

STANDING, EQUITY, AND INJURY IN FACT

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This contribution to the Notre Dame Law Review’s annual Federal Courts Symposium on “The Nature of the Federal Equity Power” asks what the traditions of equity can tell us about Article III standing. I take as my point of departure the observation by Professors Sam Bray and Paul Miller, in their contribution to the Symposium, that equity does not have causes of action as such—or at least not in the same way as actions at law. This is potentially important for standing, as many academic critiques of the Supreme Court’s standing jurisprudence have argued that standing should turn on whether the plaintiff has a cause of action. If Article III standing is to reflect traditional notions of which disputes are appropriate for judicial resolution, however, then that inquiry should include traditional practice on the equity side of the house, not just on the law side. I conclude that an equitable “grievance”—which Bray and Miller suggest plays a parallel role in equity to causes of action at law—typically involves a more particularized set of circumstances involving concrete harm or unfairness to the plaintiff. Equitable grievance, in other words, looks a lot like injury in fact. Attention to traditional equity practice thus may help put the Court’s much-maligned injury-in-fact jurisprudence on a firmer footing.

Most American lawyers, I suspect, know far too little about equity. We know that once upon a time, back in Merry Olde England, there were separate law and equity courts, but we also know that American jurisdictions have generally fused these two separate strands of law. Article III, after all, extended the federal judicial power to “all Cases, in Law and Equity,”¹ and since 1938 the Federal Rules of Civil Procedure have proclaimed that “[t]here is one form of action—the civil action.”² And so it has seemed safe to treat equity’s traditions as

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1 U.S. CONST. art. III, § 2.

2 FED. R. CIV. P. 2.

largely anachronistic and its complexities as not worth plumbing.³ That is true even among many of us who focus on procedure, jurisdiction, and remedies for a living.⁴

This neglect of equity and its distinctive qualities and traditions is surely a mistake. Sam Bray's work insists that "there has been a *partial* fusion of law and equity,"⁵ and Kellen Funk's historical study of fusion notes that "American jurisprudence to this day continues to rely on the traditional categories to determine whether certain rights or remedies are available to litigants."⁶ Even scholars who stress the integration of law and equity point to equity's continuing importance. As Doug Laycock puts it, "[t]he distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won."⁷ It is past time the non-equity-specialists paid more attention.

In that spirit, my contribution to this Symposium explores what the federal law of standing can learn from equity's distinctive traditions. Standing law does take account of equity in certain ways. That law largely accepts a connection between justiciability, the merits, and remedies.⁸ A plaintiff's injury in fact, necessary to satisfy Article III, must not only be traceable to the defendant's conduct but also redressable by the requested relief⁹—thus necessitating an inquiry into what relief may be available. And separation of powers or federalism concerns familiar to remedies law—such as whether a court should interfere with the enforcement discretion of executive officials or

3 See, e.g., Samuel L. Bray, *Equity: Notes on the American Reception*, in EQUITY AND LAW: FUSION AND FISSION 31, 38 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019) ("Equity has not been offered as a course in most American law schools since the 1960s. The basic terminology and conceptual content of equity are unfamiliar to generations of students."); Andrew Kull, *Equity's Atrophy*, 97 NOTRE DAME L. REV. 1801, 1805 (2022) ("For half a century, students have been going through U.S. law schools without hearing anything said about equity—other than the assurance that references to 'equity' in the older cases, having become obsolete, can be safely ignored.").

4 In case it is not already clear, I offer these observations not as a pointing of the finger but as a confession of guilt.

5 Bray, *supra* note 3, at 38 (emphasis added).

6 Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152, 191 (2015); see also Bray, *supra* note 3, at 38 ("US courts, both federal and state, continue to make sharp distinctions between legal and equitable remedies.").

7 Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 53 (1993); see also Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

8 See generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 661 (2006) (concluding that "the thesis that justiciability doctrines are deeply influenced by concerns about judicial remedies seems almost self-evidently true").

9 See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984).

engage in ongoing supervision of state institutions—have often migrated forward to shape a court’s view of the plaintiff’s standing at the threshold of litigation.¹⁰ Both individual jurists and commentators have sharply criticized the use of remedial law to shape standing,¹¹ but unless standing doctrine becomes a great deal more formalist than it currently is—a change few advocate—the cross-pollination of standing and remedies seems inevitable.

Equity has been curiously absent, however, from more foundational debates about standing’s basic requirements. In particular, debates over the legitimacy and nature of the injury-in-fact requirement largely proceed as if all plaintiffs assert claims for legal relief. Hence, critics of the injury-in-fact requirement generally argue that courts assessing a plaintiff’s standing should ask simply whether the plaintiff has a legal cause of action.¹² But Sam Bray and Paul Miller argue in this Symposium that causes of action are simply not a thing in equity.¹³ If that is true, then it makes little sense to structure the Court’s general standing jurisprudence, supposed to apply to legal and equitable claims alike, around the existence of a legal cause of action. After all, the overwhelming majority of cases that have shaped the Court’s contemporary standing jurisprudence have involved claims for equitable relief.

This Essay takes as its starting point Professors Bray and Miller’s observation that equity did not traditionally require a “cause of action.” Instead, they say, equity focuses on a “grievance” that can motivate the court to intervene.¹⁴ The precise meaning of an equitable grievance is not easy to pin down, but it does seem clear that it has less to do with legal rights to sue than with specific factual circumstances involving loss or unfairness to the plaintiff. Equity’s general mission, after all, is often characterized as filling the gap arising when abstract

10 See, e.g., *id.* at 759–60 (separation of powers); *O’Shea v. Littleton*, 414 U.S. 488, 499–501 (1974) (federalism).

11 See, e.g., *O’Shea*, 414 U.S. at 510 (Douglas, J., dissenting) (“I would cross the bridge of remedies only when the precise contours of the problem have been established after a trial.”); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 23 (1984).

12 See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 290–91 (1988); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 177 (1992).

13 See Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1764 (2022) (“Having a cause of action was how a plaintiff would get into a court of law, but to get into equity, a plaintiff needed something quite different.”).

14 *Id.* at 1772–75.

legal rights fail to provide relief in particular, compelling circumstances.¹⁵

Equitable grievances, I submit, look a lot like injury in fact. To the extent that Court's standing jurisprudence defines Article III's requirements in line with traditional practice,¹⁶ longstanding practice in equity may provide a firmer ground for injury in fact than does traditional practice on the law side of the house. The injury-in-fact requirement for standing may be, in other words, further evidence of the "triumph of equity" that Professor Laycock has noted.¹⁷ At a minimum, scholars of standing need to know a good deal more about equity.

I. THE DEBATE OVER INJURY IN FACT

The "irreducible constitutional minimum" of standing under Article III is an injury in fact that is fairly traceable to the challenged conduct and likely to be redressed by the requested relief.¹⁸ This requirement, while commanding the apparent assent of all recent Justices on the Supreme Court,¹⁹ has long been under siege by academics²⁰ and, occasionally, lower court jurists.²¹ Even if one doubts that any of this criticism is likely to persuade the Court to abandon the last half century of its standing jurisprudence, deepening our understanding of the injury-in-fact requirement may help answer unresolved questions concerning its contemporary application. In particular, the current Court remains divided over the ability of a "purely legal" injury to serve as injury in fact, and important cases

15 See, e.g., Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1067–71, 1081–84 (2021).

16 See, e.g., *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000).

17 See Laycock, *supra* note 7.

18 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

19 See, e.g., *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021) (Justice Thomas, writing for eight Justices); *id.* at 802–03 (Roberts, C.J., dissenting) (arguing that a remaining claim for nominal damages is insufficient injury to preserve the plaintiff's personal stake in the litigation).

20 See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 501–07 (2008); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742 (1999); Sunstein, *supra* note 12, at 222–23.

21 See, e.g., *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring) ("In deciding cases in the wake of *Spokeo*, I've come to the view—reluctantly, but decidedly—that our Article III standing jurisprudence has jumped the tracks.").

raising that question continue to press for the Court's attention.²² Doctrinal controversy now focuses on what *counts* as injury, rather than whether injury should be required—but either way we still need to clarify the meaning of the concept.

The distinctive traditions of equity can help deepen our understanding of these issues. But it may help to begin by clarifying the Court's conception of injury in fact, how it arose, and why it remains controversial.

A. *The Movement from Legal to Factual Injury*

Our leading scholar of the cause of action, A.J. Bellia, has written that “[a]t common law, there was no doctrine of standing per se. A case was justiciable if a plaintiff had a cause of action for a remedy under one of the forms of proceeding at law or in equity.”²³ Likewise, cases concerning the justiciability of a plaintiff's claims during the nineteenth century focused on the legal merits—that is, whether the relevant common or statutory law provided the right kind of legal right or entitlement to review.²⁴ By the first half of the twentieth century, American courts were speaking in terms of “standing” and requiring either (1) that the plaintiff fell within the terms of a statute creating a right to judicial review²⁵ or (2) that plaintiffs alleged “‘an invasion of recognized legal rights’ . . . that the law conferred upon the plaintiff in particular.”²⁶ As before, focus was on the presence of a legal right to sue—either by virtue of the invasion of a legally protected interest or

22 See generally William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197. In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Court divided over whether Congress could create private rights by statute such that their violation would be sufficient for injury in fact, without a further showing of actual damages. Compare *id.* at 2207 & n.3 (rejecting this proposition), with *id.* at 2217–18 (Thomas, J., dissenting) (arguing that violation of a private right satisfies the injury requirement), and *id.* at 2226 (Kagan, J., dissenting) (arguing that “concrete injury” is necessary even for legal violations, but stating that any difference from Justice Thomas's position was “unlikely to make much difference in practice”). This is not the place to parse these distinctions. The point is that, as Justice Thomas's recitation of the injury-in-fact requirement for the *Uzuegbunam* majority makes clear, see 141 S. Ct. at 797, these are simply disagreements about the precise meaning of injury in fact in close cases.

23 Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 817 (2004).

24 See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1136–39 (2009); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 712–18 (2004).

25 See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940).

26 Caleb Nelson, “*Standing*” and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 716 (2019) (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940)).

specific conferral of a right to sue by Congress.²⁷ Scholars have argued over whether plaintiffs in this era generally *also* had to demonstrate a factual injury,²⁸ but this was not the focus of the operative legal test for standing.²⁹

All this changed with the Supreme Court's 1970 decision in *Association of Data Processing Service Organizations, Inc. v. Camp*.³⁰ That case loosened considerably the requirement that plaintiffs show a cause of action or cognizable legal interest, instead asking only that they fall "arguably within the zone of interests to be protected or regulated" by the substantive laws they invoke.³¹ At the same time, however, *Data Processing* required an "injury in fact, economic or otherwise."³² The result, as Craig Stern has explained, was that "[w]hereas standing used to require that the plaintiff have suffered an injury that gave rise to a cause of action, an injury at law, the present standing is said to require only injury-in-fact, some harm to the plaintiff not necessarily tantamount to legal injury."³³

One can best understand the shift from legal to factual injury against the background of changing relationships between courts, the executive agencies, Congress, and different sorts of private litigants.³⁴ American courts began to develop a distinct doctrine of standing in the early twentieth century, as progressive jurists like Louis Brandeis and Felix Frankfurter sought to insulate the nascent regulatory state

27 See Magill, *supra* note 24, at 1135–36.

28 Compare, e.g., *id.* at 1133 (asserting that during the mid-twentieth century "Congress was allowed to authorize legal challenges to government action by parties whose only cognizable interest was . . . that the government abide by the law"), with Woolhandler & Nelson, *supra* note 24, at 701–02 (arguing that private parties suing for violations of public rights still had to show "special damage").

29 See Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1177 (2008) (observing that "[a] colorable claim of direct injury was subsumed within the cause of action," but that factual injury "would not supply standing apart from a cause of action").

30 397 U.S. 150 (1970).

31 *Id.* at 153.

32 *Id.* at 152.

33 Stern, *supra* note 29, at 1171. One can accept Professor Stern's account of a shift from legal to factual injury without equating legal injury with possession of a cause of action. See *infra* text accompanying notes 99–107.

34 Curt Bradley and I have sketched this story in somewhat more detail elsewhere. See Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 10–13 (2021); see also Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591 (2010) (complicating the conventional story with empirical analysis of standing decisions over time).

from legal challenge.³⁵ A strict requirement of *legal* injury fit well with efforts to limit challenges by regulated entities, which would generally be able to show factual costs from government action but often lacked either protected legal interests or established rights to sue.³⁶

As battles over the New Deal receded into memory, however, progressives began to worry more about agency capture than legal challenge; they thus wanted to empower regulatory beneficiaries to use courts to force agencies to vigorously pursue the goals of progressive legislation.³⁷ *Data Processing's* shift to a more permissive test of legal entitlement—the “zone of interests” test—tended to open the federal courts to these sorts of suits even when Congress had not acted to specifically authorize such suits.³⁸ *Data Processing* thus helped to foster a “public rights” model of adjudication, which featured plaintiffs in “public actions” asserting “broad and diffuse interests—such as those of consumers or users of the ‘environment’—which do not involve the litigants’ individual status.”³⁹

At the same time, however, the Court was retreating from the full implications of the public rights model by insisting on injury in fact as a constitutional prerequisite for standing.⁴⁰ As noted already, the injury-in-fact requirement appeared in *Data Processing* itself, but its potential to restrict public law litigation may not have been apparent before cases like *Sierra Club v. Morton*⁴¹ in 1972 and *Warth v. Seldin*⁴² in 1975. *Morton* made clear that a public interest organization like the Sierra Club could not assert standing to sue simply by virtue of its

35 See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); see also Sunstein, *supra* note 12, at 179.

36 See Sunstein, *supra* note 12, at 180; Magill, *supra* note 24, at 1136–39.

37 See Sunstein, *supra* note 12, at 183–84.

38 See 397 U.S. at 153–54 (1970) (indicating that the Court was following “the trend . . . toward enlargement of the class of people who may protest administrative action”); Nelson, *supra* note 26, at 763–65; Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 452–53 (1970) (characterizing *Data Processing* as liberalizing standing).

39 Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1369 (1973); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 281–318 (1990); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

40 See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); see also Magill, *supra* note 24, at 1134 (“While the Supreme Court and lower courts did expand standing in important respects between the middle of the 1960s and the 1970s, they simultaneously retreated from the standing for the public approach of the previous decades.”).

41 405 U.S. 727 (1972) (denying standing to the Sierra Club to challenge land use decisions by federal officials concerning National Forest land).

42 422 U.S. 490 (1975) (denying standing to a group of plaintiffs challenging allegedly exclusionary zoning measures in a Rochester, New York suburb).

concern for the public interest without alleging a more particular injury.⁴³ And *Warth* highlighted the injury principle's related requirements of causation and redressability.⁴⁴ At least in hindsight, *Morton* and *Warth* should have signaled that injury in fact could pose a significant hurdle to public law litigants, especially when those litigants were beneficiaries of regulation rather than its objects.⁴⁵

Warth's restrictions may have seemed of secondary importance at the time, however, because Congress had begun to enact broad citizen-suit provisions in statutes protecting the environment, consumer safety, and other broad progressive interests.⁴⁶ Those provisions purported to empower plaintiffs to sue without regard to any particular injury to their own personal interests.⁴⁷ If, as in the mid-twentieth-century era, statutory authorization provided a free pass to standing without regard to legal or factual injury,⁴⁸ then the public action could thrive notwithstanding the Court's injury-in-fact requirement. That hope seemed dashed, however, in *Lujan v. Defenders of Wildlife*,⁴⁹ which the Court decided in 1992.⁵⁰ And it became clear that injury in fact was a freestanding constitutional requirement—not a complementary avenue to establishing standing for those lacking a statutory entitlement to sue.⁵¹

43 See 405 U.S. at 734–35 (insisting that “the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured”).

44 See 422 U.S. at 504–05.

45 See, e.g., 422 U.S. at 504–08 (stating that “the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirements of Art. III” and holding that the injury in question was too indirect to support standing). For other early cases demonstrating the restrictive potential of *Data Processing's* injury-in-fact requirement, see, for example, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

46 See, e.g., Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RES., ENERGY & ENV'T L. REV. 61, 64–67 (2014) (describing the rise of environmental citizen suits under the Clean Air and Water Acts).

47 See, e.g., 42 U.S.C. § 7604(a) (2018) (Clean Air Act provision empowering “any person” to “commence a civil action on his own behalf”).

48 See Magill, *supra* note 24, at 1139.

49 504 U.S. 555 (1992).

50 It is worth noting that the Court had said that an express statutory right of action could not override Article III's injury requirement in dicta going all the way back to *Warth* itself. See 422 U.S. at 501. But *Lujan* was the first case in which the Court actually held unconstitutional an effort to grant statutory standing to a broad class of litigants without regard to personal injury. See Sunstein, *supra* note 12, at 165.

51 See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1118 (11th Cir. 2021) (Newsom, J., concurring).

Three decades after *Lujan*, scholars writing about standing,⁵² as well as some scholarly judges,⁵³ remain highly critical of the injury-in-fact requirement. Many of these critics worried that injury in fact would cripple public law litigation, but in retrospect it seems clear that the Court has never set the bar for injury in fact particularly high.⁵⁴ More compelling criticisms assert that injury in fact lacks much of a historical pedigree, while others stress ambiguities and inconsistencies in the test's application.⁵⁵ The next Section suggests that closer attention to equitable practice might help answer at least some of these concerns.

B. *The Court's Historical Standing Test*

The development of standing doctrine has featured three primary forms of argument: separation-of-powers arguments about judicial power vis-à-vis the political branches,⁵⁶ prudential considerations about the optimal conditions for judicial decisionmaking,⁵⁷ and historical arguments. In that third vein, the Supreme Court has said that “Article III’s restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”⁵⁸ An Article III “case” or “controversy” has been defined operationally, in

52 See, e.g., Cass R. Sunstein, *Injury In Fact, Transformed* (March 11, 2022) (unpublished manuscript) (on file with the *Notre Dame Law Review*); F. Andrew Hessick, *Understanding Standing*, 68 VAND. L. REV. EN BANC 195, 196 (2015); Elliott, *supra* note 20, at 468.

53 See, e.g., *Sierra*, 996 F.3d at 1117 (Newsom, J., concurring); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 973–85 (11th Cir. 2020) (Jordan, J., dissenting).

54 See Bradley & Young, *supra* note 34, at 13–14.

55 On the historical point, see, for example, Sunstein, *supra* note 12, at 168–97 and F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 299–300 (2008). But see generally Woolhandler & Nelson, *supra* note 24, at 691 (rejecting historical critiques of current standing doctrine). For arguments that the injury-in-fact rule has produced incoherent and confusing doctrine, see, for example, Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 69–70 (1984) and Hessick, *supra*, at 276.

56 See, e.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

57 See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (“The requirement of ‘actual injury redressable by the court’ . . . tends to assure that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 39 (1976)).

58 *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)).

other words, by reference to the sorts of cases traditionally heard in Anglo-American courts.⁵⁹

This formulation masks an important ambiguity concerning how—or *when*—we might seek the traditional or historical meaning of Article III’s references to “cases,” “controversies,” and “judicial power.”⁶⁰ A typical originalist inquiry would look to the original public meaning of those terms in 1789, without much attention to how those terms might have come to be understood by subsequent generations. That approach is well-established under the Seventh Amendment’s civil jury trial guarantee, for example, which specifically “preserve[s]” “the right of trial by jury” in “[s]uits at common law.”⁶¹ But Article III lacks any parallel language suggesting a specific intent to freeze legal practice at a particular time.

Important aspects of our constitutional law governing procedure have been interpreted according to a different notion of history and tradition—that is, a survey of longstanding historical practice over the course of our history, and not just at the moment when the relevant constitutional provision was adopted. In *Burnham v. Superior Court of California*,⁶² for example, Justice Scalia interpreted the Fourteenth-Amendment Due Process Clause’s limit on personal jurisdiction by looking not only to practice in 1868 but also English common-law practice, state practice from the eighteenth through the early twentieth centuries, as well as continuing contemporary practice.⁶³

59 See Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 572 (2016) (“Federal courts law incorporates the English common law and equitable practice . . . as a pragmatic solution to the generality of the Article III judicial power and its instantiation in the various judiciary acts.”).

60 See, e.g., *id.* at 549 (noting that “the law of federal courts has frequently relied on both historical practice that long *predates* the Constitution . . . and that developed considerably after ratification”); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1755–56 (2015) (describing a variety of uses for history besides ascertaining the original understanding of text).

61 U.S. CONST. amend. VII; see also *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (“Since Justice Story’s day . . . we have understood that ‘[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.’”) (quoting *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)). Seventh Amendment opinions thus ask “whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was.” *Id.*

62 495 U.S. 604 (1990).

63 See *id.* at 609–16 (plurality opinion of Scalia, J.); see also *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878) (stating that due process “mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights”). The Justices in *Burnham* divided over whether the test should be wholly one of historical tradition or whether contemporary

That sort of history derives its force “not so much from the status of politicians and judges closely associated with the Founding itself but rather from the weight of longstanding usage over time.”⁶⁴

Although the debate over Article III standing has occasionally looked to the Founders’ understanding of eighteenth-century English practice, scholars and judges have not confined themselves to that narrow time frame.⁶⁵ Good reasons exist, moreover, to stress the evolution of American practice rather than an eighteenth-century snapshot of how English practice might have looked to the Framers. The Founding generation was highly ambivalent about receiving the common law *en masse*⁶⁶ and even more ambivalent about receiving English equity.⁶⁷ They were building a federal republic with both state and federal judiciaries, while constructing a federal judiciary that combined the functions of the English law, equity, and admiralty courts.⁶⁸ The judiciary Article, moreover, was the least fleshed out at ratification. The “Madisonian Compromise,” for instance, left it to

notions of fairness should play a role, *see* 495 U.S. at 629 (Brennan, J., concurring in the judgment), but no Justice urged a different, more originalist approach to defining the historical tradition.

64 Young, *supra* note 59, at 549–50.

65 *See, e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798–99 (2021) (considering the approach of courts “both before and after ratification of the Constitution” to nominal damages); *id.* at 805 (Roberts, C.J., dissenting) (acknowledging that “[w]e should of course consult founding-era decisions” to discern how the terms “[c]ases” and “[c]ontroversies” “were understood at the time,” but insisting that standing must also conform to the evolving understanding “of an independent Judiciary” as reflected in more recent doctrine); Sunstein, *supra* note 12, at 168–79 (offering a “[c]apsule [h]istory” of English and American practice from the pre-Founding era through the nineteenth century).

66 *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 131–42 (1996) (Souter, J., dissenting) (discussing the caution with which the Founders both adopted and adapted the common law); Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554 (1882) (noting that aspects of the common law “which existed under the English political organization, or [were] based upon the triple relation of king, lords and commons, or those peculiar social conditions, habits and customs which have no counterpart in the New World . . . were never recognised as part of [the colonists’] jurisprudence”).

67 *See, e.g.*, Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 266–68 (2010); *id.* at 268 (“[T]he deviations in America from the established principles of equity were far more considerable than from those of the common law.”) (quoting Joseph Story, An Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary (Sept. 4, 1821), in 1 AM. JURIST 1, 22 (Freeman & Bolles, Boston 1829)).

68 *See* Woolhandler & Nelson, *supra* note 24, at 692 (“In favoring a private-injury requirement for private litigation, [early American courts’] decisions were influenced by American ideas about the proper role of the judiciary, its relationship to the political branches of the state and federal governments, and the legitimate allocations of public and private power.”).

Congress whether to create lower federal courts at all,⁶⁹ and the early statutes governing procedure and remedies began by incorporating state practice and only gradually carved out a role for distinctive federal rules.⁷⁰ Kristin Collins thus concludes that, “[a]s with much of the design of the federal judicial system, the details of the federal courts’ equity powers were left to Congress and the Supreme Court to resolve.”⁷¹ And she notes that this resolution was gradual and did not simply incorporate English practice.⁷²

At the end of the day, no one expects to find the injury-in-fact test, as presently constructed, lurking somewhere in *The Federalist Papers* or Madison’s notes on the Philadelphia debates. That test is a doctrinal construction designed to implement the meaning of Article III.⁷³ The question is whether the injury-in-fact test is well-grounded in traditional understandings of the sorts of lawsuits that appropriately may be brought in court. One would think, however, that traditional practice in *equity* would be relevant to defining the contours of an Article III case alongside traditional practice with respect to legal claims. Any appreciation of equity practice as meaningfully distinctive is, however, largely missing from contemporary debates about standing.

II. INJURY IN FACT AND EQUITABLE GRIEVANCE

Historical inquiries into the traditional predicates for a lawsuit have tended either to focus only on the law side of the house or at least to overlook the senses in which equity is meaningfully distinctive. Judge Newsom’s thoughtful and learned treatment, for instance, does not discuss equity as a separate category of cases potentially posing different requirements than a traditional legal cause of action.⁷⁴ Discussions of standing generally have considered equitable practice

69 See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 296 (7th ed. 2015) [hereinafter HART & WECHSLER].

70 See Collins, *supra* note 67, at 259–74.

71 *Id.* at 269.

72 See *id.* at 267–74.

73 See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 62 (1997) (arguing that doctrinal tests necessarily cannot be derived simply from the meaning of the constitutional norms that they implement).

74 Judge Newsom does briefly discuss public nuisance—an equitable genre—and acknowledges that those cases did traditionally require “some special injury” analogous to injury in fact. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring) (quoting *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98–99 (1838)).

in only a particular way, focused on redressability, and they have overlooked the implications of equity's unique history for the more foundational issue of injury in fact.

A. *Equitable Limitations on Redressability*

The redressability cases have two themes. One concern is that equitable relief might be ineffectual. It may seem futile to uphold plaintiffs' standing to litigate a claim when it is obvious, even at the outset of a case, that the plaintiff will ultimately fail to satisfy the requirements for the equitable relief they seek. Giving plaintiffs the opportunity to develop their case before requiring them to meet the requirements for equitable relief may avoid a premature conclusion that they cannot do so,⁷⁵ but it also subjects the defendant (and the court) to years of expensive and potentially intrusive litigation (and imposes corresponding pressures to settle the case) in what may ultimately be a lost cause. Courts have articulated these concerns under the rubric of whether the plaintiff's claim is "likely to be redressed by the requested relief."⁷⁶ Injunctive relief can't redress your claim, the argument goes, if you're unlikely to get it at the end of the case.⁷⁷ Or the court may conclude that an injunction may not solve the plaintiff's problem. Where redressing the plaintiff's injury would depend on actions by third parties not before the court, for example, an injunction against the defendant might be insufficient to establish redressability.⁷⁸

The second, and possibly more persuasive, aspect concerns the *impact* of equitable relief upon other values—typically, constitutional values of separation of powers or federalism.⁷⁹ The lawsuit in *Allen v. Wright*,⁸⁰ for example, sought an injunction to compel the Internal

75 See *O'Shea v. Littleton*, 414 U.S. 488, 511 (1974) (Douglas, J., dissenting) (insisting that "whether the Federal District Court in the exercise of its equitable discretion could frame suitable relief [is], of course, [a] question[] which can be answered only after a trial on the merits").

76 *Allen v. Wright*, 468 U.S. 737, 751 (1984).

77 This intuition makes a certain amount of sense, but "likely to be redressed by the requested relief" is subject to at least one obvious alternative interpretation. That is, it might well refer not to whether the requested relief is likely to be granted if the plaintiff prevails on the merits, but rather to whether the relief is likely to redress the plaintiff's injury if it *is* granted.

78 See, e.g., *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 43–44 (1976) (denying standing in part on the ground that an injunction to a government official to deny favorable tax treatment to hospitals not treating indigent persons would not necessarily make services available to those persons).

79 See Fallon, *supra* note 8, at 649–52.

80 468 U.S. 737.

Revenue Service to step up its efforts to identify and disqualify from charitable status private schools that engaged in covert discrimination against racial minorities. This raised a separation of powers concern about second-guessing the agency's enforcement discretion;⁸¹ after all, the IRS might have concluded that it had already acted upon those instances of private school discrimination that could be readily identified, and further enforcement efforts would yield diminishing returns and trade off with other enforcement priorities.

Likewise, in a variety of cases, the Court has invoked federalism concerns in rejecting standing for plaintiffs seeking injunctive relief that would include intrusive judicial monitoring of state or local prisons, courts, or police institutions.⁸² In *O'Shea v. Littleton*,⁸³ for example, the Court held that plaintiffs lacked standing to seek an injunction providing for federal monitoring of charging practices in state criminal courts. Standing considerations, the Court said, "obviously shade into those determining whether the complaint states a sound basis for equitable relief."⁸⁴ The Court saw the requested relief as "nothing less than an ongoing federal audit of state criminal proceedings" that would undermine values of comity and federalism.⁸⁵ These sorts of concerns have caused the Court not only to deny standing altogether but also, in some cases, to limit the scope of injunctive relief that plaintiffs have standing to seek.⁸⁶

B. *Causes of Action and Equitable Grievances*

What neither the cases nor the academic literature have done, so far as I can tell, is explore how equitable traditions might differ from legal ones with respect to the foundational preconditions for a suit. If equitable preconditions do differ—as Professors Bray and Miller say they do—then that difference ought to inform efforts to interpret

81 See *id.* at 759–61.

82 See, e.g., *Lewis v. Casey*, 518 U.S. 343, 385 (1996) (Thomas, J., concurring) (warning that "[p]rinciples of federalism and separation of powers impose stringent limitations on the equitable power of federal courts," and that "Article III cannot be understood to authorize the Federal Judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make").

83 414 U.S. 488 (1974).

84 *Id.* at 499.

85 *Id.* at 500 (citing *Younger v. Harris*, 401 U.S. 37 (1971)); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) ("[R]ecognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of irreparable injury which is both great and immediate.").

86 See, e.g., *Lewis*, 518 U.S. at 349–53, 353 n.3.

Article III's "irreducible constitutional minimum" for standing. In particular, that difference matters with respect to whether the "injury-in-fact" test can be justified and whether it ought to be replaced with a test focusing on whether the plaintiff has a legal cause of action.

Professors Bray and Miller argue that "causes of action" do not traditionally exist in equity, at least in the sense that current discussions mainly use that term.⁸⁷ They differentiate between three senses of a "cause of action": (1) "to be able to plead . . . the various elements required" for a successful lawsuit; (2) "a legal entitlement to sue"; and (3) a less technical meaning based on a reason that will motivate a court to act and provide relief—that is, a "cause for acting."⁸⁸ The first of these senses predominated in the early years before courts typically spoke in terms of "standing" at all. The second—"cause of action" as a legal entitlement to sue, whether granted by statute, implied by courts, or derived from common law—predominates now. It largely overlaps with the pre-*Data Processing* "legal injury" test, and it is what critics of the injury-in-fact requirement seem to mean when they say standing should require only a cause of action. Bray and Miller argue, however, that equity requires a cause of action only in the *third* sense—that is, a reason for a court to issue a remedy.⁸⁹

Professors Bray and Miller are not entirely pellucid about the difference between their second and third senses of a cause of action—that is, between "a legal entitlement to sue" and a "cause for acting" that will prompt a court to issue equitable relief.⁹⁰ The key to an equitable "cause for acting," they say, is "a grievance."⁹¹ By that they mean "a complaint rooted in interpersonal interactions that are governed by law," amounting to "a challenge to the law's routine administration or enforcement."⁹² In this sense, an equitable grievance is quite different from a legal cause of action. Equity responds, in theory, to the *gaps* in the regular remedies available at law. One might have an equitable grievance precisely because one lacks a regular, well-established legal cause of action.

87 See Bray & Miller, *supra* note 13, at 1770–72; see also Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Power* 27 (Oct. 30, 2021) (unpublished manuscript) (on file with the *Notre Dame Law Review*) (pointing out that "[e]quity . . . does not have 'causes of action' as a constraint on suits").

88 Bray & Miller, *supra* note 13, at 1774–75.

89 See *id.* at 1777.

90 For another effort to explain the difference along similar lines, see P.G. Turner, *Fusion and Theories of Equity in Common Law Systems*, in *EQUITY AND LAW*, *supra* note 3, at 1, 19–21.

91 Bray & Miller, *supra* note 13, at 1774–75.

92 *Id.* at 1777.

Not everyone seems to agree that causes of action are simply not a thing in equity, and knowledgeable people do sometimes speak of equitable causes of action.⁹³ As Professors Bray and Miller acknowledge, “[o]ver time, with doctrinal development, some . . . [equitable] grievances have become standardized so as to be roughly equivalent to civil wrongs.”⁹⁴ And we *have* merged law and equity, even if that merger is incomplete in important respects. As a result, we have statutes that both create causes of action in the legal sense and provide for equitable relief.⁹⁵ Some of these statutes purport to provide for equitable relief on behalf of plaintiffs who need show—at least as a statutory matter—no particular injury in fact of their own.⁹⁶ In such cases, the Court’s standing jurisprudence nonetheless requires a showing of injury in fact notwithstanding Congress’s intention to confer rights to sue more broadly.⁹⁷ Bray and Miller do not discuss standing, but they might consider this requirement salutary because it tends to reinstate equity’s traditional distinctiveness and particularity even in contexts where statutory law forces equity and law together.⁹⁸

It may help to consider two relatively familiar scenarios in which one might have an equitable grievance without a legal injury or cause of action. The first is *FCC v. Sanders Bros. Radio Station*,⁹⁹ in which a radio station challenged the FCC’s grant of a license to a company that wished to create a competing radio station. The case illustrates that the “legal injury” required in traditional standing cases is not identical with the legal cause of action upon which contemporary scholars

93 See, e.g., John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1014 n.100 (2008) (“Anti-suit injunctions, by providing affirmative relief on the basis of legal advantages that otherwise would be asserted as defenses, are not just an equitable remedy but an equitable cause of action.”); Bellia, *supra* note 23, at 817 (stating that “[a] case was justiciable if a plaintiff had a cause of action for a remedy under one of the forms of proceeding at law *or in equity*”) (emphasis added).

94 Bray & Miller, *supra* note 13, at 1777–78. Professors Bray and Miller insist, however, that “most of the grievances that equity would hear have not been formalized as civil wrongs. Here, exercising its older function, evincing its primordial function, equity channels discretionary corrective intervention in the enforcement of law. A suit in ‘corrective equity’ is paradigmatically about a grievance, not about a liability for a wrong.” *Id.* at 1777.

95 See, e.g., 42 U.S.C. § 2000e-5(g)(1) (2018) (providing for injunctive relief in private suits alleging unlawful employment practices under Title VII); Harrison, *supra* note 93, at 1014 n.100 (“Equity often provides additional remedies where the law already provides an entitlement to affirmative relief, a cause of action.”).

96 See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61–62 (1987) (construing the citizen suit provision of the Clean Water Act).

97 See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992).

98 See Bray & Miller, *supra* note 13, at 1774–76 (bemoaning the conflating of equitable grievances with causes of action).

99 309 U.S. 470 (1940).

would ground federal standing requirements.¹⁰⁰ Sanders Brothers had an injury in fact (probable economic injury arising from new competition), but the Court made clear that this was not a *legal* injury under the Communications Act, which provided no right to be free from competition.¹⁰¹ Nonetheless, the Court found that Sanders Brothers had a cause of action under the Communications Act, which permitted “any . . . person aggrieved or whose interests are adversely affected by any decision of the Commission” to seek judicial review of those orders.¹⁰² Given that the plaintiff sued under the Act to invalidate the license, the Court had no occasion to consider whether the plaintiff’s factual injury would be sufficient to support more traditional equitable relief.¹⁰³

What about an equitable grievance without a legal cause of action? The Roberts Court’s discussion in *Armstrong v. Exceptional Child Center, Inc.*¹⁰⁴ would seem to provide a good example. In that case, providers of healthcare services covered by Medicaid sued officials of the Idaho Department of Health and Welfare, arguing that Idaho had violated a provision of the Medicaid statute by reimbursing the providers at rates lower than federal law requires.¹⁰⁵ The plaintiffs clearly had a legal injury—they were legally entitled to the higher rate—and they sought an injunction requiring the State to increase its reimbursement rates.¹⁰⁶ The district court granted the injunction and the Ninth Circuit affirmed, holding that the plaintiffs had “an implied right of action under the Supremacy Clause to seek injunctive relief” under these circumstances.¹⁰⁷ The Supreme Court reversed, rejecting the notion that the Supremacy Clause creates causes of action of any kind.¹⁰⁸ But—crucially for our purposes—the Court said that this lack of a cause of action did not necessarily mean that a federal court could not grant equitable relief.¹⁰⁹

100 See also Bradley & Young, *supra* note 34, at 32–34 (discussing how possessing a legal interest under a particular legal provision, as captured by the “zone of interests” test, is distinct from having a legal cause of action).

101 See 309 U.S. at 473–76.

102 See *id.* at 476–77 (construing 47 U.S.C. § 402(b) (1940)).

103 Cf. Laycock, *supra* note 7, at 67 (pointing out that much of our administrative law is closer to equity than to legal models).

104 575 U.S. 320 (2015).

105 *Id.* at 323–24.

106 *Id.* at 324.

107 *Exceptional Child Ctr., Inc. v. Armstrong*, 567 F. App’x. 496, 497 (9th Cir. 2014).

108 See 575 U.S. at 324–25 (“It is . . . apparent that the Supremacy Clause is not the “source of any federal rights,” . . . and certainly does not create a cause of action.”) (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989)).

109 *Id.* at 326–27.

In discussing a possible equitable remedy in *Armstrong*, Justice Scalia's majority opinion scrupulously avoided using the term "cause of action."¹¹⁰ The Court acknowledged that "we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law,"¹¹¹ citing the landmark decisions in *Osborn v. Bank of the United States*¹¹² and *Ex parte Young*.¹¹³ "What [these] cases demonstrate," the Court explained, "is that, 'in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.'"¹¹⁴ The Court elaborated:

The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. . . . It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause. That is because . . . it does not.¹¹⁵

What *does* the remedy in such cases rest upon? *Armstrong* did not say. The Court rejected one possibility, which is that a "cause of action" could be implied under "the Medicaid Act itself."¹¹⁶ That was hardly surprising, given the Court's general aversion to implying rights of action under federal statutes in recent years.¹¹⁷ But this holding foreclosed the most obvious alternative in such cases to an implied right under the Supremacy Clause—that is, an implied right of action under whatever statute imposed the particular federal requirements in question on the defendants.¹¹⁸ It thus seems relatively clear that the

110 See *id.* at 333 (Breyer, J., concurring in part and concurring in the judgment) ("Like all other Members of the Court, I would not characterize the question before us in terms of a Supremacy Clause 'cause of action.' Rather, I would ask whether 'federal courts may in [these] circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law.')" (first quoting *id.* at 326; and then quoting *id.* at 339 (Sotomayor, J., dissenting)).

111 *Id.* at 326.

112 22 U.S. (9 Wheat.) 738, 838–39 (1824).

113 209 U.S. 123, 150–51 (1908).

114 575 U.S. at 327 (quoting *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845)).

115 *Id.* (citing Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956)).

116 See *id.* at 331–32.

117 See *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001).

118 The Court's earlier decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), which has often been cited as recognizing a federal right of action to prohibit state officers from enforcing preempted state regulation, see, e.g., HART & WECHSLER, *supra* note 69, at 745, is completely mysterious as to whether the plaintiff's ability to obtain relief stems from

anti-suit injunction in equity, recognized in cases like *Osborn* and *Ex parte Young*, is a freestanding creature not dependent on any legal cause of action.

Armstrong made clear that any equitable remedy would be subject to Congress's power to limit or replace that remedy with an alternate remedial arrangement.¹¹⁹ Construing Medicaid's provision implicitly to foreclose private enforcement, the Court ultimately concluded that no equitable remedy was available.¹²⁰ One may or may not agree with that holding, but the more fundamental problem may well have been that those traditional remedies generally entailed a prohibitory injunction preventing the enforcement of an unlawful state measure against the plaintiff.¹²¹ The *Armstrong* plaintiffs, however, sought an injunction requiring payment of future reimbursements to plaintiffs at a higher rate.¹²² That may have been simply too far outside the tradition of *Osborn*, *Ex parte Young*, or even *Shaw* for the Court to stomach.¹²³

In any event, *Armstrong*—and cases like *Ex parte Young* and *Osborn* before it—seems to contemplate circumstances in which one may have a grievance that suffices to motivate equitable relief even if one cannot invoke a legal cause of action. It would amount to much the same thing to say that one may have an equitable cause of action but not a legal one. In either case, the nature of the distinction remains a bit obscure. Professors Bray and Miller say that “[g]rievances recognized in corrective equity implicate hardships that are difficult to foresee or define [and] a wide range of inequities and injustices—in contrast to the sharply defined and independently actionable causes of action at common law.”¹²⁴ This “adjectival” or “second order” aspect of equity makes it hard to specify in advance the situations in which equity may provide relief though law cannot.¹²⁵ But the specific and *factual* nature of the predicate for such relief is clear enough. Equitable grievance, in other words, looks a lot like injury in fact.

the Supremacy Clause, the particular federal statute preempting state law, or some other source.

119 See 575 U.S. at 327–28.

120 See *id.* at 328–31.

121 See Harrison, *supra* note 93, at 1008 (arguing that *Ex parte Young* “authorized negative protection from lawsuits, not affirmative relief of a prospective kind”).

122 See 575 U.S. at 324.

123 Cf. *Edelman v. Jordan*, 415 U.S. 651, 663–65 (1974) (refusing to grant an injunction to pay money out of the state fisc under *Ex parte Young*).

124 Bray & Miller, *supra* note 13, at 1777.

125 See *id.* at 1782–85; Smith, *supra* note 15, at 1068–70.

C. *An Equitable Grounding for Injury in Fact*

Understanding a grievance in equity as roughly comparable to standing's injury in fact may help illumine the central issue in academic debates about standing, that is, whether the Supreme Court's injury-in-fact jurisprudence can be justified. Three aspects of the equitable grievance confirm its close relationship to factual injury. First, the circumstances motivating the chancellor to act—"hardships," "inequities," and "injustices," as Professors Bray and Miller recount¹²⁶—derive their force from factual circumstances. Relatedly, equitable remedies typically require "harm" or "injury,"¹²⁷ whether or not that harm need always be irreparable. And more generally, equity has been described since Aristotle as a "correction of law where it is defective owing to its universality."¹²⁸ As Alexander Hamilton put it more recently, "[t]he great and primary use of a court of equity is to give relief *in extraordinary cases*, which are *exceptions* to general rules."¹²⁹ Equity's corrective, second-order function would thus seem to depend on the sort of concrete factual settings that the injury-in-fact requirement is designed to ensure.

My hypothesis is that if equitable grievances have more to do with factual injury than with the existence of a legal cause of action, then the injury-in-fact requirement may make particular sense in equity. *Data Processing* articulated its injury-in-fact requirement, after all, in a suit under the general judicial review provision of the Administrative Procedure Act, which extends judicial review not only to those "suffering legal wrong" but also to those "adversely affected or

126 Bray & Miller, *supra* note 13, at 1777.

127 See Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 745 (2012) ("The history of the injunctive remedy in this country and in England . . . reflects a consistent and unyielding view that irreparable injury is an essential element of proof."); see also *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1,617) (observing that "the strong arm of equity . . . never ought to be extended unless to cases of great injury"); 1 C.L. BATES, FEDERAL EQUITY PROCEDURE 148 (1901) (stating that a bill in equity "must show by whom and in what manner the plaintiffs have been injured"); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS 9 (John M. Gould ed., 10th ed. 1892) (stating that a bill in equity "may . . . either complain of some injury" or "complain of a threatened wrong or impending mischief"). Although the necessity that injury be "irreparable" has been challenged, see DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 4-5 (1991), I do not understand that challenge to deny the need for an injury itself.

128 Bray, *supra* note 3, at 32 (quoting ARISTOTLE, NICOMACHEAN ETHICS bk. V, ch. 10, at 1795-96 (J. Barnes ed., W.D. Ross trans., 1984) (c. 384 B.C.E.)), see also Smith, *supra* note 15, at 1067-71.

129 THE FEDERALIST NO. 83, at 505 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

aggrieved by agency action.”¹³⁰ To be sure, equitable grievances are not *only* factual; they have to be the sort of factual injuries that equity courts see as warranting equitable relief.¹³¹ But that is also true of injury in fact, which must be not only factual but “judicially cognizable” injury.¹³² The important point is that while an injury will often “count” in equity because it arises from an unlawful act, standing does not seem to depend on the existence of a private right in the plaintiff to bring a lawsuit.¹³³ Consider again the equitable remedy acknowledged in *Armstrong*: in cases where a government official has or is about to enforce an unconstitutional law against the plaintiff, a court may issue equitable relief to prevent or remedy that factual wrong—even if there is no private legal right of action to enforce the federal law that renders the official’s action unlawful.¹³⁴ Nor does equity seem always to require a *legal* injury; in cases of opportunism, for example, equity may provide a remedy even in the absence of a legal breach.¹³⁵

The factual reality or threat of unlawful action against *this* plaintiff has generally been a necessary component of their entitlement to the injunctive remedy. If Article III standing seeks to track traditional practice, then equity’s expectation of a factual injury—a grievance—is part of the tradition shaping the contours of an Article III case. And proposals to reduce Article III’s basic requirement to whether or not the plaintiff has a legal cause of action must reckon with whether that framework would be coherent in actions focused on equitable relief. How, for instance, would a requirement that a plaintiff show a cause of

130 5 U.S.C. § 702 (2018) (emphasis added).

131 See Bray & Miller, *supra* note 13, at 1782 (equitable grievances exist “in relation to law”).

132 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 n.16 (1974); see also Stern, *supra* note 29, at 1184 (arguing that “a grave conceptual difficulty exists in taking the injury for standing to be injury ‘in fact’ apart from an assessment of the legal quality of that injury”).

133 If modern standing requirements resemble equitable practice more than the traditional legal-injury test, derived from the common law forms of action, that might be because equitable procedures have tended to dominate after the merger in the Federal Rules of Civil Procedure. See, e.g., Subrin, *supra* note 7; Laycock, *supra* note 7, at 64 (“With the notable exception of jury trial, our procedural rules are mostly derived from equity.”). I have not attempted to establish any *causal* influence of equitable procedure on *Data Processing* or the injury-in-fact test; my more limited claim is that injury in fact fits well with an age of public law litigation dominated by requests for equitable relief.

134 This does suggest that it would be a mistake for the Court to extend *Armstrong*’s holding that Congress had impliedly excluded equitable relief under the relevant provisions of the Medicaid statute to a holding that failure to provide a private right of action *in itself* impliedly forecloses equitable remedies.

135 See Smith, *supra* note 15, at 1076.

action apply to a case like *Armstrong*, where the claim is grounded in equitable principles?

It might make sense to ignore equity's orientation toward factual rather than legal injury if equitable claims made up only a small minority of the cases in which standing is at issue. But the striking fact is that equitable claims compose the overwhelming majority of such cases, at least in the last half century. A review of all Supreme Court decisions discussing standing between 1965 and 1995—the key period for the development of the Court's injury-in-fact jurisprudence—reveals that in the *overwhelming* majority of cases, the remedies sought were equitable in nature.¹³⁶ And the familiar landmarks of standing doctrine—*Data Processing*, *Warth v. Seldin*, *Allen v. Wright*, *Lujan v. Defenders of Wildlife*—all involved equitable relief.¹³⁷ Richard Fallon thus observed in 2006 that “[s]tanding issues almost never arise in suits for damages.”¹³⁸

More recently, some prominent standing cases like *Spokeo, Inc. v. Robins*,¹³⁹ *TransUnion LLC v. Ramirez*,¹⁴⁰ and *Uzuegbunam v. Preczewski*¹⁴¹ have involved claims for damages relief. Decisions like *Spokeo* and *TransUnion* may herald a new category of cases in which Congress seeks to regulate certain kinds of *private* conduct through private-attorney-general suits for statutory damages. But most standing cases seem

136 My research assistants reviewed every U.S. Supreme Court decision on standing between 1965 and 1995 to determine the sort of relief sought. See Memorandum from Sydney Engle, John Macy & Rebekah Strotman to Author (Jan. 10, 2022) (on file with author); see also Hessick, *supra* note 55, at 296 (“Under Chief Justice Burger, the Court again began to restrict standing in response to courts’ growing use of injunctions to regulate state and federal governments.”). Many, if not most, cases seeking injunctive relief also sought a declaratory judgment. Interestingly, a significant proportion of those standing cases that did involve damages claims were shareholder derivative actions, which the Court has described as “historically an equitable matter.” *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

137 One of the plaintiffs in *Warth*—an organization of homebuilders challenging exclusionary zoning laws—did allege damages claims (which proved fatal to its claim for organizational standing). See *Warth v. Seldin*, 422 U.S. 490, 515 (1975). But all the other individual plaintiffs and organizations sought injunctive relief. See *Ass’n. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970); *Allen v. Wright*, 468 U.S. 737, 746–47 (1984); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 (1992).

138 Fallon, *supra* note 8, at 650.

139 578 U.S. 330 (2016) (considering whether Congress could confer a right to sue for statutory damages under the Fair Credit Reporting Act on persons about whom the defendant had posted incorrect information in a credit report).

140 141 S. Ct. 2190, 2208 (2021) (considering standing of members in a class action seeking damages under the Fair Credit Reporting Act).

141 141 S. Ct. 792 (2021) (considering whether a claim to nominal damages could support a plaintiff’s continuing standing to litigate a challenge to a government policy after that policy was abandoned).

likely to remain focused on injunctive relief.¹⁴² Standing typically has to be litigated where the plaintiff's interest is diffuse, or where they seek to challenge action happening in the future, and in these cases injunctive and declaratory relief are likely to be more plausible than damages awards. Moreover, most standing litigation takes place in suits challenging government action, where sovereign immunity doctrines are likely to press plaintiffs toward equitable rather than legal remedies.¹⁴³

The predominance of equitable relief is not limited to cases in which standing is contested but applies to public law litigation generally. Abram Chayes' seminal discussion of the public law model of adjudication, for example, stressed "the increasing importance of equitable relief."¹⁴⁴ Doug Laycock points out that administrative litigation, designed to "provide centralized adjudication that bypasses the ordinary courts" (with their juries), "looks a lot like the chancellor's procedure."¹⁴⁵ And again, so many of the great landmarks of public law litigation—*Brown v. Board of Education*,¹⁴⁶ *Roe v. Wade*,¹⁴⁷ *United States v. Virginia*,¹⁴⁸ *District of Columbia v. Heller*,¹⁴⁹ *Obergefell v. Hodges*¹⁵⁰—involved claims for injunctive relief. This is unsurprising, given that only equity can provide the far-reaching relief necessary to restructure many discriminatory practices or practices that impinge on basic civil rights.¹⁵¹

What *is* surprising is that, given the pervasiveness of equity in public law litigation generally and in standing cases in particular, current debates about standing have so little to say about how the

142 *Uzuegbunam*, for example, featured a (nominal) damages claim only because the original injunctive claim had become moot. *See id.* at 797.

143 *See, e.g., Ex parte Young*, 209 U.S. 123 (1908) (holding that state sovereign immunity does not bar an action against a state officer for injunctive relief); *United States v. Lee*, 106 U.S. 196 (1882) (holding that federal sovereign immunity did not bar a suit against a federal officer for prospective relief); Laycock, *supra* note 7, at 63 (citing "immunity rules" as "[t]he most obvious restrictions on damages"). Professor Laycock also reports what he views to be "a widespread practice among civil liberties litigators" of avoiding damages claims. *Id.* at 63–64.

144 Chayes, *supra* note 39, at 1292; *see also* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 1–6 (1978) (beginning his account of modern civil rights litigation by rejecting the subordinate status of injunctive relief).

145 Laycock, *supra* note 7, at 67.

146 347 U.S. 483 (1954).

147 410 U.S. 113 (1973).

148 518 U.S. 515 (1996).

149 554 U.S. 570 (2008).

150 576 U.S. 644 (2015).

151 *See* Laycock, *supra* note 7, at 57 (observing that "[i]njunctive relief is routine in all civil rights and constitutional litigation" as well as "all environmental litigation").

distinctive traditions and practices of equity may bear on standing. And yet, if I am right that injury in fact closely resembles an equitable grievance, then our contemporary standing jurisprudence has ended up at a place that not only reflects historical means of getting into equity but also accommodates a world of public litigation in which equitable relief is the norm. Perhaps this is one more instance of the Court being wiser than the commentators. More likely, it reflects doctrine's tendency to be shaped by the context in which it is made. The injury-in-fact doctrine was crafted overwhelmingly in equity cases, and it has been shaped by the imperatives, concerns, and needs for constraint that exist in such cases.

Finally, appreciating the distinctiveness of equity has implications for those who would overhaul standing jurisprudence. Although proposed fixes vary, the most prominent proposals have entailed not so much a return to the legal-injury test as a focus on "whether Congress (or some other relevant source of law) has created a cause of action."¹⁵² These proposals rest on a uniquely *legal* understanding of standing that may not be so well-adapted for equitable claims.¹⁵³ Critics of the Court's injury-in-fact jurisprudence would do better, I suggest, to explore the notion of an equitable grievance as an interpretive guide for what sorts of injury should count.

The Court's critics might well respond that equity's traditions prove only that an injury in fact should be a sufficient condition for standing—not a *necessary* one. On this view, Congress should be able to overcome any objection to a plaintiff's standing simply by conferring on that plaintiff a legal cause of action, whether or not that plaintiff has an injury in fact.¹⁵⁴ Given that the contemporary debate has nearly always focused on the legitimacy of broad statutory "citizens' suit[]" provisions enabling suit in the absence of conventional injuries,¹⁵⁵ this conclusion would render any insights gained from traditional equity practice largely beside the point. This way of thinking about the problem raises several difficulties, however.

First, the Supreme Court's decision in *City of Los Angeles v. Lyons*¹⁵⁶ has been understood to hold that "a plaintiff must demonstrate

152 Sunstein, *supra* note 12, at 222; see also Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974). Others would require *both* a legal injury and a cause of action. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1122 (11th Cir. 2021) (Newsom, J., concurring).

153 Bray & Miller, *supra* note 13, at 1799 ("[T]o insist on an equitable cause of action is to work a fundamental change in how a plaintiff gets into equity.").

154 See Sunstein, *supra* note 52, at 18–19.

155 See *id.* at 11–13; see also *supra* text accompanying notes 46–51.

156 461 U.S. 95 (1983).

standing separately for each form of relief sought.”¹⁵⁷ I have my doubts about the *Lyons* rule, both as an interpretation of Article III and as a reading of what actually happened in that case.¹⁵⁸ But if *Lyons* holds, then many public law plaintiffs might lack standing to seek equitable relief even if we assume that a legal cause of action suffices to confer standing to seek equitable relief.¹⁵⁹

Second, even if one does not accept the *Lyons* rule, it may be appropriate to read most federal statutes providing for damages against the background of traditional requirements for such relief.¹⁶⁰ Such statutes should not, in other words, ordinarily be construed to confer a private right of action to seek equitable relief on persons lacking an equitable—that is, factual—grievance.

Finally, and most fundamentally, the general requirement of factual injury for equitable relief ought to change the discussion about the content of Article III’s limitation on appropriate parties. Generally speaking, the Court’s critics have not challenged the Court’s vision of Article III as limited to “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.”¹⁶¹ They have simply insisted that injury in fact has no basis in that tradition and that the relevant history is the old legal-injury rule. Acknowledging equity’s tradition of factual injury, however, would require critics to explain why the tradition *at law* should be controlling. Any such explanation faces an uphill climb, given the prevalence of equitable relief in modern standing cases, the extent to which signature aspects of modern public law draw on equitable roots, and the general “triumph

157 *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (citing *Lyons* for this proposition). No such statement occurs in *Lyons* itself.

158 On the latter point, it is surely crucial that Mr. Lyons had agreed to *sever* his damages claim from his claim for injunctive relief so as to permit the City to appeal the district court’s injunction while the damages action remained pending in the trial court. *See* 461 U.S. at 105 n.6; *see also* *Graudins v. Retro Fitness, LLC*, 921 F. Supp. 2d 456, 468 (E.D. Pa. 2013) (“Severance pursuant to Rule 21 essentially creates a separate case, the disposition of which is final and appealable.”)

159 One might also, of course, dispute the claim that a cause of action necessarily *does* suffice to create standing even for legal actions. *See, e.g.*, *Woolhandler & Nelson*, *supra* note 24, at 691.

160 *See, e.g.*, *Liu v. SEC*, 140 S. Ct. 1936, 1942 (2020) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)) (“In interpreting statutes . . . that provide for ‘equitable relief,’ this Court analyzes whether a particular remedy falls into ‘those categories of relief that were typically available in equity.’”); *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946) (“When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.”).

161 *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)).

of equity” in many aspects of modern civil practice. To graft a legal cause-of-action test for standing onto broad citizen-suit provisions with expansive equitable remedies would not amount simply to choosing one tradition over another. Rather, it would maximize the power of equitable remedies while leaving their limits behind.

Courts might, instead, embrace equity’s tradition of adaptation over time to fill whatever gaps develop in legal options for preventing injustice.¹⁶² From this standpoint, we might consider injury in fact as a sort of equitable correction for the potential of broad “public actions” to intrude on values of separation of powers, federalism, and other interests. In any event, it is hard to justify ignoring altogether the traditions on the equity side of the house—including the limits those traditions impose on judicial power.

CONCLUSION

Our law interprets Article III’s bare-bones language in light of traditional practices about how lawsuits are structured and proceed. But our view of those practices has often overlooked the distinctive character of equity. In particular, the absence of causes of action in equity, and the centrality of grievances rather than legal rights, ought to inform our view of standing—especially since so many standing cases involve equitable relief. Happily, we have somehow arrived at a basic predicate for standing—injury in fact—that seems basically similar to the grievance necessary for getting into equity. If that is right, then equity may help us better ground our current doctrine and answer some of the questions that remain.

¹⁶² See Bray & Miller, *supra* note 13, at 1795 (emphasizing that “equity cannot be static”).