear.\(^\text{48}\) For example, the Supreme Court has been unclear regarding whether its restriction on suits alleging “generalized grievances,”\(^\text{49}\) a term which courts sometimes use to refer to suits involving large segments of the public or to suits where a citizen who has no personal injury seeks to force the government to obey a duly enacted law, is a prudential limitation or a constitutional one.\(^\text{50}\) In \textit{Duke Power Co. v. Carolina Environmental Study Group, Inc.}, for example, the Supreme Court reaffirmed that a court could deny standing in a suit involving generalized harms to large numbers of the public because such a suit would raise

\[\text{46. Id. at 18–19, 24–25 (Rehnquist, C.J., concurring).}\]
\[\text{47. See Bradford, supra note 40, at 1079–80.}\]
\[\text{48. See Erwin Chemerinsky,} \textit{A Unified Approach to Justiciability}, 22 \textit{CONN. L. REV.} 677, 692 (1990) (arguing the Court's distinction between prudential and constitutional standing is often arbitrary); Craig A. Stern, \textit{Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?}, 12 \textit{LEWIS & CLARK L. REV.} 1169, 1173 (2008) (arguing the Court sometimes shifts the line between prudential and constitutional standing, especially in generalized grievances cases).}\]
\[\text{49. Courts have failed to precisely define what constitutes a “generalized grievance.” YACKLE, supra note 14, at 342 (“The 'generalized grievance' formulation is notoriously ambiguous.”); Ryan Guilds, Comment,} \textit{A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access}, 74 \textit{N.C. L. REV.} 1863, 1884 (1996) (“Beyond the uncertainty about whether generalized grievances are constitutional or prudential limitations, there is also uncertainty about their precise definition.”).}\]
\[\text{50. See Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 634 n.5 (2007) (Scalia, J., concurring) (observing that the Court “has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar,” but explaining that the doctrine “squarely rest[s] on Article III considerations, as the analysis in \textit{Lujan} . . . confirms”); Lance v. Coffman, 549 U.S. 437, 439 (2007) (implying that the ban on generalized grievance suits is an Article III limitation (citing \textit{Lujan} v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992))); \textit{Lujan}, 504 U.S. at 573–77; YACKLE, supra note 14, at 342–45 (discussing the debate in the Supreme Court regarding if the rule against generalized grievances is a constitutional rule or a nonconstitutional policy waivable by Congress); Mank, \textit{States Standing}, supra note 1, at 1710–15 (discussing confusion over whether the Court's standing cases prohibiting generalized grievances are constitutional or prudential limitations); Solimine, supra note 28, at 1027 & n.14; Stern, supra note 48, at 1173 (“The generalized grievance test appears sometimes as a constitutional doctrine, sometimes as prudential, and sometimes as a bit of both, repeatedly resisting stable classification.”); Guilds, supra note 49, at 1875–76, 1878–84.}\]
"general prudential concerns 'about the proper—and properly limited—role of the courts in a democratic society.'\textsuperscript{51} Subsequently, however, in \textit{Public Citizen v. United States Department of Justice}, the Court rejected the argument that the plaintiffs were barred from standing because they alleged a generalized grievance shared by many other citizens.\textsuperscript{52} The Court stated:

The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA [(Federal Advisory Committee Act)] does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.\textsuperscript{53}

The \textit{Public Citizen} decision did not mention \textit{Duke Power}'s rejection of suits asserting generalized grievances shared by many others.\textsuperscript{54} Because the Court has never precisely defined the term "generalized grievances" and whether the bar against them is a flexible judicial prudential doctrine or a firmer constitutional rule, it is difficult to decide whether the \textit{Public Citizen} and \textit{Duke Power} decisions are merely in tension with each other or actually contradict each other.\textsuperscript{55}

In \textit{Federal Election Commission v. Akins}, the Government argued that the plaintiffs, who sought information from the Federal Election Commission because the information allegedly could assist their voting decisions, should not have standing because they had suffered only a generalized grievance common to all other voters.\textsuperscript{56} The Court rejected the Government's argument that the informational injury to the plaintiffs was too abstract or generalized to constitute a concrete injury or that it violated judicially imposed prudential norms against generalized grievances because the statute specifically authorized the right of voters to request information from the Commission and,


\textsuperscript{53} \textit{Id.} at 449–50.

\textsuperscript{54} \textit{See id.} at 440–89.

\textsuperscript{55} \textit{See YACKLE, supra} note 14, at 342 (illustrating conflicting definitions of "generalized grievance" the Court has advanced); Solimine, \textit{supra} note 28, at 1027 (explaining that the Court "has not been clear what [generalized] grievances are" and that "the line between [Article III and prudential] requirements is not always clear").

therefore, overrode any prudential standing limitations against
generalized grievances.\textsuperscript{57} The Court distinguished prior cases
that had imposed judicially imposed prudential norms against
generalized grievances by reasoning that it would deny
standing for widely shared, generalized injuries only if the
harm is both widely shared and of "an abstract and indefinite
nature—for example, harm to the 'common concern for
obedience to law.'\textsuperscript{58} Akins stated that Article III standing was
permissible even if many people suffered similar injuries as
long as those injuries were concrete and not abstract.\textsuperscript{59} The
Court declared that the fact that "an injury is widely
shared... does not, by itself, automatically disqualify an
interest for Article III purposes. Such an interest, where
sufficiently concrete, may count as an 'injury in fact.'\textsuperscript{60}
Accordingly, the Akins decision recognized that a plaintiff who
suffers a concrete, actual injury may sue even though many
others have suffered similar injuries:

\begin{quote}
[T]he fact that 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.... This conclusion seems particularly
obvious where (to use a hypothetical example) large
numbers of individuals suffer the same common-law
injury (say, a widespread mass tort), or where large
numbers of voters suffer interference with voting rights
conferred by law.\textsuperscript{61}
\end{quote}

Akins's broad acceptance of suits involving widespread
injuries has not been accepted by all members of the Court. In
his dissenting opinion in Akins, Justice Scalia, joined by Justices
O'Connor and Thomas, argued that Article III prohibits all
generalized grievances, even ones involving concrete injuries,

\begin{itemize}
\item[58.] Akins, 524 U.S. at 23 (quoting L. Singer & Sons v. Union Pac. R.R. Co., 311 U.S. 295, 303 (1940)). The Supreme Court has not been clear on whether generalized grievances pose a constitutional or prudential barrier to standing, and the issue has been subject to much debate. Solimine, supra note 28, at 1027 & n.14. The Akins decision implied that the rule against generalized grievances is only prudential in nature, but did not explicitly decide the issue. See Akins, 524 U.S. at 19–20, 24–25; accord Mank, Standing and Statistical Persons, supra note 1, at 717.
\item[59.] Akins, 524 U.S. at 24–25; Mank, Standing and Statistical Persons, supra note 1, at 717.
\item[60.] Akins, 524 U.S. at 24 (emphasis added); Mank, Standing and Statistical Persons, supra note 1, at 717.
\item[61.] Akins, 524 U.S. at 24–25; accord Mank, Standing and Statistical Persons, supra note 1, at 717–18.
\end{itemize}
because plaintiffs must demonstrate a "particularized" injury that "affect[s] the plaintiff in a personal and individual way." He contended that the Akins plaintiffs' alleged informational injury was an "undifferentiated" generalized grievance that was "common to all members of the public" and, therefore, that they must resolve it "by political, rather than judicial, means." More broadly, Justice Scalia dissented in Akins because he argued that generalized injuries to a large portion of the public are inherently unsuitable for judicial resolution and must be addressed by the political branches of government, and especially the Executive Branch, under both Article III and the President's Article II authority.

Some commentators have argued that the Court's distinction between constitutional and prudential standing sometimes rests only on the Court's arbitrary determination to classify an issue as constitutional or prudential for its convenience without any genuine logical basis. For example, the Court's first major case denying taxpayer standing, Frothingham v. Mellon, held that an individual taxpayer generally cannot sue the government to challenge how tax dollars are appropriated because his generalized interest in government expenditures "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating and uncertain." In its subsequent Flast v. Cohen opinion, the Court acknowledged that

64. Akins, 524 U.S. at 35–37 (Scalia, J., dissenting); Mank, Standing and Statistical Persons, supra note 1, at 719; see also Brown, supra note 57, at 703–04.
65. But what makes some requirements constitutional and the others prudential? For example, why are injury, causation, and redressability deemed constitutionally mandated, but the rules against third party standing and generalized grievance merely prudential? None are mentioned in the Constitution. All are created by the Court because they are viewed as prudent limits on federal judicial power. Each is of quite recent origin. So what makes some constitutional and the others prudential? The only apparent answer sounds terribly cynical: a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that. Nothing in the content of the doctrines explains their constitutional or prudential status.

Chemerinsky, supra note 48, at 692; see also Elliot, supra note, at 515–17 (noting the current standing test "has little logical relationship to the purposes [it] is supposed to serve").
the *Frothingham* decision could be read to rely on either constitutional Article III or prudential standing doctrine to deny standing, but the *Flast* decision preferred to read *Frothingham* as using prudential or policy reasons to deny taxpayer standing. Even today, the Court has not clearly explained whether the general prohibition against taxpayer suits is based on constitutional or prudential considerations, although recent Court decisions have emphasized constitutional barriers to taxpayer standing. In *Hein v. Freedom From Religion Foundation, Inc.*, Justice Scalia in his concurring opinion, which was joined by Justice Thomas, argued that the Court should overrule *Flast* and squarely hold that the bar against taxpayer standing is constitutional and not just prudential.

From opposite positions, both Justice Scalia's strong emphasis on using constitutional standing doctrine as the primary basis for standing rules and Judge Posner's diametrically opposite view would have the advantage of clarifying the Court's current muddled compromise between constitutional and prudential standing doctrine. For example, Justice Scalia's approach of adopting a completely Article III constitutional barrier to standing in taxpayer cases would have the advantage of eliminating confusion about the basis for the prohibition against taxpayer standing. From the opposite perspective, Judge Posner's proposal in *American Bottom Conservancy* to eliminate constitutional standing principles would also have the virtue of eliminating the difficult problem of delineating the line between constitutional Article III and prudential standing barriers. One problem with Judge Posner's approach to standing in his *American Bottom Conservancy* opinion, however, is that he failed to explain to what extent his practical approach to standing is similar to or different from the


70. *Hein*, 551 U.S. at 618, 634 n.5 (Scalia, J., concurring); accord Ariz. Christian Sch. Tuition Org., 131 S. Ct. at 1449–50 (Scalia, J., concurring) (reiterating his view in *Hein* that the Court should overrule *Flast* and reject taxpayer standing on constitutional grounds); *Solimine*, *supra* note 28, at 1045.

71. See *Hein*, 551 U.S. at 618, 637. (Scalia, J., concurring).

72. *See infra* Part III.A (discussing Judge Posner's use of his practical standing test as an alternative to the current constitutional standing test).
C. The Politics of Standing

Arguably, Democratic presidents are likely to appoint judges with different views on standing and other controversial issues than Republican presidents. Some empirical studies have found statistically significant differences in judicial voting patterns between federal judges appointed respectively by either a Democratic or a Republican president, although the party of appointment is more significant on average for some issues than others, and not all judges who are appointed by a particular party have the same views. There is conflicting evidence about whether the party of appointment affects how federal courts of appeals judges vote in standing cases. Professor Cross has

73. Some presidents have openly expressed their views on wanting judges to vote a certain way. President Reagan, who served in office from 1981 until 1989, stated that his goal was to appoint a federal judiciary "made up of judges who believe in law and order and a strict interpretation of the Constitution." O'Brien, supra note 6, at 60–62 (quoting President Reagan's Message to the National Convention of the Knights of Columbus on August 5, 1986). President Eisenhower, a Republican, allegedly complained that his appointments of Chief Justice Earl Warren and Justice William J. Brennan, who became two of the greatest "liberal" justices in the Court's history, were the two worst mistakes of his presidency, although whether he actually made that statement is the subject of some dispute. Kim Isaac Eisler, A Justice for All: William J. Brennan, Jr., and the Decisions That Transformed America 158–59 (1993) (reporting President Eisenhower in 1958 probably did not tell retiring Supreme Court Justice Harold Burton that the appointment of Chief Justice Earl Warren and Justice William J. Brennan were the two worst mistakes of his presidency because of their "liberal" approaches to judicial decisions, despite later rumors to that effect, but recounting that President Eisenhower did tell Justice Burton that he wanted Burton's replacement to have a "conservative attitude" about judicial ideology); Seth Stern & Stephen Wermiel, Justice Brennan: Liberal Champion 138–39 (2010) (reporting controversy about whether President Eisenhower called the appointment of Chief Justice Earl Warren and Justice William J. Brennan the two worst mistakes of his presidency because of their "liberal" approaches to judicial decisions and also reporting that President Eisenhower did seek a more conservative justice to replace Justice Burton in 1958).

74. See generally Frank B. Cross, Decision Making in the U.S. Courts of Appeals 22–23 (2007) ("The pattern of [the empirical testing] results is consistent with a finding that presidential ideologies are reflected in the ideologies of their judicial appointees. The Republican appointees were consistently more conservative, on average, than the Democratic appointees."); Cass R. Sunstein et al., Are Judges Political?: An Empirical Analysis of the Federal Judiciary 11–12 passim (2006) (analyzing 6,408 published three-judge federal court of appeals decisions during approximately the 1995–2004 period and finding statistical significant differences in judicial voting between Democratic and Republican appointees in several subject areas, but not in other subject areas, including standing questions). Professor Cross cautions, however, that not all Republican or Democratic presidents have the same views as other presidents of the same party and that judges do not perfectly replicate the ideologies of the presidents who appoint them or the senators who confirm them. Cross, supra, at 19–20.

75. Compare Cross, supra note 74, at 185–86 (finding tentative empirical evidence that Republican judges are more likely to deny standing than Democratic judges), and
JUDGE POSNER'S "PRACTICAL" THEORY

cautioned that more empirical data is needed on how judges vote on procedural issues like standing. Nevertheless, Parts I.C, III, IV, and V will suggest that Justice Scalia's narrow approach to constitutional standing is now the norm for judges appointed by Republican presidents and Justice Breyer's broader view of standing is generally typical for most judges appointed by Democratic presidents.

Ironically, some commentators argue that "liberal justices" appointed by Democratic presidents invented modern Article III standing doctrine during the 1930s and early 1940s as a means to limit challenges to administrative decisions by "New Deal" agencies created by Democratic President Franklin D. Roosevelt, although these scholars disagree somewhat on the details and timing of how and when liberal justices sought to limit standing. Professor Ho and Ms. Ross contend, "Rather than supporting the conservative goal of keeping broad-based public interest litigation out of court, restrictive standing requirements may originally have achieved precisely the opposite result: preserving and enshrining the liberal New Deal administrative state." Professor Winter argues, "The liberals were interested in protecting the legislative sphere from judicial interference. Their goal was to assure that the state and federal governments would be free to experiment with progressive legislation."

Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. REV. 1741, 1759–60 (1999) (finding empirical evidence that, for environmental plaintiffs, Republican judges are more likely to deny standing than Democratic judges), with SUNSTEIN ET AL., supra note 74, at 53–54 (finding no statistically significant differences between Republican and Democratic appointees serving on the D.C. Circuit on standing issues).

76. CROSS, supra note 74, at 186.
77. See infra Parts II.C, IV–VI.
79. Ho & Ross, supra note 78, at 595; accord Elliott, supra note 78, at 557.
80. Winter, supra note 78, at 1456; see also Elliott, supra note 78, at 557 (referencing Winter's discussion of the liberal justices' use of standing to protect New Deal programs); Robert J. Puschaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 CORNELL L. REV. 393, 458–69 (1996) ("[Justice] Brandeis's disciple Felix Frankfurter, who became a Justice in 1939, led a rapidly emerging majority
Professor Ho and Ms. Ross argue that after 1950 liberal justices began to favor broader standing rights and conservatives began to favor a narrower standing doctrine, asserting: "By 1950, the doctrine's political valence reversed entirely. Compared to votes in cases on the merits, liberals were uniformly more likely to favor—and conservatives more likely to deny—standing." For example, they argue that Justices Black and Douglas, both appointed to the Supreme Court by President Roosevelt in the late 1930s, initially favored restrictive standing, but then favored a broad approach to standing after 1950.

Other scholars might disagree with Professor Ho and Ms. Ross about the exact timing, but they agree with the general trend that by the 1970s liberal justices appointed by mostly Democratic presidents favored broad standing rights for plaintiffs while more narrow standing was favored by more conservative judges usually appointed by Republican presidents. For example, according to Justice Scalia's standing article published in 1983, during the 1970s, liberal judges and justices mostly appointed by Democratic presidents favored broad standing, especially in environmental cases. His article criticized the 1971 D.C. Circuit Court of Appeals decision in Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission for beginning "the judiciary's long love affair with environmental litigation." Furthermore, he criticized a series of Supreme Court cases during the 1970s that reinterpreted the Administrative Procedure Act to allow a plaintiff to sue whenever he is within the prudential "zone of

81. Ho & Ross, supra note 78, at 596.
82. Id. at 596, 643-45.
84. See Scalia, supra note 13, at 884-890, 897.
86. Scalia, supra note 13, at 884.
interests' that the statute seeks to protect. His article shows, however, that between the mid 1970s and early 1980s more conservative justices, mostly appointed by Republican presidents, sought to return constitutional standing doctrine to the narrower view followed before the 1970s. In 1986, President Reagan's appointment of Justice Scalia to the Court provided a brilliant intellectual to lead a conservative movement on the Court for a narrower constitutional standing doctrine based upon separation of powers principles.

Professor Elliott, in a recent article, has suggested that conservative judges might rethink their narrow approach to standing in light of the difficulties conservative plaintiffs challenging or defending same-sex marriage laws, federal health care legislation, or stem cell research have found in meeting standing requirements. But she concedes that there is no evidence yet that leading conservative justices are rethinking their views on standing to make it easier for conservative plaintiffs to gain standing. As Parts II, III, IV, and V will explain, Judge Posner's practical approach to standing issues is at odds with Justice Scalia's narrower constitutional standing doctrine based upon separation of powers principles, and is closer to Justice Breyer's "realistic threat" approach to standing, although there are significant differences between Judge Posner and Justice Breyer in their approaches to pragmatic constitutional and legal reasoning. Judge Posner's pragmatic approach to standing may be one reason why he has never been appointed to the Supreme Court because Justice Scalia's approach to standing has come to define the views of "conservative" judges who are acceptable for appointment by Republican presidents.

III. JUDGE POSNER'S "PRACTICAL" STANDING THEORY IN AMERICAN BOTTOM CONSERVANCY

In American Bottom Conservancy, Judge Posner questioned the constitutional doctrine of standing in federal courts and instead argued that the "solidest grounds" for the doctrine of standing are "practical." As will be discussed below, the Seventh

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88. Scalia, supra note 13, at 887–90.
89. See id. at 897–99; Elliot, supra note 78, at 555–59.
90. See infra Part IV.
91. Elliott, supra note 78, at 565–72, 575–78, 583–86.
92. Id. at 586–89.
93. See infra Parts IV, VI–VII.
Circuit likely could have reached the same result regarding standing irrespective of whether it applied a constitutional Article III or “practical” standing test. Accordingly, Judge Posner was likely seeking to convince other federal judges, including the Supreme Court, to adopt his practical standing test in lieu of its current constitutional Article III standing test.

Judge Posner’s call for a practical standing test is consistent with his general pragmatic approach to legal decisionmaking. A weakness of Judge Posner’s pragmatic approach in his American Bottom Conservancy opinion was that he was arguably too dismissive of the Court’s constitutional standing precedent. A more truly pragmatic approach might be found in Justice Breyer’s attempt in Summers to fashion a realistic approach to standing from the Court’s existing precedent. Additionally, Judge Posner in his American Bottom Conservancy opinion failed to explain to what extent his practical approach to standing is similar to or different from the Court’s prudential standing doctrine.

A. Judge Posner’s “Practical” Standing Theory in American Bottom Conservancy

In American Bottom Conservancy, an environmental organization, American Bottom Conservancy, filed suit against the U.S. Army Corps of Engineers seeking to invalidate a federal permit granted to Waste Management of Illinois, Inc. authorizing it to destroy eighteen acres of wetlands in the American Bottom, a floodplain of the Mississippi River in Southwestern Illinois. The United States District Court for the Southern District of Illinois, in a decision by Judge Patrick Murphy, “dismissed the suit without prejudice on the ground that the Conservancy had not established standing to sue under Article III of the Constitution.” The Seventh Circuit, however, held that American Bottom Conservancy had standing to sue and, accordingly, reversed the district court’s decision.

1. Judge Posner Questions Constitutional Standing Doctrine. In American Bottom Conservancy, Judge Posner’s decision questioned three different grounds articulated by the U.S. Supreme

95. See infra Part III.A.
96. See infra Part III.A.
97. Am. Bottom Conservancy, 650 F.3d at 654–55. “The Corps granted the permit on condition that Waste Management create double the amount of wetlands on a nearby tract that it owns.” Id. at 654.
98. Id. at 655.
99. Id. at 656-60.
Court for the constitutional doctrine of standing in federal courts.\textsuperscript{100} First, he observed: “Some of the most frequently mentioned grounds for the constitutional doctrine of standing are tenuous, such as that it is derived from Article III’s limitation of the federal judicial power to ‘Cases’ and ‘Controversies.’”\textsuperscript{101} By concluding that the “‘Cases’ and ‘Controversies’” rationale was tenuous,\textsuperscript{102} Judge Posner questioned a long line of Supreme Court precedent, including its 2008 decision in \textit{Sprint Communications Co. v. APCC Services, Inc.}\textsuperscript{103} and its 1998 decision in \textit{Steel Co. v. Citizens for a Better Environment.}\textsuperscript{104} In \textit{Sprint Communications}, Justice Breyer declared: “We begin with the most basic doctrinal principles: Article III, § 2, of the Constitution restricts the federal ‘judicial Power’ to the resolution of ‘Cases’ and ‘Controversies.’ That case-or-controversy requirement is satisfied only where a plaintiff has standing.”\textsuperscript{105} In \textit{Steel Co.}, Justice Scalia invoked his textualist approach to interpretation in endorsing the same constitutional limitation on standing:

\begin{quote}
Article III, § 2, of the Constitution extends the ‘judicial Power’ of the United States only to “Cases” and “Controversies.” We have always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process. Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all.\textsuperscript{106}
\end{quote}

By questioning the “‘Cases’ and ‘Controversies’” rationale for standing, Judge Posner effectively disagreed with Justice Breyer, Justice Scalia, and long-standing Supreme Court precedent.\textsuperscript{107} It is certainly unusual for a federal court of appeals judge to question clear Supreme Court precedent, but Judge Posner is a unique intellect who apparently is not afraid to raise questions where other lower court judges might fear to tread.

The other two rationales for constitutional standing questioned by Judge Posner are not quite as strong precedent as the “‘Cases’ and ‘Controversies’” rationale for standing, but still

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\textsuperscript{100} \textit{Id.} at 655–56.
\textsuperscript{101} \textit{Id.} at 655 (citing \textit{Sprint Commc'ns Co. v. APCC Servs., Inc.}, 554 U.S. 269, 273–75 (2008); \textit{Steel Co. v. Citizens for a Better Env't}, 523 U.S. 83, 102 (1998); D.L.S. \textit{v. Utah}, 374 F.3d 971, 974 (10th Cir. 2004)).
\textsuperscript{102} \textit{Am. Bottom Conservancy}, 650 F.3d at 665.
\textsuperscript{103} \textit{Sprint Commc'ns}, 554 U.S. at 273–75.
\textsuperscript{104} \textit{Steel Co.}, 523 U.S. at 102.
\textsuperscript{105} \textit{Sprint Commc'ns}, 554 U.S. at 273.
\textsuperscript{106} \textit{Steel Co.}, 523 U.S. at 102 (citation omitted).
\textsuperscript{107} \textit{Am. Bottom Conservancy}, 650 F.3d at 655.
\end{flushleft}
enjoy some support.\textsuperscript{108} Justice Frankfurter in 1939, and again in 1951, justified standing as based on "the practice of the English royal courts, on which the federal judiciary was modeled."\textsuperscript{109} The modern Supreme Court has not necessarily adopted Justice Frankfurter's precise interpretation of English common law practice, but has generally endorsed the use of history in deciding which cases fall within the jurisdiction of federal Article III courts. In \textit{Sprint Communications}, Justice Breyer declared:

We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider. See, e.g., \textit{Steel Co. v. Citizens for Better Environment}, 523 U.S. 83, 102 (1998) ("We have always taken [the case-or-controversy requirement] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process" (emphasis added)); \textit{GTE Sylvania, Inc. v. Consumers Union of United States, Inc.}, 445 U.S. 375, 382 (1980) ("The purpose of the case-or-controversy requirement is to limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" (emphasis added and internal quotation marks omitted)); cf. \textit{Coleman v. Miller}, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (in crafting Article III, "the framers ... gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union"). Consequently, we here have carefully examined how courts have historically treated suits by assignors and assignees.\textsuperscript{110}

Judge Posner's questioning of a historical justification for a

\textsuperscript{108} See id. at 655–56.


\textsuperscript{110} \textit{Sprint Commc'ns}, 554 U.S. at 274–75 (alteration in original). Professors Woolhandler and Nelson have suggested that modern standing doctrine has some support in history, even if history does not compel the precise formulation adopted by the current Supreme Court. See Ann Woolhandler & Caleb Nelson, \textit{Does History Defeat Standing Doctrine?}, 102 \textit{MICH. L. REV.} 689, 691–92 (2004) (arguing that standing doctrine has historical antecedents dating back to eighteenth and nineteenth century courts, although history did not compel the precise standing doctrine used by the Supreme Court). \textit{But see} Daniel A. Farber, \textit{A Place-Based Theory of Standing}, 55 \textit{UCLA L. REV.} 1505, 1543–45 (2008) (questioning historical evidence for and constitutional basis for modern standing requirements, but acknowledging that Woolhandler and Nelson may have some basis for showing historical distinction between treatment of public versus private suits).
constitutional standing doctrine appears to be contrary to Supreme Court precedent.\textsuperscript{111}

The third rationale for constitutional standing questioned by Judge Posner is that "lawsuits wouldn't be vigorously litigated, with the requisite adverseness, unless they involved 'tangible' stakes."\textsuperscript{112} In Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., the Supreme Court stated that a plaintiff must have a personal stake in the case rather than a theoretical interest:

The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." United States v. SCRAP, 412 U.S. 669, 687 (1973). Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. As we said in Sierra Club v. Morton, 405 U.S. 727, 740 (1972):

"The requirement that a party seeking review must allege facts showing that he is himself adversely affected... does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."

The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show "injury in fact" resulting from the action which they seek to have the court adjudicate.\textsuperscript{113}

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\textsuperscript{111} Am. Bottom Conservancy, 650 F.3d at 655–56 ("I have encountered no case before 1807 in which the standing of the plaintiff is mooted, though the lists of cases in the digests strongly suggest the possibility that the plaintiff in some of them was without a personal interest." (quoting Louis L. Jaffe, Standing To Secure Judicial Review: Public Actions, 74 HARV. L. REV. 1265, 1270 (1961)); Raoul Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 YALE L.J. 816, 827 (1969).

\textsuperscript{112} Am. Bottom Conservancy, 650 F.3d at 655 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Baker v. Carr, 369 U.S. 186, 204 (1962); O'Sullivan v. City of Chicago, 396 F.3d 843, 853, 868 (7th Cir. 2005); Comite de Apoyo a los Trabajadores Agricolas (CATA) v. U.S. Dep't of Labor, 995 F.2d 510, 513 (4th Cir. 1993)).

\textsuperscript{113} Valley Forge, 454 U.S. at 473.
\end{flushright}
Judge Posner appeared to question whether a plaintiff needs to have a direct stake in a case to have constitutional standing.\textsuperscript{4}

Perhaps because he is a former academic who still teaches law at the University of Chicago Law School as a Senior Lecturer in Law,\textsuperscript{115} Judge Posner in \textit{American Bottom Conservancy} gives more weight to academic criticisms of constitutional standing doctrine than most other judges probably would.\textsuperscript{116} He writes: "All three of these grounds [for constitutional standing doctrine] have been subjected to strong criticisms by reputable scholars."\textsuperscript{117} He then cites Charles Alan Wright's treatise on \textit{Federal Practice and Procedure} and several law review articles.\textsuperscript{118} The sources cited by Judge Posner do raise serious questions about the Supreme Court's constitutional standing doctrine. For example, Wright's treatise observes: "All of these [standing] concepts, both constitutional and prudential, are slippery. Difficult tasks of judgment are required, invoking an elaboration of competing judicial philosophies that leads often to hot dispute and

\begin{itemize}
  \item \textsuperscript{4}Am. Bottom Conservancy, 650 F.3d at 655–56 (citing 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, \textit{FEDERAL PRACTICE AND PROCEDURE} § 3531.3 (3d ed. 2008); Abram Chayes, \textit{The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court}, 96 \textit{HARV. L. REV.} 4, 24–26 (1982)).
  \item \textsuperscript{116}Judge Posner has observed that most federal judges are not much interested in their evaluation by law professors because modern academic literature usually does not effectively understand the judicial process. RICHARD A. POSNER, \textit{HOW JUDGES THINK} 204–29 (2008) (explaining why judges are not law professors).
  \item \textsuperscript{117}Am. Bottom Conservancy, 650 F.3d at 655.
\end{itemize}
sometimes to disingenuous manipulation.”

Professor Pushaw found no basis for a “case” and “controversy” limitation in the Supreme Court’s early decisions, declaring:

The foregoing analysis of eighteenth and nineteenth century sources reveals that “case” and “controversy” had different meanings related to judicial functions. Interestingly, no contemporary American legal figure ever suggested that Article III’s reference to “Cases” and “Controversies” was intended as a constitutional limitation on federal jurisdiction. Most importantly, the early Supreme Court never interpreted Article III’s language that way in its discussions of “justiciability” concepts.

Similarly, Professor Winter complains:

One legitimately may wonder how a constitutional [standing] doctrine now said to inhere in article III’s “case or controversy” language could be so late in making an appearance, do so with so skimpy a pedigree, and take so long to be recognized even by the primary academic expositors of the law of federal courts.

Unlike most federal judges, Judge Posner would apparently prefer to give more weight to a well-reasoned law review article than a poorly reasoned Supreme Court decision. By contrast, in recent years, most federal judges have become less likely to cite law review articles in their decisions than in the 1970s or even the 1990s.

2. Judge Posner Proposes a Practical Theory of Standing. After questioning the Supreme Court’s constitutional standing doctrine, Judge Posner proposed an alternative

119. WRIGHT, MILLER & COOPER, supra note 114, § 3531.1, at 92.
121. Winter, supra note 78, at 1377.
122. See Am. Bottom Conservancy, 650 F.3d at 655–56 (citing five law review articles and one treatise to critique case law supporting constitutional doctrine of standing).
123. See Brent E. Newton, Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis, 4 DREXEL L. REV. 399, 401–09 (2012) (reporting an empirical study of nearly two thousand Supreme Court opinions, including concurring and dissenting opinions, from 2001 to 2011, which found that Justices currently cited law review articles less frequently than during the 1970s and 1980s, citing, on average, 0.52 articles per opinion from 2001 to 2011 compared to 0.87 articles per opinion in the early 1970s); Adam Liptak, When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant, N.Y. TIMES, Mar. 19, 2007, at A8 (“In the 1970s, federal courts cited articles from The Harvard Law Review 4,410 times, according to a new report by the staff of The Cardozo Law Review. In the 1990s, the number of citations dropped by more than half, to 1,956. So far in this decade: 937. Patterns at other leading law reviews are similar. And the drop in the number of citations understates the phenomenon, as the courts’ caseload has exploded in the meantime.”).
“practical” theory of standing. He wrote: “This isn’t to say that the doctrine of standing isn’t well grounded. But the soldest grounds are practical (just like the avowedly prudential grounds for judge-made supplements to the Article III standard, MainStreet Organization of Realtors v. Calumet City, 505 F.3d 742, 744-46 (7th Cir. 2007)).” Part VI will discuss Judge Posner’s prudential standing decision in MainStreet, the possible similarities and differences between prudential standing doctrine and his “practical” standing theory, and Judge Sykes’s concurring opinion in that case criticizing Judge Posner’s refusal to use constitutional standing doctrine. As will be discussed, Judge Posner’s American Bottom Conservancy decision goes beyond his MainStreet decision by openly acknowledging his doubts about constitutional standing doctrine and his preference for an alternative “practical” theory of standing that bears some resemblance to prudential standing doctrine, but may go beyond its current boundaries. Unfortunately, Judge Posner does not clearly define to what extent his practical approach to standing is similar to or different from existing prudential standing doctrine; possibly, he prefers a practical approach to standing rather than the established prudential doctrine because his approach gives him more flexibility to decide future cases as he sees fit.

In American Bottom Conservancy, Judge Posner explained that standing doctrine was needed for various practical reasons:

The doctrine is needed to limit premature judicial interference with legislation, to prevent the federal courts from being overwhelmed by cases, and to ensure that the legal remedies of primary victims of wrongful conduct will not be usurped by persons trivially or not at all harmed by the wrong complained of.

It is pertinent to examine the sources that Judge Posner cites to support his practical reasoning justification. The single

124. Am. Bottom Conservancy, 650 F.3d at 656.
125. Id.
126. Judge Posner’s cited sources are as follows:
Supreme Court decision he cites, Valley Forge, relies upon Article III's "cases and controversies" language rather than prudential standing doctrine, although arguably the opinion uses that language to achieve the practical result of using standing to prevent federal courts from becoming "college debating forums." More on point for his practical standing argument, Judge Posner cites his own 1991 decision in North Shore Gas Co. v. EPA, where he declared that "probabilistic benefit from winning a suit is enough 'injury in fact' to confer standing in the undemanding Article III sense." By contrast, Justice Scalia rejected "probabilistic" standing in his 2009 Summers decision and would never describe Article III standing as an "undemanding" requirement. On the other hand, Justice Breyer accepted "probabilistic standing" in his Summers dissenting opinion when he proposed a "realistic threat" test for standing.

Judge Posner also cited three law review articles and one casebook as supporting his practical standing proposal. One law review that he cites discusses how and why the prudential standing doctrine normally precludes suits by third parties; Judge Posner's citation of that article suggests that he sees the prudential standing doctrine as consistent in many cases with his practical standing approach. Two articles and one casebook cited by Judge Posner suggest that standing is an artificial doctrine created to address new types of litigation arising from the New Deal's creation of modern administrative agencies during the 1930s. If standing doctrine is really a judge-made concept designed to address the contingencies of a judicial era rather than a constitutional doctrine set in stone by the Constitution's
text and historical practice, as these scholarly works suggest, then it would be reasonable for federal judges like Judge Posner to modify standing doctrine as practical circumstances demand.\textsuperscript{134}

There is strong scholarly support for Judge Posner's practical standing theory, but his citation of Valley Forge, which relies on Article III's "cases and controversies" language rather than prudential standing doctrine, is far more questionable. Nevertheless, the Supreme Court's admonition in that case that Article III constitutional standing doctrine prevents federal courts from becoming "merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding" does have a practical aspect that fits Judge Posner's standing theory in part.\textsuperscript{135}

Judge Posner suggested that his practical standing doctrine would often reach the same result as existing standing doctrine to bar suits from bystanders with no stake in a case.\textsuperscript{136} He wrote:

Consistent with the practical as well as doctrinal thinking behind the requirement of standing, a plaintiff, to establish Article III standing to sue, must allege, and if the allegation is contested must present evidence, that the relief he seeks will if granted avert or mitigate or compensate him for an injury—though not necessarily a great injury—caused or likely to be caused by the defendant. E.g., Lujan v. Defenders of Wildlife, 504 U.S. 555... (1992). Imagine an environmental group located in California suing to prevent the Corps of Engineers from granting a permit to destroy wetlands at the North Milam site even though no member of the group planned ever to visit the American Bottom. The suit might be brought before American Bottom Conservancy brought its own suit and the Conservancy's suit might be overshadowed by the suit by the California group, even though the Conservancy's members have a greater stake because they actually frequent the Horseshoe Lake State Park and will feel the diminution in their birdwatching and other wildlife-viewing activities directly if the wetlands are destroyed.\textsuperscript{137}

By citing Justice Scalia's Article III-based constitutional standing decision in Lujan, Judge Posner was probably deliberately suggesting that his practical standing approach

\textsuperscript{134} See Ho & Ross, supra note 78, at 600 ("Developments internal to the standing doctrine of course already offer proof of the fluidity of the doctrine.").


\textsuperscript{136} See Am. Bottom Conservancy, 650 F.3d at 656.

\textsuperscript{137} Id.
would reach the same result as constitutional standing doctrine in many cases, and, therefore, that using his alternative approach would not radically change the results in many standing decisions.

3. Finding Standing on the Facts of the Case. Reversing the district court’s decision below finding that the plaintiffs lacked standing, the Seventh Circuit concluded that American Bottom Conservancy had standing because “three of its members who frequent the state park and enjoy watching birds and other wildlife there” submitted affidavits to the district court that adequately described how their aesthetic and recreational enjoyment of the affected area would be harmed by the permit issued by the Corps. Judge Posner explained that the district court judge had misunderstood the application of standing doctrine to the facts of the case:

The district judge thought that to establish standing the affiants had to attest that they would be so upset by the diminution in their bird- and wildlife-watching activities that they would no longer visit the state park. That is wrong; it is enough to confer standing that their pleasure is diminished even if not to the point that they abandon the site. For that diminution is an injury. He also found adequate causation despite the fact that Waste Management needed to obtain other permits in addition to the Corps’ wetlands permit, stating:

Although it is not certain that Waste Management will obtain the required permit from the Illinois Environmental Protection Agency to build the North Milam landfill unless the Corps of Engineers’ permit is voided, it must be likely, for Waste Management must have spent a great deal of money designing the landfill.

Finally, Judge Posner concluded that the plaintiff’s remedy of voiding the Corps permit would prevent its injury:

If American Bottom Conservancy can prevent the wetlands’ destruction by knocking out the Corps of Engineers permit, there will be no North Milam landfill. And so a judgment in the plaintiff’s favor in the present lawsuit would eliminate a probable injury from the landfill. No more is necessary to establish standing.

138. Id. at 655, 657, 660.
139. Id. at 657-58 (citations omitted).
140. Id. at 658.
141. Id.
4. Problems with Judge Posner's Practical Theory of Standing. Based on his interpretation of the facts in American Bottom Conservancy, Judge Posner could have found standing under the standard three-part constitutional Article III standing test. Instead, he sought to do so under an alternative theory because he apparently believes that a practical standing test is better than existing constitutional standing doctrine. He endorsed a practical standing test that is consistent with his broader legal pragmatism, which is discussed in Part III.B.

A weakness of Judge Posner's pragmatic approach in his American Bottom Conservancy opinion was that he was arguably too dismissive of the Court's constitutional standing precedent. A more truly pragmatic approach might be found in Justice Breyer's attempt in Summers to fashion a realistic approach to standing from the Court's existing precedent. Additionally, Judge Posner in his American Bottom Conservancy opinion failed to explain to what extent his practical approach to standing is similar to or different from the Court's prudential standing doctrine. For example, one issue is to what extent his "practical" approach to standing is similar to or different from his use of prudential standing doctrine in MainStreet Organization of Realtors v. Calumet City, which is discussed in Part VI.

B. Judge Posner's Legal Pragmatism

Judge Posner has advocated a "pragmatic" theory of legal analysis to address a wide range of legal issues. Judge Posner's pragmatic philosophy has been discussed and examined at length by a number of legal scholars. In general, Judge Posner's

142. *Id.* at 657-58 (reasoning that American Bottom Conservancy had established injury, causation, and relief, all of which are necessary for Article III standing).


144. *See supra* Part III.A.1 (emphasizing Judge Posner's reliance on secondary sources, such as law review articles and a casebook, instead of Supreme Court case law).

145. *See infra* Part V.

146. *Am. Bottom Conservancy*, 650 F.3d at 652-62 (failing to address how practical standing is different from constitutional standing); *see also supra* Part III.A.


endorsement of a "practical" approach to standing doctrine is consistent with his overall pragmatic theory of legal jurisprudence.

According to Judge Posner, from the late 1860s until the early 1950s, three American philosophers—Charles Sanders Peirce, William James, and John Dewey—developed a "pragmatic" approach to philosophical reasoning. While these three thinkers differed in some respects, they shared a common rejection of the traditional philosophical agenda first established by Plato of "investigating the meaning of... truth,... the nature of reality, the meaning of life, the roles of freedom and causality in human action, and the nature and... [meaning] of morality." Pragmatists also spurned traditional philosophical methodological concerns such as conceptualism, the a priori, and logical reasoning. Instead, American pragmatists emphasized empiricism, the use of scientific methodology into all areas of knowledge and an experimental or instrumental approach to social problem solving.

During the 1870s in Cambridge, Massachusetts, a young lawyer, Oliver Wendell Holmes Jr., participated in an informal discussion group with Pierce and James that helped to develop pragmatism as a school of thought. His subsequent scholarly work and judicial opinions reflected a pragmatic approach to legal reasoning. For example, in his 1881 book, The Common Law, Holmes famously declared in the first sentence: "The life of the law has not been logic: it has been experience." In his subsequent long service as a Justice on the Massachusetts Supreme Judicial Court and on the U.S. Supreme Court, Justice Holmes rejected legal reasoning based on pure logical deduction from existing precedents or universal natural laws and instead argued that judges consider at least to some extent the social and

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149. POSNER, How Judges Think, supra note 116, at 231.
150. Id.
151. Id.
152. Id.
153. Id. at 231–32.
154. Id. at 232.
155. Id. (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881)).
economic consequences of their decisions. In turn, John Dewey, in a 1924 essay, drew heavily upon Holmes's writings in arguing against the use of logical deduction in law and instead arguing for an empiricist approach that examined, in Judge Posner's description, the "practical consequences of legal decisions."

In his work on law and economics, Professor Posner drew upon an empiricist or pragmatic tradition in American law to show that many judges employ traditional legal vocabulary as a means to achieve relatively efficient economic ends even if their opinions did not openly acknowledge economics. More broadly, he has criticized legalists who rely upon an arbitrary set of legal rules and argued in favor of sensible pragmatic judges who consider a wide variety of legal and nonlegal information as a means to estimate the long-term impacts of their decisions. Judge Posner acknowledges that legal pragmatism has its limits because "what counts as an acceptably pragmatic resolution of a dispute is relative to the prevailing norms of particular societies. Pragmatism provides local rather than universal guidance to judicial action."

Judge Posner's terminology for pragmatic legal reasoning has evolved slightly over the years. In his 1990 book, The Problems of Jurisprudence, Judge Posner discusses legal reasoning as "practical reasoning." He acknowledged that "[practical reason] lacks a standard meaning." He defined practical reasoning as "action-oriented, in contrast to the methods of 'pure reason' by which we determine whether a proposition is true or false, an argument valid or invalid." After observing that some "neotraditionalist" lawyers used the term "practical reason" to refer the use of traditional methods in a particular field, Judge Posner proposed a different definition based "mainly in Aristotle's discussions of induction, dialectic, and rhetoric, [that] denotes the methods by which people who are not credulous form beliefs about matters that cannot be verified by logical or exact observation." His definition arguably combines the empiricist approach of philosophical pragmatism with an acknowledgement that lawyers or judges must rely

156. Id.
157. Id.
158. Id. at 237–38 (citing POSNER, ECONOMIC ANALYSIS OF LAW, supra note 7).
159. Id. at 238–40.
160. Id. at 241.
161. POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 147, at 71–123.
162. Id. at 71.
163. Id.
164. Id. at 71–72.
JUDGE POSNER'S "PRACTICAL" THEORY

sometimes upon their intuition, judgment, and general life experience to make decisions in the light of incomplete information. His critics point out that relevant empirical data often does not exist to address a particular legal issue, and, even when empirical data does exist, it is not always clear how judges should evaluate the data to reach a decision that depends upon nonempirical political or moral judgments. For the purposes of this Article, it is not necessary to evaluate the overall effectiveness of Judge Posner's theory of practical reasoning. It is enough for the purposes of this Article to observe that Judge Posner's endorsement of practical reasoning as a model for legal reasoning is generally consistent with his subsequent proposal for a "practical" approach to standing doctrine in American Bottom Conservancy.

More recently, Judge Posner has advocated for "legal pragmatism" more often than using the term "practical reasoning," but his approach is roughly similar. In his 1999 book, The Problematics of Moral and Legal Theory, Judge Posner suggests that judges and lawyers employ "pragmatic decision making—the methods of social science and common sense." His proposal that legal professionals use "common sense" is close to his earlier suggestion that they use "intuition" as part of practical legal reasoning. Judge Posner further defines legal pragmatism "as a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities." In his 2008 book, How Judges Think, Judge

165. Id. at 73, 108–12 (listing intuition as part of practical reasoning and discussing the role of tacit knowledge and judgment in law).

166. Edwards, supra note 4, at 318–33 (discussing weaknesses of Judge Posner's empirical pragmatism); Linda E. Fisher, Pragmatism Is as Pragmatism Does: Of Posner, Public Policy, and Empirical Reality, 31 N.M. L. Rev. 455, 470–71, 491–92 (2001) (evaluating how Judge Posner's pragmatism affects his judicial decisions and concluding that there is a danger when he makes conjectures based on limited evidence or ignores the normative component of legal rules); Sullivan & Solove, supra note 148, at 691, 694, 703–06, 741 ("We argue that Posner's pragmatism offers little help when it comes to evaluating and selecting ends, which is critical for resolving legal and policy disputes."); Steven Walt, Some Problems of Pragmatic Jurisprudence, 70 Tex. L. Rev. 317, 327–28 (1991) (reviewing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)) (arguing Posner's theory of practical reasoning "provides no criteria for selecting among conflicting beliefs induced by different items of practical reason").

167. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, supra note 143, at viii.

168. Compare id. (remarking that judges “can do no better than to rely on notions of policy, common sense, personal and professional values, and intuition and opinion, including informed or crystallized public opinion”), with POSNER, THE PROBLEMS OF JURISPRUDENCE, supra note 147, at 73, 77 (listing intuition as part of practical reasoning).

169. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, supra note 143, at 227.
Posner explains that "[a] key tenet of legal pragmatism is that no general analytic procedure distinguishes legal reasoning from other practical reasoning."170 Thus, he suggests that legal pragmatism and legal reasoning in general are just one variety of the broader category of practical reasoning.171 In light of Judge Posner’s lengthy work on legal pragmatism and practical reasoning, it is reasonable to assume that his use of the term "practical" in defining standing doctrine in American Bottom Conservancy is roughly consistent with his broader thought on pragmatism and practical reasoning methodology.172 Part IV will show that Judge Posner’s pragmatic or practical reasoning methodology is quite different from the more legalistic and rule-oriented approach of Justice Scalia.

IV. JUSTICE SCALIA’S SEPARATION OF POWERS BASED THEORY OF STANDING

A. Justice Scalia Treats Standing as an Essential Element of the Separation of Powers: An Originalist and Rule-Based Approach to Standing

In 1983, Justice Scalia, then a judge on the United States Court of Appeals for the District of Columbia Circuit, wrote an article, The Doctrine of Standing as an Essential Element of the Separation of Powers, arguing that the "judicial doctrine of standing is a crucial and inseparable element" of separation of powers principles required by the structure and original intent of the Constitution, "which successively describes where the legislative, executive and judicial powers, respectively, shall reside."173 Judge Scalia criticized U.S. Supreme Court cases from the late 1960s and early 1970s that liberalized and weakened standing requirements because, in his view, disregarding standing doctrine caused "an overjudicialization of the processes of self-governance."174 He concluded that the Court, beginning in

171. See id.
172. See Am. Bottom Conservancy v. U.S. Army Corps of Eng’rs, 650 F.3d 652, 656 (7th Cir. 2011). Compare supra Part III.A (identifying the goals of practical standing and suggesting that judges could alter the doctrine to address problems without being limited by the Constitution’s text and historical practice), with supra Part III.B (identifying common sense and intuition as being most useful in addressing new problems in light of incomplete facts, as opposed to using logical or exact observation).
173. Scalia, supra note 13, at 881.
the mid 1970s and continuing through a 1982 decision, had “returned to earlier [standing] traditions,” and, thereby, had “Return[ed] To The Original Understanding” of the Constitution’s separation of powers principles. Justice Scalia’s view that standing doctrine is an essential part of the Constitution’s separation of powers principles is considerably different from Judge Posner’s suggestion that Article III’s “Case” and “Controversy” language does not mandate standing doctrine and from Judge Posner’s call for a practical theory of standing.

In general, Justice Scalia believes that federal courts should ascertain the original intent of the framers of the Constitution. He has vigorously condemned proponents of a “Living Constitution,” who argue that judges could reinterpret with changing circumstances, because he believes that approach gives judges too much authority to ignore the will of the majority as expressed through Congress and the President. Unlike Justice Thomas, who supports a strong version of originalism that gives less deference to prior opinions of the Court and more weight to

175. This quotation is from the heading for Part V of Judge Scalia’s article. Id. at 897.


177. Compare supra Part III (discussing Judge Posner’s views on standing), with supra Part IV (discussing Justice Scalia’s views on standing).


the views of the framers of the Constitution, Justice Scalia is a "fainthearted originalist," who gives some weight to *stare decisis*, precedent, as a "pragmatic exception" to his "originalist philosophy." Justice Scalia is more pragmatic than Justice Thomas, but Justice Scalia, in his essay *The Rule of Law as a Law of Rules*, expressed his general preference for judges developing general categorical rules to decide cases rather than discretionary case-by-case judicial decisionmaking. Even as a self-acknowledged "fainthearted originalist" who pragmatically considers judicial precedent, Justice Scalia is a more rule-oriented judge than Judge Posner, who favors a more discretionary consideration of all circumstances and even intuition in judicial decisions.

Judge Scalia, in his standing article, was so skeptical of judicial discretion in the area of standing that he questioned the very existence of "the so-called 'prudential limitations of standing' allegedly imposed by the Court itself, subject to elimination by the Court or by Congress." He commented: "Personally, I find this bifurcation [between prudential and constitutional standing] unsatisfying—not least because it leaves unexplained the Court's source of authority for simply granting or denying standing as its prudence might dictate." Instead, Judge Scalia suggested that federal courts should eliminate prudential standing doctrine and hear all cases for which there is constitutional standing: "As I would prefer to view the matter, the Court must always hear the case of a litigant who asserts the violation of a legal right." Judge Scalia's criticism of the existence of prudential standing for allowing a degree of judicial discretion is sharply at odds with Judge Posner's practical

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184. See *supra* Part III.B (discussing the evolution and current state of the legal pragmatism theory that Judge Posner advocates).


186. Id.

187. Id. It is possible Justice Scalia today might give more weight to precedent supporting prudential standing than Judge Scalia did in his 1983 standing article, but, as the discussion of his 2009 decision in *Summers v. Earth Island Institute* will show, Justice Scalia still prefers a rule-based approach to standing. See *infra* Part IV.B–C (discussing Justice Scalia's originalist and rules-based approach to standing).
approach to standing based on a judge's discretionary consideration of factors that is, if anything, arguably broader than current prudential standing doctrine.\textsuperscript{188}

\textbf{B. Justice Scalia's Standing Masterpiece: Lujan v. Defenders of Wildlife Makes Separation of Powers the Key to Standing}

In \textit{Lujan v. Defenders of Wildlife}, Justice Scalia's opinion for the Court reflected his approach in his 1983 standing article that standing doctrine is an essential element of the separation of powers.\textsuperscript{189} His initial discussion in \textit{Lujan} of separation of powers principles clearly draws upon of his 1983 standing article.\textsuperscript{190} In \textit{Lujan}, he states:

While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, § 1, [t]he executive Power," Art. II, § 1, and [t]he judicial Power," Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot-Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In The Federalist No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and . . . more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain." The Federalist No. 48, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," \textit{Whitmore v. Arkansas}, 495 U.S. 149, 155 (1990)—is the doctrine of standing. Though some of its elements express merely

\textsuperscript{188} Compare Scalia, supra note 13, at 885–86 (critiquing prudential standing), with supra Part III.B (discussing Judge Posner's broad-based practical approach to standing).


\textsuperscript{190} Compare id. at 559–60 (discussing standing's important role in the constitutional separation of the federal government's powers), with Scalia, supra note 13, at 881–82 (arguing that "standing is a crucial and inseparable element of the [separation of power] principle" and that disregarding standing leads to "an overjudicilization of the processes of self-governance" (footnote omitted)).
prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.\textsuperscript{191}

Justice Scalia's views on standing and the separation of powers are largely the same in his 1983 article and his \textit{Lujan} opinion, with a few concessions to prudential standing precedent in the latter.\textsuperscript{192} In his 1983 article, Judge Scalia acknowledged that separation of powers principles he relied upon to justify standing doctrine were "found only in the structure of the document," but he argued that those principles were explicitly addressed by five of the Federalist Papers, including most notably James Madison's discussion relating to separation of powers in \textit{The Federalist No. 48}, the same Paper that Justice Scalia relied upon in \textit{Lujan}.\textsuperscript{193} One difference between his 1983 article and his \textit{Lujan} opinion is that in the latter document Justice Scalia does not openly criticize "prudential considerations that are part of judicial self-government,"\textsuperscript{194} a Justice writing an opinion for the Court who needs the votes of a majority of the serving justices cannot be so free to dismiss precedent as a judge authoring an article. Nevertheless, Justice Scalia, like Judge Scalia in his 1983 standing article, in \textit{Lujan} emphasizes that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."\textsuperscript{195} If standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," there is much less room for pragmatism and practicality in Justice Scalia's view of standing than in Judge Posner's approach.\textsuperscript{196}

Both Judge Posner and Justice Scalia argue that plaintiffs must demonstrate some type of personal injury for standing, but they do so for different reasons. Judge Posner argues that there

\textsuperscript{191.} \textit{Lujan}, 504 U.S. at 559–60 (alterations in original).

\textsuperscript{192.} \textit{Compare} Scalia, \textit{supra} note 13, at 881–86, 890–99 (critiquing the judicial power to confer prudential standing without reserve), \textit{with Lujan}, 504 U.S. at 559–60 (recognizing that prudential-standing considerations exist as "part of judicial self-government").

\textsuperscript{193.} \textit{Compare Lujan}, 504 U.S. at 559–60 (citing \textit{The Federalist Paper No. 48} as support for his interpretation of separation of powers and for his theory of standing), \textit{with Lujan}, 504 U.S. at 559–60 (supporting his interpretation of the Constitution's separation of powers principle).

\textsuperscript{194.} \textit{Compare} Scalia, \textit{supra} note 13, at 885–86 (criticizing prudential standing doctrine), \textit{with Lujan}, 504 U.S. at 560 (noting, and not questioning, prudential standing doctrine).

\textsuperscript{195.} \textit{Lujan}, 504 U.S. at 560.

\textsuperscript{196.} \textit{Compare} \textit{supra} Part III.A–B (explaining Judge Posner's views on practical standing and pragmatism), \textit{with supra} Part IV.A–B (explaining Justice Scalia's view that standing is part of the original intent of Article III).
is a practical component to the injury requirement. He argues that one practical reason for standing doctrine is “to ensure that the legal remedies of primary victims of wrongful conduct will not be usurped by persons trivially or not at all harmed by the wrong complained of.” Furthermore, Judge Posner, citing Lujan, explains:

Consistent with the practical as well as doctrinal thinking behind the requirement of standing, a plaintiff, to establish Article III standing to sue, must allege, and if the allegation is contested must present evidence, that the relief he seeks will if granted avert or mitigate or compensate him for an injury—though not necessarily a great injury—caused or likely to be caused by the defendant.

By contrast, Justice Scalia in his Lujan opinion reasons that separation of powers concerns require standing doctrine to include a concrete injury requirement that prevents any citizen bystander from suing about an alleged impropriety of government that does not affect him personally and could be addressed by the political branches instead. Only plaintiffs with concrete, personal injuries can utilize the federal courts. Justice Scalia’s concern in Lujan about standing and the separation of powers is essentially the same as his concern in his 1983 article about the need for standing to limit the role of the judiciary and to prevent “an overjudicialization of the processes of self-governance.” Similarly, in Lujan, Justice Scalia links the concrete injury requirement to preventing the judiciary from interfering with the political branches of government and particularly from interfering with the role of the President in enforcing the laws. He explains:

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than the political branches.

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198. Id. (citing Lujan, 504 U.S. at 555).
199. Lujan, 504 U.S. at 559–77.
200. Id.
201. Compare Scalia, supra note 13, at 881–86, 890–99 (expressing concern that not adhering to Article III standing, as supported by the structure of the Constitution, violates separation of powers principles), with Lujan, 504 U.S. at 559–60, 577 (explaining that permitting standing without a concrete injury would unconstitutionally shift power from the executive branch to the judicial branch).
than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison*,... "is, solely, to decide on the rights of individuals." Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.

If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, §3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts v. Mellon*,... and to become "virtually continuing monitors of the wisdom and soundness of Executive action." We have always rejected that vision of our role...

Even when Judge Posner and Justice Scalia agree on a standing issue such as the injury requirement, Judge Posner's practical concerns focus on the possibility that a plaintiff with no injury would take an inappropriately large role in a suit compared to a plaintiff with a greater injury. Judge Posner explains the injury requirement as follows:

Imagine an environmental group located in California suing to prevent the Corps of Engineers from granting a permit to destroy wetlands at the North Milam site even though no member of the group planned ever to visit the American Bottom. The suit might be brought before American Bottom Conservancy brought its own suit and the Conservancy's suit might be overshadowed by the suit by the California group, even though the Conservancy's members have a greater stake because they actually frequent the Horseshoe Lake State Park and will feel the diminution in their birdwatching and other wildlife-viewing activities directly if

the wetlands are destroyed.\footnote{Am. Bottom Conservancy, 650 F.3d at 656.}

By contrast, Justice Scalia would be more concerned that allowing suits by plaintiffs without concrete injuries would lead to too many suits, allowing Article III federal courts to impermissibly interfere with the discretion of the Executive Branch in violation of the President's Article II prerogatives.\footnote{Lujan, 504 U.S. at 576–77.} Justice Scalia's separation of powers concerns lead him to demand a more rigid standing doctrine than Judge Posner's more pliable practical concerns.

C. Summers v. Earth Island Institute: Rejecting Pragmatic Probabilistic Standing for a Rule-Based Separation of Powers

Justice Scalia's 2009 decision in \textit{Summers v. Earth Island Institute} demonstrates his rejection of a probabilistic and pragmatic approach to standing in favor of a rule-based approach.\footnote{Summers v. Earth Island Inst., 555 U.S. 488, 492–94, 496–500 (2009); see also Scalia, The Rule of Law as a Law of Rules, supra note 183, at 1187 (opining that appellate judges should use the rule of law whenever possible, not totality of the circumstances tests); supra Part IV.C (discussing Justice Scalia's reasoning for rejecting probabilistic standing).} Justice Scalia rejected standing for the Sierra Club and other environmental plaintiffs, even though he acknowledged that it was "likely" that at least one member would be injured in the future by the Government's sale of fire-damaged timber without public notice in some cases, because he demanded that the plaintiffs meet the traditional rule that they prove when and where a specific member would be injured.\footnote{See Summers, 555 U.S. at 490–91, 499.} By contrast, Justice Breyer in his dissenting opinion in that case, which is discussed in Part V, articulated a "realistic threat" standing test that bears some similarity to Judge Posner's practical standing approach, although Justice Breyer's approach to standing is arguably more constrained by precedent than Judge Posner's practical approach to standing.\footnote{See \textit{id.} at 503–510 (Breyer, J., dissenting) (arguing that Supreme Court precedent establishes the realistic threat standing test, which should not be "more stringent than the word 'realistic' implies"); \textit{supra} Part V (demonstrating how the realistic threat test found support in precedent and common sense).}

In \textit{Summers}, several environmental groups, including the Sierra Club, challenged U.S. Forest Service regulations allowing the Service to sell fire-damaged timber without public notice and comment if the sale was for less than 250 acres on the ground...
that applicable statutes required public notice and comment. \(^{208}\) The U.S. District Court for the Eastern District of California initially issued a preliminary injunction involving one tract of land, the Burnt Ridge Project, where one party had undisputed standing, and the parties settled their dispute over that Project.\(^{209}\) More controversially, the district court issued a nationwide injunction against five Forest Service regulations.\(^{210}\) The Ninth Circuit partially affirmed the nationwide injunction against those regulations applicable to the Project, but determined that regulations inapplicable to the Project were not ripe for adjudication.\(^{211}\)

In his *Summers* majority opinion, Justice Scalia reaffirmed his view in *Lujan* that federal courts may only appropriately address suits involving a concrete, personal injury to the plaintiff because any judicial review outside traditional injury standing requirements would impermissibly interfere with legislative and executive prerogatives.\(^{212}\) He wrote:

> In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”\(^{213}\)

Justice Scalia concluded that the plaintiffs could not meet traditional standing requirements for personal injury because they had shown no actual harm from the challenged regulations, except for the Burnt Ridge Project case that had already been settled.\(^{214}\) He determined that the standing that the plaintiffs had to challenge the Project could not serve as the basis for standing to seek a nationwide injunction against other projects that had caused no harm yet to any of the plaintiffs’ members.\(^{215}\) Justice Scalia reasoned that the affidavit of Mr. Jim Bensman, a member of one of the plaintiff organizations, could not establish standing

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209. *Id.* at 491.
210. *Id.* at 492.
211. *Id.*
212. *Id.* at 492–93.
213. *Id.* (citations omitted) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)).
214. *Id.* at 494–95.
215. *Id.* at 492–95.
based on his assertions that he regularly visited several different national parks because there was no proof that he was being harmed by the challenged regulations, but only speculation that he might be harmed in the future. Justice Scalia caustically rejected speculative future harms as the basis of standing:

Here we are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation. Accepting an intention to visit the national forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.

While his rejection of so-called speculative future injuries is not surprising given his insistence that a plaintiff must establish a concrete and imminent injury, Justice Scalia's condemnation of the plaintiffs' theory of probabilistic organizational standing is revealing because he conceded that it was likely that at least one of the Sierra Club's 700,000 members would probably be harmed by the Forest Service's regulations, but he stubbornly insisted that made no difference unless they could prove a specific injury at a particular time and place to a named individual. Justice Scalia rejected probabilistic standing and Justice Breyer's realistic threat approach to standing for the following reasons:

The dissent proposes a hitherto unheard-of test for organizational standing: whether, accepting the organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury. Since, for example, the Sierra Club asserts in its pleadings that it has more than "700,000 members nationwide, including thousands of members in California" who "use and enjoy the Sequoia National Forest," post, at 502 (opinion of BREYER, J.), it is probable (according to the dissent) that some (unidentified) members have planned to visit some (unidentified) small parcels affected by the Forest Service's procedures and will suffer (unidentified) concrete harm as a result. This novel approach to the law of organizational standing would make a mockery of our prior cases, which

216. Id. at 495–96.
217. Id. at 496.
218. See id. at 496–500.
have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm.\textsuperscript{219}

Justice Scalia’s argument that the organizational standing approach is novel and contrary to precedent is largely true,\textsuperscript{220} but he seemed unwilling to consider whether there were practical advantages to deviating from the strict rules of standing doctrine. He conceded that it might be “likely” that at least one member of the plaintiff organizations would be harmed by the regulations, but argued that was insufficient without more specific proof of when and where the harm would occur:

While it is certainly possible—perhaps even likely—that one individual will meet all of these criteria, that speculation does not suffice. “Standing,” we have said, “is not ‘an ingenious academic exercise in the conceivable’...[but] requires...a factual showing of perceptible harm.” Ibid. In part because of the difficulty of verifying the facts upon which such probabilistic standing depends, the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm—surely not a difficult task here, when so many thousands are alleged to have been harmed.\textsuperscript{221}

Justice Scalia concluded his \textit{Summers} opinion on standing by rejecting Justice Breyer’s proposed realistic threat test as inconsistent with the Court’s imminent harm test:

The dissent would have us replace the requirement of “imminent” harm, which it acknowledges our cases establish with the requirement of “a realistic threat’ that reoccurrence of the challenged activity would cause [the plaintiff] harm ‘in the reasonably near future.” That language is taken, of course, from an opinion that did \textit{not} find standing, so the seeming expansiveness of the test made not a bit of difference. The problem for the dissent is that the timely affidavits no more meet that requirement than they meet the usual formulation. They fail to establish that the affiants’ members will \textit{ever} visit one of the small parcels at issue.\textsuperscript{222}

In his rejection of Justice Breyer’s realistic threat test, Justice Scalia demonstrated that he takes a strict rules-based approach to standing.\textsuperscript{223}

\begin{itemize}
  \item \textsuperscript{219} \textit{Id. at 497–98.}
  \item \textsuperscript{220} See \textit{id. at 498.}
  \item \textsuperscript{221} \textit{Id. at 499} (alteration in original).
  \item \textsuperscript{222} \textit{Id. at 499–500} (alteration in original) (citations omitted).
  \item \textsuperscript{223} See \textit{id. at 492–93, 497–99} (reviewing precedent and constitutional language as
\end{itemize}
V. JUDGE POSNER'S "PRACTICAL" THEORY AND HIS "REALISTIC THREAT" STANDING TEST IN SUMMERS V. EARTH ISLAND INSTITUTE

A. Justice Breyer's Precedent-Based Legal Pragmatism

In general, Justice Breyer approaches constitutional interpretation differently from Justice Scalia's originalist and textualist approaches to judicial interpretation. In his 2008 book, *Active Liberty: Interpreting Our Democratic Constitution*, Justice Breyer criticizes originalist approaches to constitutional interpretation, although he recognizes that history and tradition are factors for a court to consider when interpreting the Constitution. Additionally, he criticizes textualist approaches to statutory interpretation. Justice Breyer's criticism of originalism and textualism clearly places him at odds with Justice Scalia, who favors both approaches to judicial interpretation. Justice Breyer has argued that the Constitution is a living document that must be interpreted differently by succeeding generations because "[t]oday's Court should not base an answer to a question about an issue such as gun control on the facts and circumstances of eighteenth-century society." He does caution, however, that judges must embrace judicial modesty because their understanding of the world is always limited and imperfect compared to elected officials who are in closer contact with the voting public.

Notably for the purposes of this article, Justice Breyer's 2010 book, *Making Our Democracy Work: A Judge's View*, argues that...
judges should usually adopt a pragmatic approach to constitutional interpretation that considers "a particular decision . . . as part of a complex system of rules, principles, canons, institutional practices, and understandings." Justice Breyer's approach, judicial pragmatism, appears to give more weight to precedent than Judge Posner's approach. For example, Justice Breyer observes that "pragmatism does not require a court to automatically overrule a decision because it produces harmful consequences" because a court must consider the negative effects of overruling precedent on the "law's stability." Furthermore, he writes that "[p]ragmatic approaches to law . . . can take account of the interactions of a single decision with, for example, other decisions, rules, principles, methods, canons, practices, and the consequential overall effects of modifying the legal fabric." Breyer's approach to pragmatism is somewhat different from Judge Posner's because Justice Breyer gives more weight to precedent as illustrated by his dissenting opinion in *Summers*.

In his dissenting opinion in *Summers v. Earth Island Institute*, Justice Breyer—joined by Justices Stevens, Souter, and Ginsburg—proposed a "realistic threat" standing test when organizations allege that their members are likely to be harmed in the future by government action. Justice Breyer's approach to standing demonstrated a practical bent similar in some ways to Judge Posner's practical standing test. There are some differences, however, between Judge Posner and Justice Breyer on standing and on their general philosophical approaches to law even though both embrace pragmatism. Justice Breyer sought to
build upon existing standing precedent and analogies to common law actions to justify his pragmatic or realistic test for standing. By contrast, Judge Posner observed that the Court’s Article III standing framework had been questioned by many scholars and suggested that the constitutional basis for standing doctrine should be replaced by a practical approach to standing.

B. Justice Breyer’s “Realistic Threat” Standing Test in Summers v. Earth Island Institute

In his dissenting opinion in *Summers v. Earth Island Institute*, Justice Breyer argued that the imminence requirement for injuries used in Justice Scalia’s majority opinion and used in past Court decisions should be understood in light of a “realistic likelihood” or “realistic threat” standard:

> How can the majority credibly claim that salvage-timber sales, and similar projects, are unlikely to harm the asserted interests of the members of these environmental groups? The majority apparently does so in part by arguing that the Forest Service actions are not “imminent”—a requirement more appropriately considered in the context of ripeness or the necessity of injunctive relief. I concede that the Court has sometimes used the word “imminent” in the context of constitutional standing. But it has done so primarily to emphasize that the harm in question—the harm that was not “imminent”—was merely “conjectural” or “hypothetical” or otherwise speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). Where the Court has directly focused upon the matter, *i.e.*, where, as here, a plaintiff has already been subject to the injury it wishes to challenge, the Court has asked whether there is a realistic likelihood that the challenged future conduct will, in fact, recur and harm the plaintiff. That is what the Court said in *Los Angeles v. Lyons*, a case involving a plaintiff's attempt to enjoin police use of chokeholds. The Court wrote that the plaintiff, who had been subject to the unlawful chokehold in the past, would have had standing had he shown “a realistic threat” that reoccurrence of the challenged activity would cause him harm “in the reasonably near

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236. *See id.* at 503 (disagreeing with the majority opinion about whether a realistic threat of harm constitutes a concrete injury for Article III standing).
237. *See supra* Part III.A.
future." Precedent nowhere suggests that the "realistic threat" standard contains identification requirements more stringent than the word "realistic" implies. 238

Justice Breyer sought to use the Court's Los Angeles v. Lyons decision as precedent for his realistic threat test, 239 although Justice Scalia pointed out that Lyons had used the test in that case to deny standing. 240

Justice Breyer then analogized to different common law causes of action that are based on future threats to justify a "realistic threat" test for standing. He wrote:

How could the Court impose a stricter criterion [than a realistic threat standing test]? Would courts deny standing to a holder of a future interest in property who complains that a life tenant's waste of the land will almost inevitably hurt the value of his interest—though he will have no personal interest for several years into the future? Would courts deny standing to a landowner who complains that a neighbor's upstream dam constitutes a nuisance—even if the harm to his downstream property (while bound to occur) will not occur for several years? Would courts deny standing to an injured person seeking a protection order from future realistic (but nongeographically specific) threats of further attacks? 241

Justice Breyer argued that the Court in Massachusetts v. EPA had considered predicted future harms to the coastline of Massachusetts that computer models estimated would occur several decades in the future and implied that the forestry issues in Summers involved more imminent injuries that ought to be easier to use as the basis for standing. 242 He wrote:

To the contrary, a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates. Thus, we recently held that Massachusetts has standing to complain of a procedural failing, namely, the Environmental Protection Agency's failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would

238. Summers, 555 U.S. at 505 (Breyer, J., dissenting) (citations omitted).
239. Id. (citing Los Angeles v. Lyons, 461 U.S. 95, 107 & n.7, 108 (1983)) (proposing the Court adopt the "realistic threat" test used in Lyons).
240. See id. at 495–96 (majority opinion) (stating that, in Lyons, the Court used the realistic threat test to deny standing); Mank, Summer v. Earth Island Institute Rejects Probabilistic Standing, supra note 1, at 107–10, 136–37 (discussing Justice Breyer's dissenting opinion in Summers and his use of a "realistic threat" test).
241. Summers, 555 U.S. at 505–06 (Breyer, J., dissenting).
create Massachusetts-based harm which (though likely to occur) might not occur for several decades.\footnote{Summers, 555 U.S. at 506 (Breyer, J., dissenting).}

Justice Breyer contended that the Bensman affidavit contained sufficient allegations of future harm to satisfy a "realistic threat" standing test. He wrote:

The Bensman affidavit does not say which particular sites will be affected by future Forest Service projects, but the Service itself has conceded that it will conduct thousands of exempted projects in the future. Why is more specificity needed to show a "realistic" threat that a project will impact land Bensman uses? To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive. The law of standing does not require the latter kind of specificity. How could it?\footnote{Id. at 507-08.}

In the above quoted paragraph, Justice Breyer suggested that Justice Scalia's demands for exactitude in standing allegations were unreasonable in the light of common sense, such as what we know about snowfall in New England.

Justice Breyer's realistic threat standing test and his homey common sense analogies to the common law and snowfall in New England are closer to Judge Posner's pragmatism and practical theory of standing than to Justice Scalia's originalism and rule-based approach to standing doctrine.\footnote{Compare supra Part III (analyzing Judge Posner's practical standing theory), and supra Part V (discussing Justice Breyer's precedent-based legal pragmatism and his "realistic threat" theory of standing in Summers), with supra Part IV (describing Justice Scalia's separation of powers theory of standing).} The main difference between Judge Posner and Justice Breyer is that Judge Posner questioned the very validity of constitutional standing doctrine,\footnote{See supra Part III.A.} but Justice Breyer simply sought to read existing constitutional standing doctrine more broadly within the framework of the Court's precedent.\footnote{See supra Part V.} It is impossible to say for certain whether Judge Posner would have voted with Justice Breyer if they had sat together for the Summers case, but their approaches to standing are philosophically more similar to each other than to Justice Scalia's separation of powers based theory of standing.

\footnote{243. \textit{Summers}, 555 U.S. at 506 (Breyer, J., dissenting).} \footnote{244. \textit{Id.} at 507-08.} \footnote{245. Compare supra Part III (analyzing Judge Posner's practical standing theory), and supra Part V (discussing Justice Breyer's precedent-based legal pragmatism and his "realistic threat" theory of standing in Summers), with supra Part IV (describing Justice Scalia's separation of powers theory of standing).}
VI. THE BATTLE BETWEEN JUDGE POSNER AND JUDGE SYKES ABOUT CONSTITUTIONAL VERSUS PRUDENTIAL STANDING IN MAINSTREET

In only one case has Judge Posner's pragmatic approach to standing led to a conflict with another judge following a more traditional Article III approach to standing doctrine. In MainStreet Organization of Realtors v. Calumet City, Judge Sykes wrote a concurring opinion criticizing Judge Posner for using prudential standing doctrine rather than Article III constitutional standing doctrine to deny standing even though the result was the same in that case. She may have taken the time to write a concurring opinion in the case because conservative judges like Justice Scalia or Judge Sykes commonly believe that Article III constitutional standing doctrine more generally limits suits in federal courts compared to the practical or prudential standing barriers advocated by Judge Posner, even if the results might be the same in many cases.

A. Judge Posner Finds Article III Standing in MainStreet

In MainStreet, an association of real estate brokers challenged a Calumet City, Illinois "point of sale" ordinance that forbade the sale of a house without an inspection to determine whether it is in compliance with the City's building and zoning codes. The Seventh Circuit sitting "en banc" did not reach the merits of the suit. Instead, the court of appeals concluded that neither the real estate brokers as individuals nor their Association had standing to challenge a law that impedes the sale of property they sought to broker.

Judge Posner's majority opinion concluded that the plaintiff met Article III standing requirements, but that prudential standing doctrine barred the suit. He wrote:

A complication is that there are two different concepts of standing. There is Article III standing, which requires

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248. MainStreet Org. of Realtors v. Calumet City, 505 F.3d 742, 749-54 (7th Cir. 2007) (Sykes, J., concurring); see infra Part VI.D.

249. See infra Part VI.D. Compare MainStreet, 505 F.3d at 744-49 (majority opinion) (arguing plaintiffs met Article III constitutional standing requirements but must be denied standing on prudential standing grounds), with id. at 749-54 (Sykes, J., concurring) (arguing plaintiffs failed to meet Article III constitutional standing requirements).

250. MainStreet, 505 F.3d at 743-44 (majority opinion).

251. Id. at 744.

252. Id.

253. Id. at 744-49.
just an injury in fact, and "prudential" standing, a more complex, judge-made concept of standing. We think there is standing in the first sense but not the second. There is standing in the first sense because the brokers may well be harmed by the ordinance. By adding to the cost of selling residential property, the ordinance (if allowed to go into effect) is likely to reduce the brokers' commissions in two ways. The higher the cost of selling property, the less property will be sold, and so the fewer commissions the brokers will be paid. And anything that reduces the salability of property reduces its market value, and the lower the price at which a house is sold the smaller the commission the broker will receive. Of course a seller might try to charge a higher price in order to cover some of the cost of complying with the ordinance, and a broker's commission is normally a percentage of the sale price. But the seller's attempt would fail if indeed the ordinance reduces the value of the property to prospective purchasers.

Judge Posner then addressed counter-arguments that the ordinance would not harm property values and, accordingly, that there was insufficient basis for Article III standing. He observed:

Against [my argument that the plaintiff has an injury from property loss and hence Article III standing] it can be argued that the ordinance will boost property values in Calumet City and by doing so perhaps make the brokers better off rather than worse off. That is possible, but standing in the Article III sense does not require a certainty or even a very high probability that the plaintiff is complaining about a real injury, suffered or threatened. A suit to redress an injury to the plaintiff is a "case" or "controversy" within the meaning that the courts have imprinted on these words of Article III of the Constitution, Allen v. Wright, as long as there is some nonnegligible, nontheoretical, probability of harm that the plaintiff's suit if successful would redress. As we have noted repeatedly, the fact that a loss or other harm on which a suit is based is probabilistic rather than certain does not defeat standing. Thus, as we said in Hoover v. Wagner, in reliance on the Supreme Court's decision in Pennell v. City of San Jose, "All that a plaintiff need show to establish standing to sue [in the Article III sense] is a reasonable probability—not a certainty—of suffering tangible harm unless he obtains the relief that he is seeking in the suit." A case is not dismissed for failure to invoke federal jurisdiction just because the

254. Id. at 744.
plaintiff fails to prove injury. Ordinarily and here the allegation is enough.\textsuperscript{255}

Judge Posner’s view that a “nonnegligible, nontheoretical probability of harm” is sufficient injury for Article III standing is closer to Justice Breyer’s subsequent dissenting opinion in \textit{Summers} than to Justice Scalia’s scathing denunciation of probabilistic standing in \textit{Summers}.\textsuperscript{256} Judge Posner did cite Justice Scalia’s opinion in \textit{Lujan} in reasoning that “[t]his is not a case of some abstract psychic harm or a one-day-I’ll-be-hurt allegation.”\textsuperscript{257} Judge Posner concluded that there was a likely economic injury to the real estate brokers from delayed sales and reduced prices sufficient for Article III standing.\textsuperscript{258}

\textbf{B. Judge Posner Determines that Prudential Standing Bars Standing in MainStreet}

Next, Judge Posner determined that prudential standing doctrine barred the real estate brokers’ suit in \textit{MainStreet} because the plaintiffs had suffered only a derivative injury.\textsuperscript{259} He wrote:

The strand relevant to this case governs the situation in which the injury on which the plaintiff founds his suit is derivative from the injury suffered by the defendant’s immediate victim. Often the harm from a harmful act will ramify far beyond that victim, as the present case illustrates. The initial victims of an ordinance impeding the sale of homes are homeowners who would like to sell—or perhaps all homeowners subject to the ordinance; for as we said, any impairment of the salability of a property reduces its value because salability (“alienability” in an older legal vocabulary) is one of the rights that, along with such other rights as the right to the exclusive enjoyment of the property, make a fee-simple interest more valuable than other interests in property, such as that of a licensee. But anything that impedes the sale of property, and by impeding it reduces the number of sales and the average

\begin{footnotes}
\item[255] \textit{Id.} at 744–45 (second alteration in original) (citations omitted).
\item[256] Compare \textit{id.} (explaining that a plaintiff need only show a reasonable probability, as opposed to a certainty, of suffering tangible harm to establish Article III standing), \textit{with supra} Part V (discussing Justice Breyer’s dissent in \textit{Summers}, in which he contends that precedent calls for the imminence requirement for injuries to interpret “realistic likelihood” as no more than a probability, using a practical approach to explain the validity of the “realistic threat” test).
\item[257] \textit{MainStreet}, 505 F.3d at 745 (citing \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555, 560 (1992)).
\item[258] \textit{Id.}
\item[259] \textit{Id.} at 745–49.
\end{footnotes}
sale price, harms other people besides the owners. It harms real estate brokers, sure, but it also harms title insurance companies, mortgage lenders, termite inspectors, moving companies, interior decorators, renovators, prospective home buyers, sellers of "for sale" signs, suppliers of paint for the "for sale" signs, lessors of real estate brokers' offices, colleges that the children of real estate brokers can no longer afford to attend because the brokers' incomes have declined (and the children themselves, of course), and so on ad infinitum, or at least ad nauseam. If all these incidental victims could sue, the courts would be overwhelmed. Moreover, the victims with the largest stakes—namely the homeowners impeded in selling their homes—who are also the potential plaintiffs with the first-hand information about the operation of the ordinance, are likely to be trampled in the rush to the courthouse. It is not only in bankruptcy that "clouds of persons indirectly affected by the acts and entitlements of others may buzz about, delaying final resolution of cases."

The brokers' suit thus is barred by the principle that, subject to certain exceptions, one cannot sue in a federal court to enforce someone else's legal rights.

... [T]he brokers' injury in this case is too remote to sustain standing even if they might be thought to have a property right, perhaps in contracts that they have signed with homeowners who want to sell but because of the ordinance are less likely to be able to do so at an attractive price.260

Judge Posner admitted that there was a "wrinkle" in the case because "the City did not argue remoteness until we raised the issue at oral argument."261 While Article III constitutional standing barriers can be raised sua sponte by a court to dismiss a case at anytime, even if the parties do not raise the question, it is less clear whether a court can dismiss a case for prudential standing reasons if a defendant fails to raise the issue in a timely manner.262 Judge Posner concluded that the Seventh Circuit could dismiss the suit for the prudential standing issue of remoteness: "Because what we are calling the doctrine of remoteness is a method of judicial protection of absent parties or other unrepresented interests, a court can invoke it on its own initiative, as many cases make clear."263

260. Id. at 745–47 (citation omitted).
261. Id. at 747.
262. Id. at 747–49.
263. Id. at 748–49.
C. Comparing American Bottom Conservancy with MainStreet

In American Bottom Conservancy, Judge Posner cited MainStreet as the only precedent for his practical standing theory. He wrote: “But the soliest grounds are practical (just like the avowedly prudential grounds for judge-made supplements to the Article III standard, MainStreet Organization of Realtors v. Calumet City, 505 F.3d 742, 744-46 (7th Cir. 2007)).” In MainStreet, Judge Posner does mention practical issues involved in standing. For example, he observes that “the practical objections to allowing the second-tier purchaser to sue are identical to the objections to allowing someone harmed by the infringement of another’s rights to sue.” In MainStreet, however, he more frequently discusses standing in light of the Court’s prudential standing doctrine rather than just practical considerations.

In his American Bottom Conservancy opinion, Judge Posner never clearly explained to what extent his practical theory of standing is similar to or different from the Court’s prudential standing doctrine. Perhaps he prefers a practical standing theory because it gives him more flexibility as a judge to decide standing than to follow the Court’s existing prudential standing doctrine. If so, Judge Posner should explain more clearly the considerations he would use in making practical standing decisions. Possibly, he does not do so because the whole thrust of his pragmatic approach to judging involves a case-by-case consideration of numerous factors that are hard to boil down to a single formula. Judge Posner’s MainStreet decision is in some ways a stronger opinion than his American Bottom Conservancy opinion because it is both practical and tries to fit itself within the Court’s precedent. Judge Posner’s American Bottom

265. MainStreet, 505 F.3d at 747.
266. See id. at 744–49.
267. See id. at 745 (citing several cases, including a Supreme Court case, that demonstrate the affixed terms of prudential standing, which categorically preclude federal courts from exercising jurisdiction over cases that otherwise would be allowed under Article III).
268. See supra Part III.B.
269. Compare supra Part III.A (analyzing Judge Posner’s practical standing theory in American Bottom Conservancy, which rejected Supreme Court precedent, questioned the validity and efficacy of the tradition, and promoted a pragmatic theory without attempting to incorporate this theory into current doctrine), with supra Parts VI.A–B (discussing Judge Posner’s MainStreet opinion, which did not question or criticize long-standing precedent, but instead incorporated his practical theory with the prudential standing doctrine already in place).
Conservancy opinion may be too radical a break from precedent to have influence, and Justice Breyer's Summers dissenting opinion may offer a more realistic option for the Court to gradually move away from Justice Scalia's Article III approach to standing.

D. Judge Sykes's Concurring Opinion Argues the MainStreet Plaintiffs Failed to Establish Article III Standing

In her concurring opinion, Judge Sykes agreed with Judge Posner's "comprehensive" prudential standing analysis and his conclusion that the plaintiff's claims were "too remote" for standing.\textsuperscript{270} She "disagree[d], however, that the plaintiff has gotten over the first hurdle of establishing constitutional standing; Article III's case-or-controversy requirements are not met here."\textsuperscript{271} Judge Sykes reasoned that the fact that the brokers did not yet have brokers' contracts establishing a current economic injury barred not just prudential standing, but also constitutional standing.\textsuperscript{272} She rejected Judge Posner's reasoning "that the possibility of reduced future commissions—commissions the brokers have no arguable legal right or expectation to receive—is enough to confer constitutional standing."\textsuperscript{273}

Judge Sykes disagreed with Judge Posner's relaxed approach to meeting the injury requirement for Article III standing, instead of addressing injury under a prudential standing analysis.\textsuperscript{274} In light of the plaintiffs' burden to demonstrate each element of standing, including injury, she criticized Judge Posner's majority opinion:

[I]t is hard to understand the court's categorical statement that a "case is not dismissed for failure to invoke federal jurisdiction just because the plaintiff fails to prove injury." Majority op., at 745. To the contrary, it is the plaintiff's burden to prove injury-in-fact, \textit{Lujan}, 504 U.S. at 561–62, 112 S. Ct. 2130, and cases are often dismissed for failure of the plaintiff to carry that burden. Also, I cannot agree with the court's view that "[o]rdinarily and here the allegation [of injury] is enough," as long as "there is some nonnegligible, nontheoretical, probability of harm." Majority op., at 744. This treats the constitutional

\textsuperscript{270} \textit{MainStreet}, 505 F.3d. at 749 (Sykes, J., concurring).
\textsuperscript{271} Id.
\textsuperscript{272} Id. at 750–51.
\textsuperscript{273} Id. at 750.
\textsuperscript{274} Id. at 752.
minimums as trifling requirements easily satisfied by almost any allegation of injury, leaving only prudential standing considerations to be consulted. But the Supreme Court has long emphasized that the case-or-controversy requirement is critical to the legitimacy of the court’s role: “That requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called ‘prudential’ considerations.” Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (“[N]either the counsels of prudence nor the policies implicit in the ‘case or controversy’ requirement should be mistaken for the rigorous Art. III requirements themselves.”) 275

Judge Sykes reasoned that the plaintiffs did not have a legally protected interest in possible future broker commissions, and, therefore, “[w]ithout a claim of injury to a legally protected interest, the brokers cannot establish Article III standing.” 276 She also reasoned that even legally protected interests could not serve as the basis for Article III standing if the injury depends upon the actions of independent third parties. She wrote:

Moreover, because the point-of-sale ordinance regulates real property owners, not brokers, the claim asserted here arises from the City’s allegedly unconstitutional regulation of someone other than the Association’s members, and “much more is needed” to establish standing. Lujan, 504 U.S. at 562, 112 S.Ct. 2130. The attenuated injury asserted by the Association is insufficient to satisfy this standard. The brokers’ alleged injury (even assuming it is legally cognizable and judicially redressable) depends upon the independent action of third parties not before the court—namely, the property owners upon whom the ordinance operates, building inspectors and zoning authorities, and prospective buyers of real property in the City who are just as likely to pay more, not less, for property that complies with the City’s codes. This is too conjectural to satisfy the “much more” that is needed to establish standing where the challenged regulation burdens someone other than the plaintiff. 277

In concluding her concurring opinion, Judge Sykes acknowledged that she had reached the same result as Judge Posner’s prudential standing decision would have reached, but she argued that it was important to address the Article III

275. Id. (second, third, and fourth alterations in original) (citations omitted).
276. Id. at 753.
277. Id. at 753–54.
reasons for denying standing to ensure that constitutional standing principles are "closely monitored and scrupulously enforced" even where prudential standing doctrine would also prohibit standing. She observed:

In short, the brokers' alleged injury is "a diffuse and speculative harm," and more fundamentally, the "interest asserted is not a legally protected one." The suit therefore must be dismissed for lack of Article III standing. Of course, my disagreement with my colleagues on this point means only that the case is doubly dismissible; I join the court's conclusion that prudential third-party standing doctrine bars the Association from bringing this claim. But if the Supreme Court's recent standing jurisprudence means anything, it is that constitutional standing prerequisites are to be closely monitored and scrupulously enforced. See Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2562 (2007) ("No 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.") (quotation omitted); DaimlerChrysler, 126 S. Ct. at 1861 ("The case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (internal quotations omitted). This is (or should be) true even when there is a prudential doctrine handy to guard against unwarranted extensions of judicial authority. I see little reason to think the Court would be inclined to relax the constitutional minimums in third-party standing cases.278

In MainStreet, Judge Sykes's concurring opinion demonstrated that she has a strong Article III standing philosophy similar to Justice Scalia's, and different from Judge Posner's either pragmatic or prudential approach to standing. Like Justice Scalia or Judge Scalia in his 1983 article, Judge Sykes argued for a preeminent role for Article III standing doctrine as a means to limit the scope of the federal judiciary and thereby "guard against unwarranted extensions of judicial authority."279

VII. CONCLUSION

Justice Scalia, Justice Breyer, and Judge Posner are all former law school professors,280 but Judge Posner acts more
like one today than the others. Both Justice Scalia and Justice Breyer have authored books and articles since becoming judges, but neither has approached the prolific Judge Posner's 30 books and more than 300 articles and book reviews. More like an academic than a typical judge, Judge Posner is more willing to challenge conventional reasoning, such as Article III as the basis for standing, than other judges, including either Justice Scalia or Justice Breyer. But being a maverick may have cost Judge Posner his chance to serve on the Supreme Court. It is also possible that Judge Posner is now more willing to take bold positions, such as abolishing Article III standing, because he knows that it is unlikely that he will be considered for the Court, since he celebrated his 72nd birthday in 2011.

Because presidents have increasingly sought to appoint judges who reflect their political philosophy, it is likely that a

http://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 8, 2012 (stating Justice Scalia was "a Professor of Law at the University of Virginia from 1967–1971, and a Professor of Law at the University of Chicago from 1977–1982, and a Visiting Professor of Law at Georgetown University and Stanford University" and Justice Breyer "was an Assistant Professor, Professor of Law, and Lecturer at Harvard Law School, 1967–1994, a Professor at the Harvard University Kennedy School of Government, 1977–1980, and a Visiting Professor at the College of Law, Sydney, Australia and at the University of Rome"); see supra note 115 (establishing Judge Posner as a Senior Lecturer in Law and listing Judge Posner's courses and seminars).


283. See Boynton, supra note 10, at 8.

284. See FEDERAL JUDICIAL CENTER, supra note 11 (stating that Judge Posner was born in 1939).

285. For example, President Reagan, who served in office from 1981 until 1989, stated that his goal was to appoint a federal judiciary “made up of judges who believe in law and order and a strict interpretation of the Constitution.” O'Brien, supra note 6, at 60–62. Empirical studies have found statistically significant differences in judicial voting patterns between federal judges appointed respectively by either a Democratic or a Republican president, although the party of appointment is more significant on average for some issues than others and not all judges of appointed by a particular party have the same views. See Breyer, Making Our Democracy Work, supra note 227, at 154 (“Presidents and their judicial appointees are more likely, however, to share a basic philosophical approach to the country and to the law, and how they relate to each other.”); Cross, supra note 74, at 22–23 (“[P]residential ideologies are reflected in the ideologies of their judicial appointees. The Republican appointees were consistently more conservative, on average, than the Democratic appointees.”); Sunstein et al., supra note 74, at 11–12 passim (analyzing 6,408 published three-judge federal court of appeals decisions during the 1995–2004 period and finding statistical significant differences in judicial voting between Democratic and Republican appointees in several subject areas, but not in other
Republican president contemplating a Supreme Court appointment would prefer a judge favoring a consistent Article III standing barrier to "unwarranted extensions of judicial authority" to a pragmatic judge who might take positions contrary to the President's ideological views in some cases. The last two presidents, George W. Bush and Barack Obama, each appointed two justices to the Court and each of these two justices agreed with the other justice appointed by the same president between ninety-four to ninety-six percent of the time during the Court's 2010–2011 term. Perhaps because they feared that

subject areas, including standing questions). Professor Cross cautions, however, that not all Republican or Democratic presidents have the same views as other presidents of the same party and that judges do not perfectly replicate the ideologies of the presidents who appoint them or the senators who confirm them. CROSS, supra note 74, at 7–8. Compare id. at 185–96 (finding tentative empirical evidence that Republican judges are more likely to deny standing than Democratic judges), and Pierce, supra, note 75, at 1742, 1760 (same), with SUNSTEIN ET AL., supra, at 53–54 (finding no statistically significant differences between Republican and Democratic appointees serving on the D.C. Circuit on standing issues).

MainStreet Org. of Realtors v. Calumet City, 505 F.3d 742, 754 (7th Cir. 2007) (Sykes, J., concurring); see also SUNSTEIN ET AL., supra note 74, at 53 (observing that conservative Supreme Court justices seem more likely to find that parties lack standing and that "conservative judges are more likely to be appointed by Republican presidents").

Some justices in the past broke with the views of their appointing president, but presidents have increasingly sought to avoid such "mistakes." Justice Stevens was appointed by Republican President Ford and Justice Souter by Republican President George H.W. Bush, but both voted more closely with more liberal Democratic appointees to the disappointment of the Republican Party. Robert Barnes, With Justice Sotomayor, a First Year that Stands Apart, WASH. POST, July 11, 2010, at A1 (reporting John Oldham McGinnis, a law professor at Northwestern University, characterized Justice Souter as voting with the conservative wing of the Court during his first year, but thereafter became a reliable liberal vote); Jeffrey Toobin, After Stevens: What Will the Supreme Court Be Without Its Liberal Leader?, NEWYORKER, Mar. 22, 2010, at 38, 39, available at http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin (identifying Justice Stevens as the leading liberal justice for many years despite being appointed by a Republican president).

Judge Posner's pragmatism might lead him to disagree with other justices appointed by Republican presidents, neither Presidents Reagan, George H.W. Bush, nor George W. Bush nominated Judge Posner to the Court despite his acknowledged brilliance as a judge and legal scholar.289

Judge Posner makes powerful arguments for a pragmatic approach to standing. But there are two major objections. First, a serious weakness of Judge Posner’s pragmatic approach in his American Bottom Conservancy opinion was that he was arguably too dismissive of the Court’s constitutional standing precedent. Despite the arguments of many academics that Article III does not mandate a standing requirement in federal courts, Judge Posner’s suggestion that courts eliminate constitutional standing doctrine is contrary to precedent dating to 1944. It is unlikely that the Court will abolish constitutional standing doctrine even if not all judges defend it as strongly as Justice Scalia. Justice Breyer’s proposal in Summers to adopt a more realistic approach to current constitutional standing doctrine is more politically astute than Judge Posner’s suggestion to abolish the doctrine.

Second, a pragmatic approach to standing inevitably allows judges to make ad hoc decisions, and even ones based on “intuition,” according to Judge Posner’s legal pragmatism. Critics have charged that prudential standing doctrine gives judges broad discretion. In Newdow, Chief Justice Rehnquist’s concurring opinion criticized the majority opinion for its ad hoc approach. Judge Posner’s practical standing theory is even more vulnerable than prudential standing doctrine to the charge that it lacks general philosophical principles needed for a consistent body of law. Judge Posner, in his American Bottom Conservancy opinion, failed to explain to what extent his practical approach to standing is similar to or different from the Court’s prudential standing doctrine. For example, to what extent is his “practical” approach to standing similar to or different from his use of prudential standing doctrine in MainStreet? If he wants other judges to adopt his practical approach to standing doctrine, Judge Posner, in future cases, will have to explain how a practical standing doctrine would work in a variety of cases. Even for a judge as brilliant as Judge Posner, changing standing doctrine from its Article III rationale will not be easy. Justice Breyer’s efforts to liberalize existing Article III standing precedent and doctrine through a “realistic threat” test based upon precedent may prove more fruitful than Judge Posner’s approach of abolishing constitutional standing and replacing it with his proposed alternative “practical” standing test.

289. See Boynton, supra note 10.