

Posner's Pragmatic Justiciability Jurisprudence: The Triumph of Possibility over Probability

Eugene Kontorovich†

INTRODUCTION

This Essay examines Judge Richard Posner's jurisprudence on justiciability—the subject matter jurisdiction limits on federal courts. Judge Posner's decisions reflect a particularly liberal and expansive view of standing and associated limits on federal court jurisdiction, combined with a narrow view of statutory and other subconstitutional limitations. Standing and related justiciability doctrines are a natural place for a visionary jurist like Posner to make a mark. Standing doctrine is famously confused, with lines of inconsistent Supreme Court decisions giving much to choose from to those who, in the spirit of Justice Antonin Scalia, favor robust Article III restrictions on the subject matter jurisdiction of the federal courts and those who, in the spirit of Justice Stephen Breyer, support loosening these restrictions.¹ The ongoing academic debate over the doctrine, which has emphasized the inadequacy of the doctrine's purported justifications, also invites jurisprudential innovation.

Posner's pragmatic judicial philosophy and skepticism of doctrine, combined with an ongoing concern about the workload of federal courts, led him to develop a characteristic approach to Article III jurisdiction. However, Posner's expansive approach to justiciability—which he has described as “pragmatic” or “probabilistic”—goes far beyond what Supreme Court precedents dictate. Moreover, in the name of opposition to what he sees as

† Professor of Law, George Mason University Antonin Scalia Law School. The author clerked for Judge Posner in 2001–2002.

¹ Earlier work has explored how one of Posner's major standing cases departs from even Justice Breyer's expansive view of the doctrine. See, for example, Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing: Closer to Justice Breyer's Approach to Standing than to Justice Scalia's*, 50 *Houston L Rev* 71, 119 (2012). This Essay examines a wider range of standing cases, as well as Posner's approach to other constitutional and statutory justiciability doctrines.

formalistic and ad hoc doctrinal rationalizations for the standing doctrine, Posner's justiciability cases recapitulate many of these weaknesses.

In his academic work and some early cases, Judge Posner strongly favored a robust view of Article III justiciability limits. In particular, he embraced the view that Article III's justiciability limitations² constrain federal courts to redressing "injuries of the same general sort redressed by common law courts in the eighteenth century."³ Far from dismissing these limits on judicial review as anachronisms, or mechanistic originalism, Posner understood their principal purpose to be rooted in the separation of powers.⁴ In this view, justiciability restrictions serve as a built-in check on the powers of the courts relative to the political branches, without which the authority of the former may seem limitless. As Judge Posner put it, courts might "have their wings clipped if they did not limit their power by minimizing the occasions on which to exercise it."⁵

But on the bench, Judge Posner developed a very limited view of Article III justiciability doctrines. The most prominent of the Article III rules is standing—a doctrine famously described as confused, pointless, and archaic by commentators and known for its zig-zagging lines of Supreme Court decisions.⁶ The widespread academic view that standing "serves no useful purpose,"⁷ and the broad space left by inconsistent Supreme Court decisions, make it a natural place for Posner's pragmatic jurisprudence.

Posner's standing decisions articulate a broad theory of judicial review, in which standing is largely reducible to the question of whether the plaintiff has a cause of action. Posner's opinions also repeatedly emphasize a "probabilistic" approach to standing,

² See *People Organized for Welfare & Employment Rights v Thompson*, 727 F2d 167, 171 (7th Cir 1984) (opining that a plaintiff's injury should "at least resemble the type of injury that would support a lawsuit under traditional principles of common law or equity; it must therefore affect one's possessions or bodily integrity or freedom of action, however expansively defined").

³ Richard A. Posner, *The Federal Courts: Challenge and Reform* 43 (Harvard 1996). See also *Thompson*, 727 F2d at 171 (opining that a plaintiff's injury should "at least resemble the type of injury that would support a lawsuit under traditional principles of common law or equity; it must therefore affect one's possessions or bodily integrity or freedom of action, however expansively defined").

⁴ See Posner, *The Federal Courts* at 43–44 (cited in note 3).

⁵ *Id.* at 44.

⁶ See, for example, Eugene Kontorovich, *What Standing Is Good For*, 93 Va L Rev 1663, 1664–66 (2007).

⁷ Mark V. Tushnet, *The "Case or Controversy" Controversy: The Sociology of Article III: A Response to Professor Brilmayer*, 93 Harv L Rev 1698, 1705 (1980).

in which a statistical possibility that a favorable decision would have concrete benefits for the plaintiff is enough to satisfy Article III.⁸ In practice, this means that few plaintiffs, even with highly attenuated causal relationships to the complained-of action, would fail to satisfy Article III limits. Posner's standing and political question jurisprudence is hard to reconcile with both the practice and theory of standing as articulated by the Supreme Court in *Lujan v Defenders of Wildlife*⁹ and *Clapper v Amnesty International*.¹⁰ It also ignores serious practical functions the standing doctrine may serve.

Part I first describes the doctrine of standing and then shows how numerous Posner opinions constitute a frontal assault on it. Posner replaces that admitted uncertainty that surrounds the application of standing principles to an anything-goes approach that carries its own costs. Part II examines Posner's similarly liberal approach to another major justiciability limitation, the political question doctrine. Part III shows that while Posner's cases give little weight to traditional justifications for justiciability doctrines, particularly those rooted in the separation of powers, they do embrace it as a discretionary docket management tool. Thus, Posner's liberal approach to constitutional standing rules is matched by a fairly serious application of so-called "prudential" or judge-made justiciability limits. Part IV critiques Posner's approach to justiciability on the grounds that it does not fully appreciate the pragmatic purposes embedded in the crusty doctrinal structure of standing rules.

I. STANDING

Judge Posner's standing decisions constitute bold challenges to both the theory and application of the Supreme Court's justiciability doctrines. In dicta, he comes close to adopting the view that such doctrines lack both constitutional basis and practical utility.¹¹ In his application of existing tests, he comes close to making the Supreme Court's requirements of standing as devoid of effect as he thinks they are of practical purpose.

⁸ See, for example, *American Bottom Conservancy v United States Army Corps of Engineers*, 650 F3d 652, 658 (7th Cir 2011); *MainStreet Organization of Realtors v Calumet City*, 505 F3d 742, 744 (7th Cir 2007).

⁹ 504 US 555 (1992).

¹⁰ 568 US 398 (2013).

¹¹ See *American Bottom Conservancy v United States Army Corp of Engineers*, 650 F3d 652, 659–60 (7th Cir 2011).

The Supreme Court has described Article III as requiring a plaintiff to have an injury with a sufficient degree of concreteness, imminence, and nexus with the defendant's conduct. But the precise cutoff for what the Court has described as a "concrete" and "imminent" injury has been difficult to discern from the cases. Posner's standing cases, however, focus not on the formal relationship between plaintiffs and the alleged injury but whether there is a statistical probability that the defendant's conduct may harm the plaintiff's interests. However, a closer examination of his standing decisions reveals a different kind of formalism: for Posner, a "probability" of injury is in practice a shorthand for *any probability*, or rather "not impossibility."

A. The Supreme Court's Standing Jurisprudence and Its Difficulties

The Supreme Court has repeatedly described standing as a threshold Article III requirement for adjudication. Standing turns on the existence of a particular relationship, or nexus, between the plaintiff and the challenged government action. The exact nature of the necessary nexus has been difficult for the Court to articulate—ironically, given that standing seeks to guard against amorphous and inchoate injuries—but the three-part test spelled out in *Lujan* serves as the basic reference point. The central requirement is that the plaintiff has an "injury in fact": an injury somehow particular to the plaintiff, as opposed to a societal grievance of the kind that might have been treated as public nuisance at common law.¹² The other two elements—which the Court labelled "causation" and "redressability"—often go together: the challenged conduct must be a traceable cause of the injury, and the remedy sought from the court must have some likelihood of ending the injury (which would be impossible if the injury is not caused by the conduct in the first place).¹³

The injury-in-fact requirement is hardly a model of clarity. The nature of the required injury is, the Court admits, "not susceptible of precise definition."¹⁴ Still, some basic concerns of the injury requirement can be teased out. Standing demands that

¹² *Lujan*, 505 US at 560.

¹³ *Id.* at 560–61.

¹⁴ *Allen v Wright*, 468 US 737, 751 (1984).

courts respond only to “distinct and palpable” harms.¹⁵ This limitation most often has bite in ideological litigation by public interest groups. Related to abstractness is a concern about “general” rather than “particular” injuries.¹⁶ When government action harms many people in the same way, none has standing to assert the “undifferentiated” injury.¹⁷

One basic difficulty of the jurisdictional “injury” requirement is that the existence of an “injury” is also an element of a basic prima facie tort case. (The same can be said about the second requirement, causation.) In anticipatory challenges to complex regulatory action, demonstrating the connection between government action and a plaintiff’s legal interests may be even more difficult than in a garden-variety tort. Thus, a common academic criticism of the injury requirement, emphasized heavily by Judge Posner, is that it collapses a merits inquiry into a jurisdictional one, requiring courts to determine questions of fact without the benefit of any evidence.¹⁸ In this view, to say a plaintiff does not have an injury is just a judicial guess, an ad hoc assessment of probability.

B. Posner’s Standing

In a series of decisions, Judge Posner attacked the very existence of a constitutional requirement of standing and the policy justifications for it. Noting the significant academic criticism of the standing doctrine, Posner has expressed doubt that Article III creates any such limitations.¹⁹ Posner’s doctrinal heresy is motivated by his impatience for legal rules that seem to serve no useful purposes. And in his view, standing doctrine does not serve the purposes often attributed to it.²⁰

For example, one justification for requiring a plaintiff to have a concrete injury is to ensure vigorous adjudication. Posner, however, notes that ideological litigants will often be *more* motivated than those whose interest is limited to their own personal injury.

¹⁵ Id (quotation marks and citations omitted).

¹⁶ See *Lujan*, 505 US at 573–74.

¹⁷ Id at 575.

¹⁸ See *American Bottom Conservancy*, 650 F3d at 659.

¹⁹ See id at 655–56.

²⁰ See id at 656 (arguing that standing doctrine is defensible primarily to the extent it serves clear “practical” ends).

Indeed, bearing the expense of a lawsuit is in this view evidence of a willingness to mount a vigorous defense.²¹

Posner's approach to standing requirements is best illustrated in a series of cases in which he narrowly interpreted existing Supreme Court precedents in cases involving issues that perennially raise justiciability problems—environmental regulation and Establishment Clause challenges.

1. Environmental regulation.

The environmental case, *American Bottom Conservancy v United States Army Corp of Engineers*,²² reads like a law school exam about standing: its facts closely track the major Supreme Court precedent on ideological environmental litigation, *Lujan*, but tweaked ever-so-slightly to at least open the possibility of a different outcome. In *Lujan*, the plaintiffs complained that the secretary of the interior's improper interpretation of certain environmental regulations would lead to the funding of overseas development projects that would harm the habitat of some endangered species.²³ The plaintiffs' claimed injury was a diminution in their ability to take delight from these creatures.²⁴ The Court ruled that the plaintiffs lacked an Article III injury.²⁵ Their conceptual interest in the animals was not enough.²⁶

The narrowest view of the holding focuses on the Court's discussion of whether the plaintiffs had plans to visit the potentially imperiled crocodiles and other fauna. While the plaintiffs in *Lujan* were true animal lovers who had visited the animals' habitat in the past, the animals lived far away and, at the time of their lawsuit, the plaintiffs lacked concrete plans to commune with them again.²⁷ Their interest in the aesthetic enjoyment of the animals was too amorphous and remote, the Court ruled, to constitute an Article III injury.²⁸

But it is hard to imagine that questions of the courts' Article III powers turn on whether someone has yet bought a ticket to see a

²¹ See *People Organized for Welfare & Employment Rights v Thompson*, 727 F2d 167, 172 (7th Cir 1984), citing Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv L Rev 645, 674 (1973).

²² 650 F3d 652 (7th Cir 2011).

²³ *Lujan*, 504 US at 563–64.

²⁴ *Id.*

²⁵ *Id.* at 562.

²⁶ *Id.* at 563.

²⁷ *Lujan*, 504 US at 564.

²⁸ *Id.* at 562, 564.

crocodile. The real problem with the plaintiffs' suit involves some combination of the amorphous nature of their injury with its lack of personal particularity. As the Court emphasized, while aesthetic and emotional harms can certainly give rise to justiciable cases, a plaintiff must meet a higher standard when the complained of conduct is not in any way directed at *them*.²⁹ That is because vague aesthetic interests in nondirected government conduct, several degrees of causation removed from the plaintiffs' alleged injury, are widely shared and bleed into pure policy disagreements. The problem with the *Lujan* claim was that the plaintiffs were essentially attempting to relitigate regulatory decisions in which their interests were little different from those of the general public. It would make standing doctrine uncommonly silly if the plaintiffs could evade a structural Article III limit on judicial power with a thousand-dollar outlay on a package tour (which, given the stage at which standing decisions occur, they would not actually have to go on).

Yet this is the view of *Lujan* that Posner took in *American Bottom Conservancy*. That case involved a plan by a waste disposal company to eliminate several acres of wetlands.³⁰ The plaintiffs were nature lovers who claimed this would negatively affect various species in a way that would limit their aesthetic enjoyment of those species.³¹ The linkage between the plaintiffs and the project was indirect, as was the link between the relief they sought and the defendant.³² The plaintiffs did not visit any creatures in the affected wetland, which was private property.³³ Rather, they admired these species from the vantage point of a public park half a mile away.³⁴ Nor did the plaintiffs sue the company that was going to fill the wetland. Instead, they brought an action against a government agency that had issued a permit authorizing the project.³⁵

In short, their lawsuit was about government action not directed at them and about land that they had never been on. Nonetheless, the public park was close enough, Judge Posner ruled.³⁶ The key is that the plaintiffs were regular visitors to the park,

²⁹ Id at 562–63.

³⁰ *American Bottom Conservancy*, 650 F3d at 654.

³¹ Id at 657.

³² Id at 657–58.

³³ See id at 657.

³⁴ See *American Bottom Conservancy*, 650 F3d at 657.

³⁵ Id at 656.

³⁶ See id at 657.

and there was no reason to think that they would not frequent it again.³⁷ This was enough for Posner to find *Lujan*'s limits on justiciability inapplicable. The plaintiffs did not claim that the birds in their "visual field" at the park were the same ones that land in the affected wetlands but only that they were of the same species.³⁸ Judge Posner, however, thought it sufficient that the park was in close proximity to the habitat of the bird species, making it *possible* that some of the same individual birds were involved.³⁹

The Supreme Court's application of the injury-in-fact analysis focuses on the number of degrees of attenuation that exist between the plaintiffs' claimed injury and the challenged government action.⁴⁰ The Supreme Court in *Lujan* emphasized that the test of standing is higher in cases challenging government action of which the plaintiff is not the object. When the government action is not the direct cause of plaintiffs' injury, it must at least be closely linked to it.⁴¹ A probability of benefit is not enough—there must be a deeper nexus between the plaintiff and the allegedly wrongful conduct.

Applying that analysis here, one could start by noting that the proposed landfill might never be built, regardless of the permit, for a variety of other economic and regulatory reasons.⁴² Even if it is built, the mitigation projects agreed to by the company may provide suitable alternate homes for the birds.⁴³ Even if the project is built and mitigation is not immediate or complete, the affected birds might themselves find other suitable nearby places to rest their feet and wings.⁴⁴ Even if they do not, and the number of birds passing through the area may be reduced, the number visible from the park on the biannual occasion of plaintiffs' visits may be entirely undistinguishable.⁴⁵ Thus the plaintiffs' injury

³⁷ See *id.*

³⁸ See *American Bottom Conservancy*, 650 F3d at 657.

³⁹ See *id.* ("They fly all over the place, doubtless including the park, which is only half a mile from the wetlands.").

⁴⁰ See *Clapper*, 568 US at 410 (enumerating a five-piece "chain of contingencies" intervening between plaintiffs' claimed injury and the conduct they complained of).

⁴¹ See *Lujan*, 504 US at 562. In *American Bottom Conservancy*, there were at least two third-parties to the government action whose conduct would be required to bring about the injury—the waste company and the birds. *American Bottom Conservancy*, 650 F3d at 654–55.

⁴² See *American Bottom Conservancy*, 650 F3d at 658.

⁴³ See *id.* at 659–60.

⁴⁴ See *id.* at 660.

⁴⁵ See *id.*

here is four steps removed from the conduct they complain of—far from what the Court would describe as an injury-in-fact.

Posner ignored this aspect of *Lujan* and instead focused on the plaintiffs' ticket to see a crocodile.⁴⁶ He also took the opportunity to emphasize the "probabilistic" nature of standing injury.⁴⁷ Posner correctly emphasized that a standing determination turns on a fairly preliminary estimation of the imminence of an injury, which must be deferential to the plaintiff because of a lack of discovery.⁴⁸ Thus, he found a cognizable injury based on the chance that the permit might result in a project on a nearby parcel that could reduce the animal traffic through the park (a point that was quite unclear given that the waste company would offset the wetland by creating another one nearby) in a way that would be noticeable to the nature lovers.⁴⁹ In so doing, he described the standing test as "probabilistic"; but what in practice this meant was that any probability—thus anything short of impossibility—would confer standing.⁵⁰ This turns standing into an inquiry based on pure possibility, as opposed to some concrete probability. It is hard to see why one needs a constitutional doctrine to screen out *impossible* claims.

Moreover, Posner's holding in *American Bottom Conservancy* largely elides the causation and redressability prongs of the Supreme Court's standing inquiry. In cases like *Lujan*, causation is used to screen out cases in which a governmental policy challenged by the plaintiff is not a direct cause of the potential injury-in-fact the plaintiff invokes. Thus, in *Lujan*, the plaintiffs' purported standing was predicated on the extinction of the crocodiles; but the government policy they challenged—a regulation that provided that foreign aid projects need to undertake explicit inquiries into their environmental impact—was not killing any

⁴⁶ See *American Bottom Conservancy*, 650 F3d at 656–57, citing *Lujan*, 504 US at 562–63.

⁴⁷ *American Bottom Conservancy*, 650 F3d at 658, quoting *MainStreet Organization of Realtors*, 505 F3d at 744.

⁴⁸ See *American Bottom Conservancy*, 650 F3d at 658.

⁴⁹ See *id.* at 659.

⁵⁰ See *id.* at 658, citing *MainStreet Organization of Realtors*, 505 F3d at 744 (quotations omitted):

A suit to redress an injury to the plaintiff is a "case" or "controversy" . . . 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.

crocodiles. Similarly, the real culprits, if any, in *American Bottom Conservancy* would be the developers, not the Army Corp of Engineers. The plaintiffs sued the latter because they had no conceivable cause of action against the former. Even if the probabilistic harm to the wildlife could be considered an “injury in fact,” it still would not give the plaintiffs standing under *Lujan*.

Equating probability with possibility was repeated by Posner in several cases.⁵¹ In *Tucker v United States Department of Commerce*,⁵² a citizen suit challenge to the methods of the decennial census, Posner stressed the mere need for “some probability of a tangible benefit” in the form of greater federal funds or more congressional districts.⁵³ Yet he went on to find the standing requirement met without any evidence of such a probability, but rather because the possibility had not been ruled out.⁵⁴ While there was no evidence that the state would gain through a different census method, it was possible. This is not a probability; it is a hypothetical possibility, and the benefit to the plaintiff would be filtered through numerous intermediate steps, each with an indeterminate outcome. In comparison, the Supreme Court, in a similar challenge several years later, also found standing satisfied, but only after considering detailed evidence that showed a “virtual certainty” that the relevant state, and even counties, in which the plaintiffs reside would benefit from a change in method.⁵⁵

2. Establishment Clause

Posner’s minimalist view of Article III standing rules—and his corresponding tendency to read exceptions to it in Supreme Court case law in the broadest way—can also be seen in two 2006

⁵¹ See, for example, *Bruggeman v Blagojevich*, 324 F3d 906, 910 (7th Cir 2003) (involving a challenge by Medicaid beneficiaries seeking to require officials to adopt a plan to make it easier for developmentally challenged people to be admitted to certain kinds of care facilities):

The potential benefit to them from the relief that they seek thus is speculative.

But not so speculative as to negate standing, which is a matter of probabilities rather than certainties.

⁵² 958 F2d 1411 (7th Cir 1992).

⁵³ *Id.* at 1415.

⁵⁴ See *id.* at 1415–16.

⁵⁵ See *Department of Commerce v United States House of Representatives*, 525 US 316, 330–31 (1999).

Establishment Clause cases.⁵⁶ The Establishment Clause is a good acid test of standing theories. That is because most practices challenged under the provision—such as public religious displays or spending on religious programs—are by definition not “aimed” at anyone, nor do they infringe on any classic common law rights. The injury they cause is largely conceptual and universal (the believer is as protected by the First Amendment as the dissenter).

In response to such difficulties, which might lead to the uncomfortable conclusion that the Establishment Clause is entirely nonjusticiable, the Supreme Court has at times applied a somewhat more relaxed standing test to Establishment Clause challenges. In *Flast v Cohen*,⁵⁷ the Court ruled that taxpayers have standing to challenge legislative appropriations for religious purposes, because the Framers understood such use of public funds as being individually harmful for antiestablishmentists and constituting the particular injury the Clause seeks to guard against.⁵⁸ Many academics saw *Flast* as establishing, at the least, a broad exemption of the Establishment Clause from traditional Article III restrictions or, at the most, as sowing the seeds for a rejection of an injury requirement in favor of Professor William Fletcher’s “cause of action” theory of standing.⁵⁹ However, that is not how the Court saw matters. In a series of subsequent decisions, it greatly limited *Flast* to its facts, explaining that only actual items of legislative appropriation are subject to the *Flast* rule.⁶⁰ Other kinds of in-kind or general-account support for religious projects do not give rise to taxpayer standing.

Posner took the course of reading *Flast* broadly; he thought it represented a suggestion that the standing doctrine was prudential. In *Freedom from Religion Foundation v Chao*,⁶¹ Posner ruled that taxpayers had standing to challenge funding of programs by the President’s Office of Faith-Based and Community Initiatives.⁶² These programs were not funded by specific congressional appropriations, as in *Flast*, but rather by the general White

⁵⁶ See generally *Freedom from Religion Foundation v Chao*, 433 F3d 989 (7th Cir 2006); *Laskowski v Spellings*, 443 F3d 930 (7th Cir 2006).

⁵⁷ 392 US 83 (1968).

⁵⁸ *Id.* at 103–04.

⁵⁹ William A. Fletcher, *The Structure of Standing*, 98 Yale L J 221, 290–91 (1988). See also Part IV.

⁶⁰ See *Hein v Freedom from Religion Foundation*, 551 US 587, 605–09 (2007) (discussing case law evolution that narrowed the *Flast* rule).

⁶¹ 433 F3d 989 (7th Cir 2006).

⁶² *Id.* at 996–97.

House budget, and were thus further removed from the particular *Flast* “injury.”⁶³ Yet Posner concluded, over Judge Kenneth Ripple’s dissent, that it was close enough. The heart of their dispute was whether standing limitations such as the injury requirement are seen as a hard constitutional rule, and thus whether plaintiffs with undifferentiated injuries would have to fall into some clear exception, or whether the injury requirement is itself a prudential exception to broad federal court jurisdiction.⁶⁴ Posner’s opinion focused on the incoherence of Supreme Court standing cases and paid particular attention to the liberal ones.⁶⁵ Judge Ripple, in his dissent, emphasized the essential purposes of standing as a fundamental limit on federal court power.⁶⁶ Subsequently, in *Hein v Religious Freedom Foundation*,⁶⁷ the Supreme Court overruled Posner’s decision.⁶⁸

Another odd Establishment case, *Laskowski v Spellings*,⁶⁹ involved a taxpayer challenge to a one-time grant to the University of Notre Dame to train teachers at the Catholic institution.⁷⁰ By the time the lawsuit was heard, the money had been spent, and no further appropriators were in the offing (the provision of the funds to a religious program at Notre Dame appears to have been an oversight).⁷¹ Judge Posner held that the case was not moot, because the plaintiffs’ injury could still be redressed if the school refunds the money to Congress.⁷² In this view, Establishment Clause injuries include not just governmental appropriation of the money to religious purposes but the resulting depletion of the fisc—an ongoing injury that sounds like the classic nonjusticiable general grievance, sometimes called “taxpayer standing.” Posner’s adoption of this injury shows quite clearly his expansive view of Article III standing.⁷³

⁶³ See *id.* at 992–93.

⁶⁴ Compare *id.* at 991–92, with *id.* at 997 (Ripple dissenting).

⁶⁵ See *Freedom from Religion Foundation*, 433 F3d at 991–93.

⁶⁶ *Id.* at 998 (Ripple dissenting) (“A lawsuit based on such undifferentiated injury—a mere disagreement with the government policy—is hardly the case and controversy within the jurisdiction of the federal courts.”).

⁶⁷ 551 US 587 (2007).

⁶⁸ *Id.* at 593.

⁶⁹ 443 F3d 930 (7th Cir 2006).

⁷⁰ *Id.* at 933.

⁷¹ *Id.*

⁷² *Id.* at 934.

⁷³ The Supreme Court vacated Posner’s ruling in the case for reconsideration in light of *Hein*. With the Supreme Court having made clear that *Flast* was a unique exception, and not a basis for liberalizing standing, Posner was forced to join Judge Sykes’s opinion

As Judge Sykes put it in her dissent:

[T]he majority holds that a recipient of a federal grant may be ordered to repay the grant as a remedy in a taxpayer lawsuit alleging that the government violated the Establishment Clause in making or insufficiently monitoring the grant. The majority achieves this result by importing the common law doctrine of restitution—a private law concept—into the public law realm of Establishment Clause litigation, vesting taxpayers with a unique sort of qui tam–like authority to sue private parties for reimbursement of the Treasury when the government is alleged to have committed an Establishment Clause violation. . . . This is a dramatic expansion of taxpayer standing, and there is no authority for it.⁷⁴

II. POLITICAL QUESTIONS

Posner expressed even greater skepticism of the political question doctrine, which holds that certain issues closely related to the basic structure of government cannot be adjudicated by federal courts.⁷⁵ In his long tenure on the bench, he never deemed a case nonjusticiable on political question grounds. He reversed several dismissals on political question grounds, expressing doubt about the very existence of the doctrine. As with his standing decisions, Posner placed great weight on academic criticism aimed at the “scope, rationale, provenance, and legitimacy” of nontextual Article III limitations while paying little attention to its not infrequent actual use by courts.⁷⁶ Indeed, he has described it as “undeserving of the dignity of a special doctrine.”⁷⁷

In *Tucker*, a case in which citizens of Illinois challenged the Census Bureau’s “actual enumeration” requirement, Posner rejected a dismissal of the case on political grounds (as well as on standing grounds, discussed above).⁷⁸ Reversing the district court’s political question dismissal, he said there was no reason

on remand, which held the case nonjusticiable. *Laskowski v Spellings*, 546 F3d 822, 827 (7th Cir 2008).

⁷⁴ *Laskowski*, 443 F3d at 939 (Sykes dissenting).

⁷⁵ See Jill Jaffe, Note, *The Political Question Doctrine: An Update in Response to Recent Case Law*, 38 Ecol L Q 1033, 1037 (2011).

⁷⁶ *Tucker*, 958 F2d at 1415 (suggesting that challenge to the Census Bureau’s methods of conducting decennial census is not a political question). But see *id* at 1419 (Ripple concurring in the judgment).

⁷⁷ *Id* at 1415.

⁷⁸ *Id* at 1415–16.

the court could not fashion an equitable remedy, though elsewhere in the opinion he concluded the opposite.⁷⁹ Posner noted that finding a political question would cast doubt on the justiciability of apportionment cases as well.⁸⁰ Nonetheless, Posner ultimately dismissed the case as nonjusticiable—on prudential standing grounds.⁸¹ He held that the plaintiffs were not in “the zone of interests” of the Census Clause, thus adopting the “cause of action theory” of standing.⁸² In this view, standing is nothing but the merits question of whether the relevant law provides someone in the plaintiff’s position with a cause of action.

In another case, involving the Interior Department’s nonrecognition of an Indian tribe, Judge Posner rejected the notion that the political question doctrine barred jurisdiction.⁸³ While acknowledging that recognition of sovereigns is a classic political question, Posner held that this does not apply to Indian tribes, in which the imponderables of “the conduct of foreign affairs [and] judicial ignorance of those affairs” are not implicated.⁸⁴ This of course ignores the question of whether and to what extent Indian tribes are regarded as independent sovereigns with whom the United States maintains political relations, or rather simply concludes that they are not.⁸⁵

III. STANDING AS A DOCKET MANAGEMENT TOOL

Posner’s skepticism about Article III standing restrictions contrasts, at first glance, with his robust application of prudential standing rules and other subconstitutional limitations on federal jurisdiction. A close analysis shows they are motivated by common ideas. Posner essentially sees standing, viewed in its best light, as performing a function similar to the statutory amount-in-controversy requirement in diversity jurisdiction—preventing the inundation of the federal courts: “[T]he solidest grounds [to

⁷⁹ *Id.* at 1417–18.

⁸⁰ *Tucker*, 958 F2d at 1417–18. See also *United States Department of Commerce v Montana*, 503 US 442, 458 (1992) (“As our previous rejection of the political question doctrine in this context should make clear, the interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary.”).

⁸¹ *Tucker*, 958 F2d at 1418–19.

⁸² See *id.*

⁸³ *Miami Nation of Indians of Indiana, Inc v United States Department of the Interior*, 255 F3d 342, 347–48 (7th Cir 2001).

⁸⁴ *Id.* at 347.

⁸⁵ Yet Posner went on to cite a variety of analogies involving relations with foreign countries in the course of the opinion. *Id.* at 347–48.

justify standing limitations] are practical . . . to prevent the federal courts from being overwhelmed by cases.”⁸⁶ Standing in his view—which finds little support in Supreme Court jurisprudence—is essentially a flexible tool for the allocation of judicial resources, an overtheorized docket management device.⁸⁷ Thus, in several cases, he adopted a broad notion of Article III standing but ultimately found jurisdiction wanting as a matter of prudential standing.⁸⁸ Ironically, prudential standing limitations have an even more uncertain “provenance and legitimacy,” as it allows federal courts to, at their discretion, reject lawsuits properly within their constitutional jurisdiction and which Congress has instructed them to adjudicate.

One interesting corollary of this approach is that, while Posner took a critical approach to Article III standing, he was enthusiastic about the so-called “prudential standing” doctrine. This is a set of entirely judge-made rules that serve purposes similar to those of standing but might bar justiciability even when Article III limits do not strictly apply. The classic example is *jus tertii*, which prevents plaintiffs from suing based on a real injury to others that has an indirect effect on them. Posner embraced prudential standing and in several cases dismissed on these grounds even after taking a very relaxed approach to Article III standing issues.

This may seem odd, as prudential standing doctrine is even vaguer in form and purpose than Article III standing, which Posner himself described as “various”⁸⁹ and “protean and mutable.”⁹⁰ But this is why Posner accepted prudential standing—it can be “relaxed” or overlooked when (in the view of the court) it is useful for practical reasons, but also invoked to husband and prioritize judicial resources. Thus, prudential standing is what Judge Posner ultimately thought all standing doctrines should be—a discretionary judicial throttle on plaintiffs with potentially attenuated interests rather than a hard Article III limit.

Despite Posner’s liberal position on standing as a jurisdictional limit, he took a strict approach to statutory grants of federal jurisdiction over state court issues. In matters such as pendent

⁸⁶ *American Bottom Conservancy*, 650 F3d at 656.

⁸⁷ See *People Organized for Welfare & Employment Rights v Thompson*, 727 F2d 167, 172 (7th Cir 1984) (“If passionate commitment plus money for litigating were all that was necessary to open the doors of the federal courts, those courts, already overburdened with litigation of every description, might be overwhelmed.”).

⁸⁸ See, for example, text accompanying note 80.

⁸⁹ *MainStreet Organization of Realtors v Calumet City*, 505 F3d 742, 745 (7th Cir 2007).

⁹⁰ *Chao*, 433 F3d at 992, revd, *Hein*, 551 US 587 (2007).

jurisdiction,⁹¹ ancillary bankruptcy jurisdiction,⁹² settlements of federal question cases,⁹³ and jurisdiction over arbitral awards,⁹⁴ Posner's jurisprudence takes a relatively restrictive approach. But there is an underlying aspect unifying them: both strands of jurisdictional decisions seek to promote judicial economy by screening out private, state-law disputes involving unfamiliar and particular issues while reserving broad court power over federal, and often more interesting, issues.

Take, for example, Posner's approach to the domestic relations and probate exceptions to federal jurisdiction. These doctrines hold that issues involving marriage and divorce, and the probating of an estate, fall outside of the statutory grant of diversity jurisdiction. The traditional reasons for the exceptions resonate with those behind standing requirements—these were not the kind of matters heard by English courts of law and equity but rather in ecclesiastic courts. Indeed, some argue that this limitation has Article III dimensions. Judge Posner has expressed skepticism, rooted in academic criticism, at both the constitutional and “shoddy [] historical underpinnings.”⁹⁵ As with standing, Posner expressed disdain for purely historical or formalist accounts for a doctrine:

Even if the framers of the Judiciary Act of 1789 intended to deny to the federal courts jurisdiction over the sorts of cases that in England were heard in the ecclesiastical court, they presumably had some reason for doing this besides the name of the court. And the exception probably would not have persisted as long as it has *without a better reason* than that it may have been implicit in the first judiciary act or that the framers of Article III of the Constitution may have intended to limit the jurisdiction of the federal courts to the types of cases adjudicated in the English common law and chancery courts. Rigidly historicist interpretations of the Constitution have not been much in vogue for generations.⁹⁶

⁹¹ See, for example, *Dragan v Miller*, 679 F2d 712, 716 (7th Cir 1982) (“The interest in judicial economy, however, argues very strongly for confining this lawsuit to state court.”).

⁹² See, for example, *Chapman v Currie Motors, Inc*, 65 F3d 78, 82 (7th Cir 1995).

⁹³ See, for example, *McCall-Bey v Franzen*, 777 F2d 1178, 1187 (7th Cir 1985).

⁹⁴ See, for example, *Baravati v Josephthal, Lyon & Ross, Inc*, 28 F3d 704, 709 (7th Cir 1994).

⁹⁵ *Dragan*, 679 F2d at 713.

⁹⁶ *Id* at 714 (emphasis added).

For Posner, the original intent of Article III is not a good reason for continuing jurisdictional limitations. Nonetheless, Posner adopted a broad understanding of the scope of both exceptions, holding that they apply to both the statutory grants of diversity *and* federal question jurisdiction, a question that has long divided the federal courts of appeals.⁹⁷ He did so because he believed he has discovered “practical reasons” for the doctrine, which, as with standing, amount to considerations of “judicial economy.”⁹⁸

As with standing,⁹⁹ Posner's hostility to historical justifications may lead him to undervalue practical but poorly articulated reasons that inhere in the domestic relations exception doctrine. It is true that the colonies did not establish ecclesiastic courts, but this does not mean that the special handling of family matters lost its relevance in America. Colonies and states often continued to keep matters of divorce and probate out of the hands of ordinary common law or equitable courts, instead entrusting them either to specialized bodies or even to the legislature itself.¹⁰⁰ This might suggest that such questions of personal status involve peculiarities of local mores and judgments not well-suited to standard legal determination, let alone adjudication by a fairly aloof federal judge. This understanding of the doctrine gets one to largely the same practical result as Posner's docket management interpretation, but perhaps for a more substantial reason.

IV. A CRITIQUE OF POSNER'S PRACTICAL STANDING JURISPRUDENCE

Posner “pragmatic” justiciability jurisprudence broadly assails Article III limitations on justiciability as being unrooted in the Constitution and as being a formal doctrinal accretion that does not serve the policies it is often said to promote. In his view, standing doctrine was a twentieth-century development designed to limit litigation of rights and interests in the regulatory state, an attempt to limit public interest litigation in the straitjacket of Anglo-American common law. In short, this criticism sees standing as an ahistorical attempt to limit, through subject matter jurisdiction, the usefulness of new rights that do not resemble those that existed at common law.

⁹⁷ See *Jones v Brennan*, 465 F3d 304, 307 (7th Cir 2006).

⁹⁸ *Dragan*, 679 F2d at 714.

⁹⁹ See Part IV.

¹⁰⁰ See generally James E. Pfander and Emily K. Damrau, *A Non-contentious Account of Article III's Domestic Relations Exception*, 92 Notre Dame L Rev 117 (2016).

But Posner's fairly cursory rejection of standing as rooted in the text, structure, or meaning of the Constitution relies entirely on a few prominent scholarly works written from the late 1960s to early 1990s and heavily influenced by the critique of Professor Fletcher.¹⁰¹ More recent, and more detailed, historical work has found that while the name "standing" is indeed a twentieth-century label, the underlying restrictions on justiciability have an excellent pedigree.¹⁰² Thus Posner's practical critique of standing may ironically suffer from a dose of formalism: looking only for precedents and justification for standing doctrine in cases that use the particular label "standing." It also suggests some broader dangers of judicial reliance on academic scholarship, which is prone to changing trends and the emergence of new evidence, and which often fails to develop, and in which one may tend to pick friends, or at least familiar faces, out of the crowd of divided academic opinion.¹⁰³

Posner's skepticism of Article III standing's pedigree is even more problematic given his embrace of prudential standing as an alternative.¹⁰⁴ The prudential doctrine's legitimacy is even shakier. Unlike constitutional standing, there is no claim that prudential limits are a mandatory limit on the scope of judicial review. While Supreme Court cases rooting the injury-in-fact requirement in Article III's "Cases" and "Controversies" limits may be wrong, it is at least making sense to say that the Court cannot hear cases that Article III does not extend to. But prudential standing is explicitly rooted not in the Constitution but rather in a judicially developed set of doctrines, akin to abstention. This

¹⁰¹ Fletcher, 98 Yale L J at 290–91 (cited in note 59) (describing the standing inquiry as properly being about the merits, namely "whether the plaintiff has the right to enforce the particular legal duty in question").

¹⁰² See, for example, Robert J. Pushaw Jr, *Fortuity and the Article III "Case": A Critique of Fletcher's The Structure of Standing*, 65 Ala L Rev 289, 325 (2013) ("The Framers and Ratifiers, then, thought that an Article III 'Case' involved a violation of a plaintiff's federal legal rights that came about fortuitously—that is, involuntarily as a result of a chance occurrence beyond his control, rather than as part of a calculated effort to manufacture a lawsuit."); Anne Woolhandler and Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich L Rev 689, 691 (2004) (noting that, although "early American courts did not use the term 'standing' much," they "were well aware of the need for proper parties." They "regularly designated some areas of litigation as being under public control and others as being under private control").

¹⁰³ See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L Rev 195, 214 (1983) (quoting Judge Harold Leventhal as observing that using legislative history is like "looking over a crowd and picking out your friends").

¹⁰⁴ See Part III.

raises the serious criticism to which abstention doctrines have been subject—what authority do federal courts have to refuse to hear cases that the Constitution permits them to hear and that Congress by statute has put within their jurisdiction? The language of the relevant jurisdictional statutes is mandatory (“shall”), not precatory. Moreover, the traditional justifications for prudential jurisdictional dismissals invoke hoary doctrines like equitable discretion, which allowed chancellors to deny relief when the public interest demanded it. This would not square well with Posner’s “pragmatic” approach. But that leaves prudential standing without any anchor in positive law. The considerations of judicial economy Posner adduces are within the purview of Congress in allocating jurisdiction to and among the courts. Congress could have denied jurisdiction in those cases in which the courts might think it imprudent but did not.

Moreover, dismissals on standing grounds are themselves costly. Because standing, in the conventional view, goes to the Article III jurisdiction of a court, it can and must be raised at any time in the litigation. Thus, a dismissal on standing grounds can occur even after substantial proceedings on the merits. This is justified as a doctrinal matter because, if it emerges that the court has no jurisdiction, it simply cannot proceed regardless of efficiency considerations. Yet in Posner’s pragmatic standing doctrine, a case can still be dismissed for “prudential” reasons at any time¹⁰⁵—but such dismissals cannot be justified by an absolute lack of jurisdiction to hear the case. More generally, prudential standing based on practical docket management considerations makes an already vague and unpredictable doctrine even more contingent.

Posner’s rendering of a constitutional doctrine into pragmatic terms demonstrates the dangers of such pragmatism—missing institutional values imbedded but not always articulated in doctrine. Standing is a doctrine that developed over time, reflecting a common law view of the judicial function. As with many common law doctrines, it may serve pragmatic purposes that none of the courts that incrementally contributed to it fully realized themselves. Indeed, some recent scholars have found that the apparent formalism of standing doctrine nonetheless can be significantly utilitarian. Professor Maxwell Stearns has shown that

¹⁰⁵ See *MainStreet Organization of Realtors v Calumet City*, 505 F3d 742, 747–48 (7th Cir 2007).

standing can prevent the manipulation of outcomes by agenda-setters, such as strategic litigants, in situations of intransitive judicial outcomes, which are likely to be quite common on collegial courts.¹⁰⁶ My earlier work has shown that in cases in which a unitary government action will affect many similarly situated rights-holders, standing can prevent inefficient valuations among possible plaintiffs, who are in effect highly numerous co-owners of a right.¹⁰⁷ Whether these justifications can account for most standing decisions, or the Supreme Court's meandering standing decisions, is unclear. But Posner failed to engage with latter scholarship that responds to the critique of standing in the literature he appears most familiar with.

Posner's approach also neglects standing's role as a limitation on judicial power rather than a mere docket management tool. Standing is, after all, part of Article III's *limits* on judicial power, designed to give broader scope for political action without judicial interference. One of the major justifications for justiciability restrictions in modern Supreme Court jurisprudence sees them as part of the balance of power between the branches. If courts are not restricted in their occasions for pronouncing on matters of public law by the exogenous circumstances of a particular kind of thing happening to a plaintiff, they become more like a legislature, which can exercise its power whenever it deems proper. In this view, the formalism or artificiality of standing restrictions are not a bug, but a feature. Moreover, as Justice Scalia has emphasized, broad standing to challenge government action by similarly affected citizens threatens to bypass the Executive's power to "Take Care" that the laws are faithfully executed. Posner does not engage significantly with these arguments. Moreover, by transforming standing into an almost entirely prudential doctrine, he transforms it from a limitation on the power of courts into just a further degree of power and discretion.

¹⁰⁶ Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal L Rev 1309, 1405–12 (1995); Maxell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U Pa L Rev 309, 330 (1995).

¹⁰⁷ Kontorovich, 93 Va L Rev at 1667 (cited in note 6) ("Standing allows courts to bypass the problems of high transaction costs and strategic behavior by attempting to replicate the outcome of the bargaining that would have taken place in a low transaction-cost environment.").