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A Jurisprudence of Doubt: Generalized Grievances As a Limitation to Federal Court Access

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COMMENTS

A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access

Liberty finds no refuge in a jurisprudence of doubt.[1]

I. INTRODUCTION

It is difficult to conceive of a constitutional doctrine more riddled with confusion, more unanimously savaged by commentator and court, more important and yet more neglected than the access doctrines which encompass standing jurisprudence. Favorable commentary regarding the federal concept of standing is elusive, and those looking beyond commentary and seeking some coherent understanding may find the doctrine as perplexing as the sphinx's riddle. As a result, it is not surprising that virtually every article attempting to explain or criticize the recent explosion in standing jurisprudence begins with obligatory footnotes citing both scholars'[2] and the Supreme Court's own criticism of standing.[3]

The confusion surrounding standing jurisprudence does not diminish the central importance it has in federal court litigation.[4] At its core, standing is access, and "access decisions influence in a major way our constitutional structure."[5] In public law areas, such as environmental protection, standing can mean the difference between court

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1. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter).

2. *See, e.g.*, Abram Chayes, *The Supreme Court 1981 Term-Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22-23 (1982) (arguing that standing amounts to a "ritual recitation" before the court "chooses up sides and decides the case"); William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 290 (1988) ("[T]he Supreme Court has failed to articulate an intellectual framework that can satisfactorily explain the results in cases that are already decided, or that can be usefully employed to shape legal analysis in cases yet to come."); Gene R. Nichol, *Rethinking Standing*, 72 CAL L. REV. 68, 68 (1984) ("In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical.").

3. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court.").

4. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitations of federal-court jurisdiction to actual cases or controversies.").

5. Nichol, *supra* note 2, at 69.

action and the status quo.[6] Although the importance of standing is most easily seen in public law areas,[7] where courts are asked to enforce rights against the government, standing issues are not limited to such situations.[8] Moreover, unfamiliarity with standing jurisprudence inflicts costly and inefficient litigation expenditures. Litigators unfamiliar with the law of standing may win at trial or even at the appellate level only to find that a higher court refuses to hear the merits. Similarly, defense attorneys unfamiliar with standing may waste significant resources or lose a case on the merits when a standing motion early in the litigation would have best served their clients' interests.

Generalized grievances are a subcomponent of standing doctrine and encompass a set of doctrinal limitations on federal court access. These limitations preclude plaintiffs from asserting a generalized injury, often said to be suffered "by all or a large class of citizens."[9] Generalized grievances endure all the difficulties of general standing jurisprudence but less of the critical commentary.[10] This dearth in commentary may be due, in part, to the limited number of Supreme Court cases discussing generalized grievances.[11] Yet in recent years

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6. *Compare* Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (denying standing to environmental plaintiffs challenging federal environmental regulations) *with* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 81 (1978) (finding standing for environmental group challenging liability limitations for nuclear accidents).

7. *See, e.g., Lujan*, 504 U.S. at 563 (denying standing to environmental group who challenged validity of federal environmental regulations); *Valley Forge Christian College*, 454 U.S. at 470 (holding that public interest group did not have standing to challenge on Establishment Clause grounds the transfer of federal property to a religious school of higher education); *Duke Power Co.* 438 U.S. at 81 (finding that individuals who live near a nuclear power plant have standing to challenge federal limitations on liability for nuclear accidents). For a discussion of public law litigation, see Chayes, *supra* note 2, at 4-5.

8. *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149, 166 (1990) (denying standing to a death row inmate challenging state court's denial of a mandatory appellate review for a fellow death row inmate); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 107 (2d ed. 1988) ("Standing questions arise principally in challenges to government conduct, where litigants often lack the obvious stake present in most lawsuits between private parties . . . ."). For a detailed analysis and overview of a nonpublic law application of standing, see Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995) (outlining and developing a synthesis for standing of state governments in federal court).

9. Warth v. Seldin, 422 U.S. 490, 499 (1975).

10. Throughout this Comment reference will be made to generalized grievances both as a standing limitation and as a descriptive term of art. When a claim or category of cases is described as generalized it is implicitly a claim which fails to meet the standing requirements because it falls under generalized grievance limitations.

11. Explicit reference to generalized grievance has occurred seventeen times in the Court's history. *See* United States v. Hays, 115 S. Ct. 2431, 2435 (1995); *Lujan*, 504 U.S. at 575; *Whitmore*, 495 U.S. at 177 n.6 (Marshall, J., dissenting); Asarco Inc. v. Kadish, 490 U.S. 605, 616 (1989); Public Citizen v. United States Department of Justice, 491 U.S. 440, 449 (1989); County of Oneida, New York v. Oneida Indian Nation, 470 U.S. 226, 269 (1985)

generalized grievances have taken on a new and important role. Of the seventeen references to generalized grievances in the Court's history, almost half have come after 1980.[12] More importantly, the concept of generalized grievances has been used to limit court access in such hotly contested areas as environmental litigation,[13] racial equality,[14] and First Amendment Establishment Clause jurisprudence.[15]

The continued vitality of this access limitation was recently reaffirmed in *United States v. Hays*[16] and continues to play an important role in civil litigation, particularly where public interest groups seek to enforce group-based rights against the government. Moreover, as this Comment will attempt to demonstrate, generalized grievances often have the effect of rendering constitutional provisions beyond the scope of judicial review.[17] Such an effect is significant because it leaves both constitutional interpretation and enforcement in executive and legislative hands, a result which is unique to generalized grievances. Generalized grievances are emblematic of the Court's new found willingness to defer to the other branches of government in constitutional interpretation and enforcement.

Part II of this Comment outlines the Supreme Court's basic standing analysis, including the "constitutional minimum"[18] of in-

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(Stevens, J., dissenting); Allen v. Wright, 468 U.S. 737, 751 (1984); Secretary of State v. Joseph H. Monson Co., 467 U.S. 947, 956 n.5 (1984); *Valley Forge Christian College*, 454 U.S. at 475; Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 120 (1979) (Rehnquist, J., dissenting); *Duke Power Co.*, 438 U.S. at 80; Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 (1977); *Warth*, 422 U.S. at 499; Schlesinger v. Reservist Comm. to Stop the War, 418 U.S. 208, 217 (1974); United States v. Richardson, 418 U.S. 166, 175-76 (1974); Association of Data Processing, Inc. v. Camp, 397 U.S. 159, 171 (1970) (Brennan, J., concurring and dissenting); Flast v. Cohen, 392 U.S. 83, 106 (1968). Search of WESTLAW, SCT database (Oct. 30, 1995).

12. *See supra* note 11 (listing the cases in reverse chronological order).

13. *See infra notes* 122-33 and accompanying text (discussing *Lujan* and the impact the Court's generalized grievance rationale has on environmental standing); *see also* Randall S. Abate & Michael J. Meyers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury in Fact after Lujan v. Defenders of Wildlife*, 12 UCLA J. ENVTL. L. & POL'Y 345 (1994) (discussing alternative standing rationales after the Supreme Court's landmark environmental standing decision in *Lujan*); Roger Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, C127 ALI-ABA 1 (1995) (discussing the maze of standing requirements which must be overcome in order to gain representational and individual standing in environmental litigation).

14. *See Hays*, 115 S. Ct. at 2431 (voting rights); *Allen*, 468 U.S. at 737 (racial segregation).

15. *See Valley Forge*, 454 U.S. at 464; *Flast*, 392 U.S. at 83; *see also* Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 495-503 (1995) (discussing standing and the Establishment Clause).

16. 115 S. Ct. 2431 (1995).

17. *See infra* notes 182-91 and accompanying text.

18. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

jury,[19] causation,[20] and redressability.[21] Over the past two decades these components, rooted in Article III of the Constitution, have become increasingly important and are now an indispensable requirement of federal court access.[22] In addition, this section will identify two prudential limitations which, while not constitutionally required, still constitute self-imposed restraints on the authority of the judiciary to hear cases and render opinions.[23]

Part III introduces what has traditionally been considered a third prudential limitation and thus a bar to federal court access—generalized grievances. This section analyzes the Supreme Court's conflicting treatment of generalized grievances. Emphasis is placed on the 1992 decision *Lujan v. Defenders of Wildlife*,[24] which several commentators believe has removed generalized grievances from a prudential limitation and placed it in the realm of a constitutional requirement.[25] This section concludes by surveying federal circuit court cases after *Lujan* in order to ascertain its effect in the lower courts.[26]

Part IV surveys the Supreme Court's generalized grievance cases in an effort to define, explain, and critique this obstacle to federal court access.[27] As a corollary to this process, an attempt will be made to clarify the confusion surrounding the prudential/constitutional distinction as outlined in Part III. This analysis divides the Supreme Court's treatment of generalized grievances into five discrete fact patterns or theories. These include: (1) generalized grievances as an injury suffered by a large group; (2) generalized grievances pertaining to a constitutional form of governmental process; (3) racial stigmatization as a generalized grievance; (4) generalized grievances as part of the particularity requirement of Article III; and (5) generalized grievances as a form of judicial restraint. This section ultimately concludes that, as traditionally defined, generalized grievances have always been a constitutional limitation rooted in Article III. Furthermore, as prudentially understood, generalized grievances are merely reformulations of either the political questions doctrine or the judicial philosophy of self-restraint. As a result, this Comment advocates an

19. *See infra* notes 56-76 and accompanying text.

20. *See infra* notes 77-83 and accompanying text.

21. *See infra* notes 84-90 and accompanying text.

22. Since 1945 standing has been mentioned in terms of Article III 1,975 times in the federal courts. Search of WESTLAW, Allfeds database (November 10, 1995).

23. *See infra* notes 91-108 and accompanying text.

24. 504 U.S. 555 (1992).

25. *See infra* notes 109-40 and accompanying text (discussing the difference between judicially created prudential limitations and Art. III constitutional requirements).

26. *See infra* notes 141-49 and accompanying text.

27. *See infra* notes 151-311 and accompanying text.

abandonment of generalized grievances as prudentially defined and a reformulation of generalized grievances which more closely resembles the traditional Article III requirement of particularized injury.

II. STANDING OVERVIEW

There are three basic constitutional requirements of standing—injury, causation and redressability. Simply stated they require: (1) an injury-in-fact, by which the Court means "a legally protected interest that is [both] 'concrete and particularized *and* actual or imminent, not conjectural or hypothetical' ";[28] (2) "a causal relationship between the injury and the challenged conduct"[29] such that the injury can be "fairly traced to the challenged action of the defendant";[30] and (3) "a likelihood that the injury will be redressed by a favorable decision."[31] Despite their relative clarity, these requirements hide many of the complexities and pitfalls of standing litigation.[32]

The constitutional foundation of these requirements is theoretically rooted in Article III, which requires federal courts to adjudicate only "Cases"[33] or "Controversies."[34] Upon this foundation, a party who lacks a redressable injury caused by the defendant fails to bring forth a "case or controversy." As such, the court lacks jurisdiction to hear the case and must dismiss the action.[35]

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28. Northeastern Fla. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2302 (1993) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)) (emphasis added; citations, footnote and internal quotations omitted).

29. *Id.* (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976))

30. *Simon*, 426 U.S. at 41.

31. *Id.*

32. TRIBE, *supra* note 8, at 107. ("Although the Supreme Court's view of standing has evolved considerably over recent years and currently presents substantial confusion at a number of points, the doctrinal categories that must be examined are clear.").

33. U.S. CONST. art. III § 2.

34. *Id.* Not all commentators agree that standing is required by Article III. Most have argued that standing cannot be historically justified. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 462-67 (1965) (arguing that injury is not a prerequisite to judicial standing); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Right?*, 78 YALE L.J. 816 *passim* (1969) (exploring the Framers perceptions of Article III and the Court's power); Cass Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163, 168-79 (1992) (same); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (same); *see also* Gene R. Nichol, *Justice Scalia, Standing and Public Law Litigation*, 42 DUKE L.J. 1141, 1150 (1993) (noting the Framers' lack of substantive discussion regarding the requirement of case or controversy).

35. The plaintiff bears the burden of establishing sufficient facts in the pleadings to meet standing requirements. United States v. Hays, 115 S. Ct. 2431, 2435 (1995) ("[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is the proper party to invoke judicial resolution of the dis-

In determining whether standing conditions are met, the Court focuses on the party bringing suit, not on the merits of the party's claim.[36] The central issue is whether *this* party can sue. As Justice Scalia has wryly noted, the question is "what's it to you."[37] This view of standing, as unrelated to the merits, has been criticized not only for being less than sincere, but also for developing an analysis of standing unrelated to the cause of action.[38] Nevertheless, an emphasis on the party rather than the cause of action is undoubtedly the black letter law in standing jurisprudence.

A. Justification for Standing

Whatever its constitutional basis, one thing is clear: Standing is a modern development of constitutional law that has exploded over the last quarter century.[39] The first reference to standing did not occur until 1944 in *Stark v. Wickard*.[40] After lying dormant for two decades, standing gained new found vigor as the Supreme Court became inundated with numerous public law challenges requiring constitutional adjudication. As the Warren Court began to recognize new substantive rights involving privacy, equal protection, and due process, the Court searched for a concept to help inform its development of public law.[41] Later, as the Court's ideology began to shift, the doctrine of standing was narrowed and new requirements were added in an effort to limit federal court access.[42] Standing was just such an animal. This bifurcated attempt to initially open and then limit judicial access has continued to be a rationale, albeit an implicit one, for standing jurisprudence.

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pute.") (internal quotations and citations omitted). Because standing is a jurisdictional question, it may be raised at any time either by the parties or by the court *sua sponte*. *Id.*

36. Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Standing in no way depends on the merits of the plaintiff's contention . . . .").

37. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). It is important to distinguish between looking at the claim, which is a necessary part of any standing analysis, and reaching the merits. Only the latter is barred under traditional standing principles.

38. Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 51-62.

39. *See* Fletcher, *supra* note 2, at 224 (noting that "current standing law is a relatively recent creation"); Sunstein, *supra* note 34, at 169 ("[S]tanding, as a distinct body of constitutional law is an extraordinarily recent phenomenon.").

40. 321 U.S. 288, 304 (1944); *see* Sunstein, *supra* note 34, at 169.

41. Nichol, *Rethinking Standing*, *supra* note 2, at 73-74.

42. *Id.* at 75. While the Supreme Court's docket has remained static at around 150 cases a year, circuit courts have become more and more active, leading to the conclusion that circuit courts are the final arbiter of many constitutional and statutory issues. LAWRENCE BAUM, THE SUPREME COURT 71-109 (3d ed. 1989).

In addition to conserving judicial resources, the Court and commentators have frequently identified other justifications and rationales for standing. None is more frequently identified or criticized than the doctrine of separation of powers. Justice O'Connor succinctly identified separation of powers as a rationale in *Allen v. Wright*.[43] A year earlier, then-Judge Antonin Scalia justified separation of powers as the central rationale for standing. According to him, "standing is a crucial and inseparable element of [separation of powers] whose disregard will inevitably produce, as it has in the past few decades—an over judicialization of the process of self-governance."[44]

For Justice Scalia and the Court, the requirement of a case or controversy establishes parameters within which the Court is to make access decisions. Going beyond these parameters would infringe on both the executive and legislative branches and would allow nine unelected individuals to issue advisory opinions and make public policy decisions more appropriately addressed by the representative branches of government.[45] Nearly ten years later, in *Lujan v. Defenders of Wildlife*,[46] Justice Scalia would express those same views in a majority opinion and conclude that "the core component of standing is an essential and unchanging part of the case or controversy requirement of Article III."[47]

Another rationale for standing, closely related to principles of separation of powers, is federalism. The same concern for an appropriate limitation on federal court power exists when the Court reviews decisions made by state executive or legislative branches.[48] Here the concern is not with the preservation of coequal branches of govern-

43. 468 U.S. 737, 761 (1984) ("[T]he idea of separation of powers counsels against recognizing standing in a case brought . . . to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. . . . We could not recognize respondents' standing in this case without running afoul of that structural principle.").

44. Scalia, *supra* note 37, at 881.

45. *Allen*, 468 U.S. at 759-61.

46. 504 U.S. 555 (1992).

47. *Id.* at 560. Separation of powers as the underlying rationale has not gone without criticism. *See* Gene R. Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 113 U. PENN. L. REV. 635, 636-50 (1985); *see also* Nichol, *supra* note 2, at 100 (arguing that "separation of powers problems can be as readily presented by claims in which particularized injury is clear"); Dana S. Treister, Comment, *Standing To Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689, 701-06 (1994) (arguing that separation of powers is not served when the Court refuses to address appropriate constitutional claims).

48. State courts are not subject to the federal rules of standing. Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

ment, but with the respect of local and state decisions in a federal system.[49]

The adverse nature of American court proceedings led to the early recognition of yet another standing rationale. The adversarial process of American courts made standing necessary to "assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."[50] Under this rationale, by requiring the plaintiff to show redressable concrete injuries caused by the defendant, a court is able to reach sound decisions with all of the arguments presented and with faith that the issues were addressed in a clear and convincing manner by both sides.[51] In short, standing "tends to assure that the legal questions presented by the Court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[52]

A more cynical rationale, and an often unstated but implicit belief of many commentators, is that standing is a tool used to abdicate judicial responsibility. Standing is a means of avoiding issues which, if reached on the merits, would create public resentment, confused logic, or significant amounts of additional litigation. At the same time, many argue that when the Court decides it wants to hear the substantive issues of a case it will ignore standing, create new requirements to standing jurisprudence, or manipulate the underlying requirements to actually reach the merits in an unprincipled fashion.[53] This use of

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49. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 113 (1983) (standing denied in federal suit against local police); Rizzo v. Goode, 423 U.S. 362, 366 (1976) (standing denied because of "unwarranted intrusion by the federal judiciary into the discretionary authority committed to state and local law to perform their official functions"); O'Shea v. Littleton, 414 U.S. 488, 493-99 (1974) (denying standing to plaintiffs seeking to challenge discretionary enforcement of state criminal laws); *see also* Nichol, *supra* note 2, at 99 (arguing that *Rizzo* and *O'Shea* justified denials of standing because of an "unwarranted intrusion by the federal judiciary into the discretionary authority committed to local and state authorities") (internal quotations and citation omitted).

50. Baker v. Carr, 369 U.S. 186, 204 (1962).

51. *See* Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need To Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1069 (1994) ("By requiring a vigorous adversary contest, standing serves the purposes of assuring a clear presentation of the issues so that a court can make an informed decision on the merits and produce logical precedent.").

52. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

53. *See supra* notes 228-43 and accompanying text (identifying *Powers v. Ohio*, 410 U.S. 614, 616-19 (1973) as an example of the Court's result-oriented standing analysis).

standing, as both a sword and a shield, has not been lost on commentators[54] and Supreme Court dissenters.[55]

B. *Structure of Standing*

1. Article III Requirements

a. Injury-in-fact

Probably the most important component of the constitutional standing regime is the requirement of an injury-in-fact. In *Association of Data Processing Services Organizations Inc., v. Camp,*[56] the Court first recognized the need for some baseline injury component sufficient to satisfy Article III. As initially conceived, this requirement sought to replace the esoteric "legal interest" test with a more reasoned analysis which did not focus on the merits of the dispute.[57]

Over the years, the injury-in-fact requirement has grown in complexity such that now an injury meets Article III requirements only when the plaintiff alleges an invasion of a "legally protected interest"[58] which is "distinct and palpable"[59] and whose occurrence is "ac-

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54. *See, e.g.,* Nichol, *supra* note 2, at 90 (arguing that the Court's refusal to find standing for a woman seeking child support in *Linda R.S. v. Richard D.* reflected the Court's lack of empathy rather than any sound analysis of the standing doctrine).

55. *See, e.g., Valley Forge,* 454 U.S. at 490 (Brennan, J., dissenting) (arguing that "the Court disregards its constitutional responsibility when, by failing to acknowledge the protection afforded by the Constitution, it uses 'standing to slam the courthouse door against plaintiffs who are entitled to full consideration on their claims on the merits' ") (quoting Barlow v. Collins, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in result and dissenting)); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 95 (1978) (Rehnquist, J., dissenting) (arguing that the Court reached the merits of dispute, despite a lack of standing, in order to "remove the doubt which has been cast over this important statute").

56. 397 U.S. 150 (1970); *see* Fletcher, *supra* note 2, at 230 (noting that *Data Processing* is the intellectual foundation of modern injury in fact analysis).

57. *See* Sierra Club v. Morton, 405 U.S. 727, 733 (1972); Nichol, *Rethinking Standing, supra* note 2, at 74 n.36.

58. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). It is unclear what this requirement adds to the standing analysis. It does not appear until the Court's 1992 decision in *Lujan.* If "legally protected interest" requires an analysis of the underlying claim, it is at odds with a standing analysis unrelated to the merits. Furthermore, inquiry into a "legally protected interest" cannot be understood as requiring that the underlying legally protected interest be the plaintiff's since that would contradict third party standing jurisprudence. The only case expressly addressing this language, Adarand Contractors, Inc. v. Pena, 115 S. Ct. 2097 (1995), which held that the plaintiff's "claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges invasion of a legally protected interest." *Id.* at 2104. Until the Court more substantially addresses the legally protected interest component, it is speculative and unproductive to attempt to divine its meaning.

59. Warth v. Seldin, 422 U.S. 490, 501 (1975). The terms distinct and palpable were later replaced with the requirement that the injuries be concrete and particularized. *Lujan,*

tual or imminent" not merely "conjectural or hypothetical."[60] The requirement of an actual or imminent injury was first recognized in *O'Shea v. Littleton*.[61] In *O'Shea*, the Court denied standing to a class of plaintiffs seeking injunctive relief from allegedly discriminatory enforcement of criminal laws.[62] Although some of the plaintiffs had suffered past discriminatory state action, there was no showing they would suffer the injuries again. While past wrongs were probative of "whether there [was] a real and immediate threat of repeated injury,"[63] the Court held that plaintiffs have standing only when their injuries are "sufficiently real and immediate to show an existing controversy."[64]

In *Los Angeles v. Lyons*,[65] the Court solidified the imminent injury requirement for plaintiffs seeking declaratory or injunctive relief.[66] At issue in *Lyons* was the use of choke holds by members of the Los Angeles Police Department.[67] In denying Lyons standing to sue, the Court held that "[a]bsent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles."[68] Finding it unlikely Ly-

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504 U.S. at 560. The change in usage seems to be more concerned with diction than with anything of substantive importance.

60. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983)).

61. 414 U.S. 488 (1974).

62. *Id.* at 496.

63. *Id.*

64. *Id.*

65. 461 U.S. 95 (1983).

66. *Id.* at 105. An imminent injury would not be required for restitution claims because the claimant is not seeking declaratory or injunctive relief.

67. *Id.* at 98. Lyons sought to enjoin the police conduct and argued that it was the policy of the police department to engage in unconstitutional choke holds in its daily law enforcement capacity. *Id.* In dismissing the complaint, Justice White, writing for a five-member majority, held that "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the choke hold by police officers." *Id.* at 105.

68. *Id.* at 111. Lyons also alleged that he had personally suffered from institution of the choke hold. *Id.* at 105. He was not, however, barred from seeking compensation for such injuries. *Id.* The fact that Lyons suffered the injuries did not allow him to seek injunctive relief. According to the Court:

> That Lyons may have been illegally choked by police . . . while presumably affording Lyons' standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.

Id.

ons would be subject to a choke hold again, the Court dismissed the complaint.[69]

The requirement of an "actual" injury is subtly different from the requirement of imminence, a point which is illustrated by the death penalty case *Whitmore v. Arkansas.*[70] In *Whitmore* the Court sought to limit redress of injuries it considered "speculative."[71] The Court rejected the intervention of Whitmore, a death row inmate, on behalf of fellow inmate, Ronald Simmons, who had waived his right to appellate review.[72] Arguing that the Eighth Amendment required mandatory appellate review, Whitmore alleged that he was personally injured because Simmons' crime would not be added to Arkansas' comparative database.[73] The Court, in an opinion by Justice Rehnquist, characterized such an injury as "too speculative to invoke the jurisdiction of an Art. III court."[74] Because Whitmore could not demonstrate that he would be retried if he was allowed to intervene, "it [was] nothing more than conjecture that the addition of Simmons' crimes to a comparative review 'data base' would lead the Supreme Court of Arkansas to set aside"[75] Whitmore's death sentence.[76] The distinction between *Whitmore* and *Lyons,* though subtle, is important. In *Lyons* the problem was not the injury (an unconstitutional choke hold) but whether the plaintiff would suffer the injury again. In *Whitmore*, by contrast, the problem was not only whether the plaintiff would suffer an injury, but whether the injury (paucity of criminal database) was an injury at all. These two interrelated requirements of actual or imminent injury make up a distinct subcomponent of injury-in-fact analysis.

b. Causation

The second component of Article III standing is the principle of causation. *Simon v. Eastern Kentucky Welfare Rights Organization*[77] established the modern causation standard which requires that an in-

69. *Id.* at 113.

70. 495 U.S. 149 (1990).

71. *Id.* at 157.

72. *Id.* at 161-66.

73. Such a database was used by the state supreme court to compare the heinousness of a defendant's crime. *Id.* at 156-57.

74. *Id.* at 157.

75. *Id.*

76. *Id.* Whitmore's failure to allege an actual injury made his "[a]llegations of possible future injury" fatally flawed because a "threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* at 158 (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)).

77. 426 U.S. 26 (1976).

jury-in-fact "fairly can be traced to the challenged action of the defendant, and not . . . result[ ] from the independent action of some third party not before the court."[78] In *Simon* indigent individuals and representative groups brought suit against the Secretary of the Treasury and the Commissioner of Internal Revenue.[79] The plaintiffs took issue with revenue rulings allowing favorable tax treatment to nonprofit hospitals who only offered emergency-room services for the poor.[80] The Court dismissed the action.[81] Although the plaintiffs suffered a concrete injury (failure to get complete hospital services), it was "purely speculative whether the denials of service . . . fairly can be traced" to the government's grant of favorable tax treatment.[82] Since it could not be said that the favorable tax treatment caused the hospital to deny full services for indigent patients, causation was not met.[83]

c. Redressability

The third and final component of Article III standing, and one related to injury-in-fact[84] and causation,[85] is redressability. The Court first identified redressability as a standing component in *Linda R.S. v. Richard D.*[86] and analytically distinguished it from the causation principle in *Allen v. Wright.*[87] Redressability requires that it be " 'likely' as opposed to merely 'speculative' that the injury will be 'redressed by a

78. *Id.* at 41-42.
79. *Id.* at 28.
80. *Id.*
81. *Id.* at 46.
82. *Id.* at 42-43.
83. For another example of the Court's dismissal for lack of causation, see Allen v. Wright, 468 U.S. 737, 756-57 (1984) (denying standing because there was no evidence that tax benefits caused segregative effect in schools).
84. The concept of redressability is linked to the injury-in-fact component because defining an injury a particular way determines whether it is redressable. Take, for example, an affirmative action case in which the plaintiff alleges that a racial set-aside for contracts violates the equal protection clause. If the Court chooses to define the injury in terms of the ability to secure a government contract, striking down the set-aside may not ensure that the plaintiff will receive the contract. The action is therefore not redressable. On the other hand, if the Court defines the injury in terms of the ability to compete equally for a government contract, striking down the set-aside will redress the plaintiff's injury. *See* General Contractors v. Jacksonville, 113 S. Ct. 2297, 2303 (1993).
85. "The 'fairly traceable' and 'redressability' components of the constitutional standing inquiry were initially articulated by th[e] Court as 'two facets of a single causation requirement.' " *Allen*, 468 U.S. at 753 n.19 (citing CHARLES WRIGHT, LAW OF FEDERAL COURTS § 13, 68 n.43 (4th ed. 1983)). However, "[t]o the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." *Id.*
86. 410 U.S. 614, 616-19 (1973).
87. *See* 468 U.S. at 753.

favorable decision' "[88] of the Court.[89] The distinction between redressability and causation is a subtle one, but essentially focuses on the injury and its causal connection to either the defendant's conduct or the requested remedy.

Redressability, like causation, reflects efficiency as well as separation of powers concerns because it discourages advisory opinions and restrains courts from adjudicating matters when a favorable decision will not operate to make the petitioning party whole. In conformity with the adversarial process, the need for concrete factual issues rather than an amorphous "debating society"[90] is served by a standing analysis focused on the practical and immediate impact of its decisions.

2. Prudential Limitations

Unlike injury, causation, and redressability, prudential limitations are not constitutionally required. Instead, prudential limitations are an aspect of "judicial self-government"[91] created so a court will "not be called upon to decide abstract questions of wide public significance."[92] These limitations are essentially "rules of self-restraint founded upon the recognition that the political branches of government are generally better suited to resolving disputes involving matters of broad public significance."[93] Since these policy reasons are quite similar to the doctrine of separation of powers and reflect many of the same constitutional values associated with the "case and contro-

88. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

89. The application of redressablity is illustrated by *Linda R.S.*, 410 U.S. at (1975), which involved nonpayment of child support by a father of an illegitimate child. Texas, which jailed fathers of legitimate children for failure to pay child support, did not apply similar coercive measures to the fathers of illegitimate children. *Id.* at 615-16. The Court failed to reach the merits of the mother's equal protection claim. Since the requested relief would "result only in the jailing" of the father, it was "speculative" as to whether the mother would get the support payments she sought. *Id.* at 618. She therefore lacked standing to sue. *Id.* at 619. For additional applications of the redressability component, see *Lujan*, 504 U.S. at 557-68 (plurality opinion) (plaintiffs failed to allege redressable injury because it was unclear whether Secretary of Interior could bar other governmental agencies from funding environmentally destructive foreign projects); Warth v. Seldin, 422 U.S. 490, 505-08 (1975) (standing denied to various individuals and groups who alleged unconstitutional exclusionary zoning because there was no evidence that the removal of the zoning ordinances "would benefit petitioners").

90. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

91. *Lujan*, 504 U.S. at 560.

92. *Warth*, 422 U.S. at 500.

93. Apache Bends Apts. v. United States through IRS, 987 F.2d 1174, 1176 (5th Cir. 1993).

versy" requirement, the Court "has not always been clear" whether it was undertaking a prudential or constitutional analysis of standing.[94]

Despite the similarities between prudential and constitutional limitations, there are two distinct prudential limitations which, in recent years, have developed a substantial body of Supreme Court precedent. These are the general limitation on third party standing and the prudential limitation called zone of interest. Each is court-imposed and may be ignored if Congress clearly expresses its intent to do so.[95]

a. Third Party Standing

As a general rule, parties may not assert the constitutional rights of third parties.[96] This requirement is consistent with a standing doctrine concerned with maintaining an adversarial process where the parties have a significant stake in the outcome.[97] Furthermore, it reflects concerns about "the adjudication of rights which those not before the Court may not wish to assert"[98] because, when recognized, third party standing allows the vicarious assertion of individual rights.

Despite a general antipathy toward third party standing, the Court has developed a three-part exception.[99] Under this exception, a party may assert the rights of a third party if: (1) the litigant has "suffered an injury in fact thus giving him or her 'a sufficiently concrete

94. *See Valley Forge Christian College*, 454 U.S. at 471 ("[I]t has not always been clear in the opinions of this Court whether particular features of the 'standing' requirement have been required by Article III *ex propio vigore*, or whether they are requirements that the court has erected and which were not compelled by the language of the Constitution.").

95. *Warth*, 422 U.S. at 501 ("[C]ongress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

96. Powers v. Ohio, 499 U.S. 400, 410 (1991); *see generally*, Henry D. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (analyzing the doctrine of third party standing).

97. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 82 (1994).

98. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 80 (1978).

99. In addition to this general three part exception, the Court has recognized a "substantial overbreadth" exception which is unique to overly broad statutes which infringe on First Amendment free speech rights. WILLIAM B. LOCKHART *et al.* CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS 753 (7th ed. 1991); *see, e.g.*, Osborne v. Ohio, 495 U.S. 103, 122 (1990) (upholding conviction against substantial overbreadth challenge); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985) (upholding moral nuisance statute despite overbreadth challenge); New York v. Ferber, 458 U.S. 747, 774 (1983) (upholding child pornography statute notwithstanding overbreadth challenge); *see generally*, TRIBE, *supra* note 8, at 1022-39 (outlining and critiquing the substantial overbreadth doctrine); Lawrence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541 (1985) (same); Henry D. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (same); Martin Redish, *The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1056-69 (1983) (same).

interest' in the outcome of the issue in dispute";[100] (2) there is "some hindrance to the third party's ability to protect his or her own interest";[101] and (3) the litigant "has a close relationship to the third party."[102] In addition to meeting these three requirements, the litigating party must also meet the additional constitutional requirements of causation and redressability since Article III is neither waiveable nor mutable.[103]

b. Zone of Interest

A second prudential limitation, related to the considerations of third party standing, is the zone of interest requirement.[104] This limitation was first recognized in *Association of Data Processing Service Organizations, Inc. v. Camp*.[105] According to the Court, a plaintiff has standing "if the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[106] This requirement is justifiable since only plaintiffs who are the intended beneficiaries of a statute or administrative regulation should be able to sue. This requirement also ensures the adverseness of the issues presented to the court.[107] In areas outside administrative and statutory regulation, however, it does not appear that the zone of interest requirement adds anything not already addressed by third party considerations.[108] For example, if a plaintiff alleges a personal violation of free speech, that party is within the zone of interest. If the party alleges violation of someone else's free speech rights, third party prudential limitations would apply.

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100. *Powers*, 499 U.S. at 410 (quoting Singleton v. Wulff, 428 U.S. 106, 112 (1976)).

101. *Id.* at 411.

102. *Id.*

103. *See* Whitmore v. Arkansas, 495 U.S. 149, 163-64 (1990) (requiring that defendant must satisfy the requirements of Article III even if asserting the rights of a third party); *see also* CHEMERINSKY, *supra* note 97, at 82-83 ("It must be stressed that the person seeking to advocate the rights of third parties must meet the constitutional standing requirements of injury, causation and redressability. . . .").

104. *See* TRIBE, *supra* note 8, at 142-45 (identifying the similarities between third party standing and zone of interest prudential limitations). For a more in depth discussion of the background of and justifications for the zone of interest limitation, see Sanford A. Church, Note, *A Defense of the 'Zone of Interest' Standing Test*, 1983 DUKE L.J. 447.

105. 397 U.S. 150 (1970).

106. *Id.* at 153.

107. CHEMERINSKY, *supra* note 97, at 99.

108. *Id.* at 101 ("If a person is asserting an injury to his or her constitutional rights, the zone of interest test is met. If an individual is not asserting a personally suffered wrong, then the requirement for injury or at least the bar against third-party standing would preclude review.").

III. GENERALIZED GRIEVANCES: PRUDENTIAL OR CONSTITUTIONAL LIMITATION?

Notably absent from the above consideration of prudential limitations are generalized grievances. This term of art has been cataloged as a prudential limitation in all too familiar passages at the beginning of most standing opinions.[109] From a broad definitional standpoint, generalized grievances have been variously described as complaints "shared in substantially equal measure by all or a large class of citizens,"[110] as grievances associated with taxpayer standing,[111] as mere interests in having the government follow the law,[112] as citizen suits,[113] and as injuries associated with racial stigmatization.[114]

Moving beyond generalities, however, it is far from clear whether generalized grievances are rooted in Article III, are prudential limitations, are neither, or both. The confusion surrounding the classification of generalized grievances is disconcerting. Not only does it demonstrate the inability of the Court to adhere to a basic analysis, but the confusion has real world implications because of fundamental and important differences between Article III and prudential limitations.

The distinction between prudential and constitutional limitations is an important one.[115] Because Article III is nondiscretionary, categorizing generalized grievances as a constitutional limitation removes from the court and the other branches of government any power to broaden judicial access.[116] The irreducible minima of injury, causation, and redressability are just that—irreducible. On the other hand,

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109. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-502 (1975) (outlining the Court's standing analysis).

110. *Id.* at 499.

111. *See, e.g.*, Fletcher, *supra* note 2, at 267 (characterizing the generalized grievance cases in terms of taxpayer standing).

112. *See, e.g.*, CHEMERINSKY, *supra* note 97, at 89 (characterizing generalized grievances as mere interests in having the government follow the law).

113. *See, e.g.*, 13 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.10, 634-43 (1984) (analyzing generalized grievances in terms of citizen suits).

114. *See, e.g.*, Hays v. Louisiana, 115 S. Ct. 2431, 2436 (1995) (denying standing because of an insufficient stigmatic injury).

115. *See generally*, Gottlieb, *supra* note 51, at 1063 (demonstrating the importance of separating prudential and constitutional standing requirements).

116. *See* Gottlieb, *supra* note 51, at 1067. ("[W]hen a court identifies a limitation as constitutional which the court should have identified as prudential, the court actually prevents future courts and Congress from considering situations where the prudential concerns might be outweighed by countervailing considerations.").

generalized grievances as a prudential limitation can be broadened by congressional action.[117]

A. *Generalized Grievances as a Prudential Limitation*

In a series of housing rights cases, the Court recognized Congress's ability to expand standing to the limits of Article III. In so doing the Court undertook a thorough analysis of prudential limitations and squarely placed generalized grievances within this category. In *Trafficante v. Metropolitan Life Insurance Co.*,[118] the Court considered the application of the Fair Housing Act.[119] Alleging violation of that Act, two individuals brought suit asserting discrimination by a landlord in his treatment of housing applicants.[120] Finding that both parties had standing, the Court took notice of Congress's intent to confer standing "as broadly as permitted by Article III."[121]

In *Warth v. Seldin*,[122] the Court confronted a constitutional challenge to allegedly exclusionary zoning by a Rochester, New York suburb. In dismissing the complaints of various organizations and individuals who lived outside the zoned suburb, the Court set forth in

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117. While it is clear that Congress may reduce the compass of prudential limitations it, is less clear whether lower courts may do so. *See* Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 137 n.37 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The Court in *Blumenthal* stated:

> [T]he fact that the [non-constitutional] limitations of the standing doctrine . . . are termed 'prudential limitations' does not mean that the lower courts have discretion as to whether to apply these limitations or not. The Supreme Court has announced these prudential limitations in its supervisory capacity over the federal judiciary and . . . we believe there is a nondiscretionary duty to apply the limitation.

Id. In addition, if the Supreme Court remains true to *stare decisis*, there is little it can do to reverse or limit prudential limitations. In Warth v. Seldin, 422 U.S. 490, 500-01 (1975), the Court did hold that in "some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *Id.* at 500-01. It should be stressed that this balancing test was the impetus for the three part third party exception and has never been applied to generalized grievances or zone of interest limitations. The ability of countervailing principles to broaden standing at the judicial level is therefore limited and constrained.

118. 409 U.S. 205 (1972).

119. Civil Rights Act of 1968, Pub. L. No. 90-284, § 801, 82 Stat. 81, codified as amended 42 U.S.C. § 3601-3631 (1968)).

120. The first defendant, a black man, acted as a tester and was given misinformation about apartment availability. The second defendant was a white man who lived in the apartment complex and who claimed that he was stigmatized by living in a "white ghetto" and suffered an injury in fact because he was denied the "social benefits of living in an integrated community." *Trafficante*, 409 U.S. at 208.

121. *Id.* at 209.

122. 422 U.S. 490 (1975).

dicta the basic requirements of standing jurisprudence. According to the Court:

> Apart from [the] minimum constitutional mandate, this Court has recognized outer limits on the class of persons who may invoke the court's decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.[123]

This identification of generalized grievances as a prudential limitation was to prevail in subsequent cases citing the *Warth* rationale.[124]

B. Lujan v. Defenders of Wildlife*: Generalized Grievances as a Constitutional Requirement*

In 1992, generalized grievances seemed to undergo significant revision in a watershed standing decision involving environmental protection. At issue in *Lujan v. Defenders of Wildlife*[125] was a decision by the Secretary of the Interior regarding the application of the Endangered Species Act[126] to actions in foreign nations. Defenders of Wildlife, a conservation group, filed suit seeking a declaratory judgment that the new regulation violated the "geographic scope" of the Endangered Species Act.[127]

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123. *Id.* at 499.

124. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982); Gladstone, Realtors v. Village of Bellwood 441 U.S. 91, 100 (1979).

125. 504 U.S. 555 (1992).

126. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended, 16 U.S.C. § 1531-1543 (1973)). The Endangered Species Act of 1973 requires the Secretary of the Interior to "insure that any action authorized, funded, or carried out" by a federal agency does not "jeopardize the continued existence of any endangered species." Cabinet Mountains Wilderness v. Peterson, 510 F. Supp. 1186 (D.C. Dist. Col. 1981), *aff'd*, 685 F.2d 678 (D.C. Cir. 1982). The Secretary of the Interior interpreted these requirements as requiring application only to domestic operations and activities on the high seas. *Lujan,* 504 U.S. at 558-59.

127. *Lujan*, 504 U.S. at 559. Two Defenders of Wildlife members traveled to Egypt in 1986 and "observed the traditional habitat of the endangered Nile crocodile," and alleged that they suffered an injury-in-fact because of the United States' "role . . . in overseeing the rehabilitation of the Aswan High Dam." *Id.* at 563 These individuals stated in their pleadings their intent to return to Egypt in the foreseeable future and asserted as injury their inability to view the Nile crocodile which was being threatened by the Aswan Project. *Id.* In an opinion by Justice Scalia, the Court rejected such "some day intentions" and denied standing on this basis because of the plaintiff's failure to allege an "imminent" injury. *Id.* at 562-67 "[W]ithout any description of concrete plans, or indeed even any specification of when the some day will be" the plaintiffs did not establish the "actual or imminent" injury required by Article III. *Id.* at 564.

Plaintiffs alleged standing, in part, on the basis of a citizen suit provision of the Endangered Species Act. Under this provision, "[A]ny person may commence a civil suit on his own behalf (a) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of the chapter."[128] Because *Warth* held that "the injury required by Article III may exist solely by virtue of statutes creating legal rights the invasion of which creates standing,"[129] it appeared that this citizen suit provision would be sufficient to establish plaintiffs' standing.

The Court rejected this argument and denied standing, holding that Article III does not recognize a "congressional conferral upon all persons of an abstract, self contained, non-instrumental 'right' to have the Executive observe the procedures required by law."[130] Accordingly, a right to protect endangered species and to have government agencies follow the dictates of the Endangered Species Act cannot be created by Congress because it interferes with Article III requirements of standing and infringes on the role of the Executive. In the most important passage for purposes here, the Court, in an opinion by Justice Scalia, stated:

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—*does not state an Article III case or controversy.*[131]

This statement *appears* to switch application of generalized grievances from a prudential limitation to a core component of the "case or controversy" requirement. Because the Court concluded that the citizen suit provision was a generalized grievance and held that generalized grievances were barred by Article III requirements, Congress could not confer standing merely by granting a procedural right to sue. To allow Congress to do so "would be disregarding a principle fundamental to the separate and distinct constitutional role of the Third Branch"[132] and would "transfer from the President to the courts

128. 16 U.S.C. § 1540(g) (1973).

129. Warth v. Seldin, 422 U.S. 490, 500 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 616 (1973)).

130. *Lujan*, 504 U.S. at 573.

131. *Id.* at 573-74 (emphasis added).

132. *Id.* at 576.

the Chief Executive's most important constitutional duty, to 'take care that the laws are faithfully executed.' "[133]

After the *Lujan* decision was announced commentators were quick to criticize its holding and demonstrate that Justice Scalia's opinion represented a significant departure from past standing jurisprudence. Professor Sunstein described the decision as ranking among "the most important in history in terms of the sheer number of federal statutes that it has apparently invalidated,"[134] and Professor Nichol criticized the decision for being "difficult to square with the language and history of Article III, with the injury requirement itself, with more modest visions of judicial power and with time-honored notions of public law litigation."[135] Furthermore, commentators asserted that Justice Scalia's analysis of citizen suits and his identification of the procedural injury as a generalized grievance marked a shift from a prudential to an Article III foundation.[136]

While Justice Scalia's opinion characterized generalized grievances as a constitutional limitation, it is unclear whether *Lujan* was as significant a departure as some commentators have suggested. The Court's failure to confer standing in citizen suits is of course novel and important.[137] Yet the Court's decision to characterize generalized grievances as Article III limitations may not have been inaccurate or terribly new.

Looking first within the four corners of *Lujan*, the failure of the Court to overrule the string of cases characterizing generalized griev-

133. *Id.* at 577 (quoting U.S. CONST. art. II § 3).

134. Sunstein, *supra* note 34, at 165.

135. Nichol, *supra* note 2, at 142-43.

136. *See, e.g.*, CHEMERINSKY, *supra* note 97, at 95 ("*Lujan* likely means that the bar against generalized grievances will be treated as constitutional and not prudential in the future."); Gottlieb, *supra* note 51, at 1106-07 ("The Court in *Lujan* . . . specifically takes this prudential concern—generalized grievances—and imports into it its constitutional analysis by interpreting Article III as prohibiting generalized grievances."); Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8 J. LAND USE & ENVTL. L. 343, 362-63 (1993) (arguing that Justice Scalia's majority opinion in *Lujan* transferred generalized grievances from a prudential to an Article III limitation); Douglas Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy; Reexamining "Injury in Fact,"* 33 COLUM. J. TRANSNAT'L L. 259, 270 n.40 (1995) (noting that "Justice Scalia seems to be transforming the 'generalized grievance' limitations from a prudential consideration that can be waived or set aside by Congress into one of the core elements of standing"); Patrick L. Proctor, Comment, *No Generalized Grievances: The "Law of Rules" Approach to Standing*, 19 OHIO N.U. L. REV. 927, 935 (1993) (arguing that generalized grievances are now a constitutionally imposed limitation); Treister, *supra* note 47, at 719 (arguing that *Lujan's* emphasis on injury-in-fact makes clear that generalized grievances are now constitutionally prohibited).

137. *See* Sunstein, *supra* note 34, at 197-222 (outlining and demonstrating the significant shift *Lujan* represents in "citizen suits").

ances as prudentially based is noteworthy.[138] In fact, the Court sought to distinguish *Trafficante*,[139] which first identified generalized grievances as prudential limits.[140] Absent specific language by the Court identifying a shift in understanding, generalized grievances may retain a residual prudential limitation.

Perhaps the clearest evidence that *Lujan* did not signify a radical move from a prudential to a constitutional understanding of generalized grievances comes from an analysis of federal circuit court decisions handed down after *Lujan*. If *Lujan* marked a significant departure as many have thought, it seems logical that circuit courts would have recognized this and no longer described or analyzed generalized grievances under a prudential limitation rubric. In fact, an analysis of circuit court cases demonstrates that the exact opposite has occurred.

In *Benjamin v. Aroostook Medical Center, Inc.*,[141] handed down well after the *Lujan* opinion, the First Circuit listed "[s]everal prudential considerations" which "infuse standing determinations."[142] Among these were "abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches."[143] Although *Benjamin* did not expressly rest on concerns about generalized grievances, the court's litany of prudential considerations included generalized grievances. While such statements are dicta, they demonstrate that a revolution in generalized grievance understanding has not occurred. Similar characterizations of generalized grievances as prudential limitations have occurred in every circuit discussing prudential limitations

138. *See supra* notes 118-24 and accompanying text (discussing the initial identification of generalized grievances as prudential limitations).

139. 409 U.S. 205 (1972); *see supra* notes 118-21 and accompanying text (discussing the Court's holding in *Trafficante*).

140. According to the *Lujan* Court, *Trafficante* was distinguishable because in the latter opinion "Congress elevat[ed] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in the law. . . . " Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992). It is not readily apparent why an individual interest in living in an integrated community is any less abstract than the personal interest in viewing endangered species, particularly for professional environmentalists. The Court's distinction of *Trafficante* certainly is supported by the thinnest of reeds.

141. 57 F.3d 101 (1st Cir. 1995).

142. *Id.* at 104.

143. *Id.*

after the *Lujan* decision, including the First,[144] Third,[145] Fifth,[146] Seventh,[147] Eighth,[148] and Eleventh[149] Circuits.

Given the breadth of support for a prudentially imposed limitation in the circuit courts, a conclusion that *Lujan* transferred generalized grievances *entirely* from a prudential limitation *entirely* to an Article III foundation seems premature. This circuit court evidence does not mean generalized grievances are not constitutionally limited. All these post-*Lujan* cases suggest is that *Lujan* did not entirely remove generalized grievances from a prudentially based analysis altogether. To understand why this is true and to more fully comprehend the confusion surrounding the theoretical foundations of generalized grievances, it is helpful to explore exactly how the Court has developed the generalized grievance limitation on federal court access. As generalized grievances gain in clarity, so too will the argument that generalized grievances have never been an analytically distinct prudential limitation.

IV. CHARACTERIZING GENERALIZED GRIEVANCES

Beyond the uncertainty about whether generalized grievances are constitutional or prudential limitations, there is also uncertainty about their precise definition. According to Professor Chemerinsky, "[A] generalized grievance is where the plaintiffs sue solely as citizens concerned with having the government follow the law or as taxpayers interested in restraining allegedly illegal government expenditures."[150] On the other hand, the Court has alternatively described generalized grievances as existing when "the asserted harm is . . . shared in a substantially equal measure by all or a large class of citizens"[151] or when the harm is associated with "every citizen's interest in proper application of the Constitution and laws" and the plaintiff is "seeking relief

144. Adams v. Watson, 10 F.3d 915, 918 n.7 (1st Cir. 1993) (listing generalized grievances as a separate and distinct prudential limitation).

145. Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d Cir. 1994) (listing generalized grievances as a separate and distinct prudential limitation).

146. Apache v. United States through I.R.S., 987 F.2d 1174, 1176 (5th Cir. 1993) (listing generalized grievances as a separate and distinct prudential limitation).

147. Family & Children's Ctr. v. School City, 13 F.3d 1052, 1059 (7th Cir.), *cert. denied*, School City of Mishawaka v. Family & Children's Ctr., Inc., 115 S. Ct. 420 (1994) (listing generalized grievances as a separate and distinct prudential limitation).

148. Von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323, 325 n.1 (8th Cir. 1995) (listing generalized grievances as a separate and distinct prudential limitation).

149. Church v. City of Huntsville, 30 F.3d 1332, 1335 (11th Cir. 1994) (listing generalized grievances as a separate and distinct prudential limitation).

150. CHEMERINSKY, *supra* note 97, at 89.

151. Warth v. Seldin, 422 U.S. 490, 499 (1975).

that no more directly benefits the plaintiffs than the public at large."[152] Mindful that generalizations about standing "are largely worthless,"[153] it is still necessary to explore these statements in more detail.

A. *Injuries Which Affect Everyone Equally*

The notion that a generalized grievance exists whenever the "harm asserted is shared in substantially equal measure by all or a large class of citizens"[154] is logical enough. After all, when everyone asserts a right, that right is "generalized" in the sense of not being unique. Yet further reflection on this definition demonstrates its flaws.

An example best illustrates the point. Assume that as the United States enters the twenty-first century crime is dramatically on the rise. As a result of this epidemic, prisons are overflowing, prison riots are on the horizon, and financially strapped states are pleading for federal relief. In an effort to lessen the costs of maintenance, Congress passes a comprehensive statute. In addition to granting money to the states, the statute includes the following passage: "1) Be it enacted that every man, woman and child over the age of sixteen shall serve two weeks in a designated jail, prison, or penitentiary for the purposes of cleaning toilets, scrubbing tiles, and generally maintaining the physical conditions of the nation's correctional facilities. This service shall be without compensation, and is the duty of every citizen."

Such a statute affects nearly everyone in the nation. It affects everyone equally because virtually everyone will have to perform these duties. Can it honestly be supposed that no one subject to that provision would have standing to challenge the statute simply because a great number of other citizens are similarly situated? It seems unlikely given the magnitude of the injury at stake.

The types of cases embracing a generalized grievance analysis, however, have not been limited to injuries which affect a large group. Generalized grievances have also been invoked in situations where minority groups claim a stigmatic injury unique to their group identity.[155] Characterizing generalized grievances as large group injuries shared in substantially equal measure does not explain these cases. Stigmatic injuries are often alleged and suffered by discrete and insular minorities who, because of their minority status in the United

152. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992).
153. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970).
154. *Warth*, 422 U.S. at 499.
155. *See infra* notes 203-244 and accompanying text.

States, cannot realistically suffer a broad injury shared by all or most citizens. If a small group of Eskimos claimed state action stigmatized them in some way it would hardly seem accurate to describe their injury as "shared in substantially equal measure by all or a large class."[156]

The Supreme Court has also recognized the fallacy underlying standing decisions based solely on the number of individuals affected. According to Chief Justice Warren: "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."[157] As a matter of logic and policy, "the existence of a generalized grievance is not determined simply by the number of people affected."[158]

B. Injuries Associated With "Constitutional Governance"

A series of Supreme Court cases have denied federal court access when the plaintiff's asserted right concerns an injury associated with Constitutional process limitations. These cases, which span a period of constitutional history well before modern standing jurisprudence, stand for the idea that the plaintiff must assert more than a right to have the government follow the internal constitutional structures of the United States' constitutional democracy.

In *Fairchild v. Hughes*[159] the Court, in an opinion by Justice Brandeis, dismissed a challenge to the validity of the procedures used to ratify the Nineteenth Amendment. Holding that the Court did not have jurisdiction under Article III, Justice Brandeis noted that the "[p]laintiff has [asserted] only the right, possessed by every citizen, to require that the government be administered according to the law and that the public moneys not be wasted. Obviously this general right does not entitle a private citizen to institute . . . a suit . . . ."[160]

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156. *Warth*, 422 U.S. at 499.

157. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973);. *But see* United States v. Richardson, 418 U.S. 166, 179 (1974) ("In a very real sense, the absence of any particular individual or class to litigate these claim[s] gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.").

158. *See* CHEMERINSKY, *supra* note 97, at 89; *see also* Treister, *supra* note 47, at 709 ("[G]overnment[ ] acts (or failure to act) may injure a plaintiff, even though the injury is widely shared by others.").

159. 258 U.S. 126 (1922).

160. *Id.* at 129-30.

Similarly, in *Ex Parte Levitt*,[161] the Supreme Court confronted a potentially embarrassing decision regarding one of its recent members. Levitt filed suit, alleging that Justice Hugo Black had been nominated to the Supreme Court in violation of Article I, section 6, clause 2 of the Constitution.[162] The Court's *per curiam* decision failed to reach the merits:

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action and it is not sufficient that he has merely a general interest common to all members of the public.[163]

Ex Parte Levitt and *Fairchild v. Hughes* were handed down well before modern standing jurisprudence had taken hold. Trying to fit either within a prudential or constitutional framework is inappropriate. Nevertheless, *Levitt* and *Fairchild* demonstrate that interests associated only with having the Constitution obeyed are not enough to gain federal court access. The impact of *Levitt* and *Fairchild* is to remove, for all practical purposes, the emolument[164] and ratification[165] provisions from the realm of judicial review at—least with respect to private citizens.[166] In so holding, *Levitt* and *Fairchild* are the intellec-

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161. 302 U.S. 633 (1937) (per curiam).

162. *Id.* at 633. Article I, § 6, cl. 2 reads: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

163. *Ex Parte Levitt*, 302 U.S. at 634.

164. U.S. CONST. art. I, § 6, cl. 2.

165. U.S. CONST. art. V.

166. The ability of members of Congress to challenge the constitutionality of laws not personally affecting them has not been addressed by the Supreme Court. "Public officials ordinarily fare no better than private individuals in efforts to assert general public interests." WRIGHT ET AL., *supra* note 113, at 641, n.19. Nevertheless, a series of District of Columbia Circuit Court cases has held that members of Congress may have standing to assert what are arguably generalized grievances when "the member of Congress claims a nullification of his or her vote." CHEMERINSKY, *supra* note 97, at 106; *see, e.g.*, Barnes v. Kline, 759 F.2d 21, 25-30 (D.C. Cir. 1984) (holding that Senator has standing to challenge the constitutionality of a pocket veto), *vacated as moot sub. nom.* Burke v. Barnes, 479 U.S. 361 (1987); Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.) (en banc)(per curiam) (holding that Senators have standing to challenge validity of treaty recision), *vacated*, 444 U.S. 996 (1979); Daughtrey v. Carter, 584 F.2d 1050, 1058 (D.C. Cir. 1978) (holding that a member of Congress lacks standing to challenge presidential pardon of Vietnam draft resisters); Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974) (holding that Senators have standing to challenge validity of treaty recision); Holtzman v. Schlesinger, 484 F.2d 1307, 1315

tual genesis for the proposition that "a plaintiff . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy."[167]

Twenty-seven years after the Court handed down its decision in *Ex Parte Levitt*, the Court once again faced interpreting Article I, section 6, clause 2 and again chose not to reach the merits. *Schlesinger v. Reservists Committee to Stop the War*[168] was an action for declaratory and injunctive relief brought by members of the Armed Forces Reserve who opposed the war in Vietnam. The group brought a class action on behalf of all United States citizens and argued that certain members of Congress violated Article I's incompatibility clause[169] when they served in the Army Reserve and held office as members of Congress.[170]

In dismissing the plaintiffs' action, the Court characterized the underlying injury as a "generalized" one.[171] While portraying the injury as a "generalized grievance," the Court squarely placed its holding within the injury-in-fact component of Article III.[172] According to the Court, "[t]he only interest all citizens share in the claim . . . is one which presents injury in the abstract."[173] Such injuries do not provide standing because they are not "concrete,"[174] and because finding injury in the abstract "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the

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(2d Cir. 1973) (holding that a member of Congress lacks standing to challenge the constitutionality of the bombing of Cambodia), *cert. denied*, 416 U.S. 936 (1974); Edwards v. Carter, 445 F. Supp. 1279, 1286 (D.D.C.) (denying standing to members of Congress who challenged submission of the Panama Canal treaty only to the Senate.), *aff'd on other grounds*, 580 F.2d 1055 (D.C. Cir. 1978); *see generally* CHEMERINSKY, *supra* note 97, at 104-10 (outlining legislators' standing); Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981) (same).

167. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992).

168. 418 U.S. 208 (1974).

169. *Id.* at 211. The relevant provision of the constitution provides: "[N]o Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

170. *Schlesinger*, 418 U.S. at 210-211.

171. *Id.* at 217. The conclusion that members of the Reserve had a general interest has not gone without criticism. See Gottlieb, *supra* note 51, at 1096 (arguing that the plaintiffs in *Schlesinger* "were members of the Reserve itself, and therefore had an interest above and beyond that of the population at large.").

172. TRIBE, *supra* note 8, at 125 ("In *Schlesinger*, Chief Justice Burger's majority opinion held that 'the generalized interest of all citizens in constitutional governance,' which was the interest alleged to be adversely affected, is too 'abstract' to give rise to 'concrete injury' of the sort which constitutes 'injury in fact.' ") (citations omitted).

173. *Schlesinger*, 418 U.S. at 217.

174. *Id.* at 222.

Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.' "[175]

On the same day *Schlesinger* was announced, *United States v. Richardson*[176] held, on similar grounds, that a generalized grievance by a taxpayer did not meet the standing requirement of federal jurisdiction.[177] At issue in *Richardson* were provisions of the Central Intelligence Agency Act of 1949 concerning public reporting of expenditures.[178] Richardson argued that the CIA's failure to report its expenditures violated a clause of the Constitution which requires publication of a regular accounting of expenditures of public money.[179] Relying on the Court's earlier taxpayer cases and citing the Court's decision in *Levitt* for support, Chief Justice Burger characterized Richardson's complaint as "undifferentiated and 'common to all members of the public.' "[180] The only injury alleged by respondent was an inability to 'obtain a document that sets out the expenditures and receipts' of the CIA."[181] Such an injury, according to the Court, was "surely . . . a generalized grievance."[182] The Court went on to explain:

> While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any *particular concrete injury* as a result of the operation of this statute.[183]

The intellectual foundation of the *Richardson* decision rested with the insufficiency of the alleged injury. By the time *Richardson* was announced, injury was a distinct component of Article III standing requirements.[184] Although some commentators have questioned whether *Richardson* was based on prudential or Article III limitations, the Court's emphasis on injury, and its failure to even mention prudential limitations,[185] suggests an Article III basis for the decision.

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175. *Id.*

176. 418 U.S. 166 (1974).

177. *Id.* at 179-80.

178. *Id.* at 167.

179. *Id.* at 168; *see* U.S. CONST. art. I, § 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

180. *Richardson*, 418 U.S. at 177 (quoting *Ex Parte* Levitt, 302 U.S. 633, 634 (1937)).

181. *Id.* at 169.

182. *Id.* at 176.

183. *Id.* at 177 (emphasis added).

184. *See supra* notes 56-57 and accompanying text.

185. Justice Powell's concurring opinion did mention prudential limitations. *Richardson*, 418 U.S. at 181 (Powell, J., concurring).

By way of summary, the Court's decisions in *Levitt, Fairchild, Schlesinger* and *Richardson* stand for a basic proposition: To satisfy the requirements of Article III a plaintiff must allege a more personalized injury than an interest in constitutional governance. Failure to differentiate a claim and show some "concrete injury"[186] outside constitutional impropriety is insufficient. Understood this way, most generalized grievances will occur under Article I sections which do not confer individual rights and which focus on the process by which the government operates.[187] Such injuries are generalized because the plaintiff is merely asking for constitutional adherence. Conferring standing in such situations gives the distinct impression of "government by injunction"[188] and forces the Court to go beyond its constitutional role as the court of last resort in adversarial proceedings.

Characterizing generalized grievances in terms of a theory of "constitutional governance" adds more to the analysis than mere injuries which affect a large group equally. Consider the prison hypothetical outlined earlier. Although subjecting virtually every citizen to two weeks of uncompensated work affects a large group, it does not raise issues of constitutional governance. While Ralph from Boise and Margaret from New York allege the same constitutional infringements, both allege more than a desire to have the government follow the law. Each is personally denied an individual right and suffers an individualized injury. The fact that many share the injury does nothing to reduce the personalized nature of the injury.

Generalized grievance jurisprudence might, therefore, be understood as differentiating between constitutional provisions which grant individual rights and constitutional provisions which outline and determine the basis of America's constitutional structure.[189] For example, a broad distinction might be drawn between Article I and the first

186. *Richardson*, 418 U.S. at 179-80.

187. Article I encompasses most generalized grievances because it establishes most of the principles under which the government operates. Nevertheless, other provisions including Art. II, the First Amendment's Establishment Clause, and the Tenth Amendment, may easily fall within this category of procedural governance.

188. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

189. CHEMERINSKY, *supra* note 97, at 68-69 ("In general, a person who claims discrimination or a violation of an individual liberty, such as freedom of speech or due process of law, will be accorded standing. But someone who seeks to prevent a violation of a constitutional provision dealing with the structure of government is unlikely to be accorded standing unless the person has suffered a particular harm distinct from the rest of the population.").

nine amendments to the Constitution.[190] Since most provisions of Article I set out the powers and structure of Congress, it is less likely that interests beyond constitutional governance will exist. On the other hand, Eighth Amendment guarantees against cruel and unusual punishment confer an individual right not to be subject to capricious state action.

Such broad generalizations are unfortunately of little utility. The Commerce Clause[191] is a case in point. While the Commerce Clause concerns the power of the federal government in a federalist system, and is therefore a structural provision, standing can and has been established in Commerce Clause cases. A convicted felon arrested under a federal law prohibiting the possession of guns in a school zone may challenge Congress's power to enact such a provision because his interest in reversing his conviction is obviously a strong one.[192]

Despite the ability to challenge structural provisions because of the existence of some secondary personal injury, some constitutional provisions are unlikely to have such secondary effects. Defining generalized grievances in terms of constitutional governance has the effect of rendering these constitutional provisions beyond judicial review. One has difficulty imagining a way to establish a differentiated injury if the President of the United States chooses not to give her State of the Union address or decides to run for a third term.[193] Alternatively, Justice Burger has argued that "In a very real sense, the absence of any particular individual or class to litigate [a claim] gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."[194]

It is unclear how judicial abdication of select constitutional provisions serves the interests of separation of powers.[195] Understood as a complex game of checks and balances, separation of powers is not furthered when one of the "checkers" skips town.[196] As one commentator has noted: "Separation of powers notions are defeated if a branch of government is free to ignore or disobey the laws without the possi-

190. Excluded from this generalization would have to be the establishment clause which often does not confer an individual right. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982).

191. U.S. CONST. art. I, § 8, cl. 3.

192. *See* United States v. Lopez, 115 S. Ct. 1624 (1995).

193. CHEMERINSKY, *supra* note 97, at 97.

194. United States v. Richardson, 418 U.S. 166, 179 (1974).

195. *See supra* notes 43-47 and accompanying text (citing separation of powers as the primary rationale for the standing doctrine).

196. *See* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2:5 (1978) (arguing that separation of powers requires a blending of governmental power).

bility of review."[197] The delicate balance between coequal branches is skewed unnecessarily when the judiciary abdicates its constitutional responsibility.

Furthermore, relying on the representative branches to follow constitutional mandates is not always practical. Assuming a constitutional violation has occurred, it is unlikely the political process will rectify the situation, either because the issue at stake seems abstract (members of Congress serving in the Reserves) or because a majority of citizens favor the constitutional violation (a popular president running for a third term). Finally, it has been recognized since 1803 that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[198] Failure to follow this philosophy makes a leap of faith which obliterates the judiciary's status as a coequal branch of government.[199]

While the constitutional governance cases are relatively clear and their criticisms are well-entrenched,[200] they do not satisfactorily explain all generalized grievance jurisprudence. As noted earlier, generalized grievances have recently been invoked for the first time in a statutory case[201] and have also been employed in an equal protection context to deny standing to individuals claiming infringements under the Fourteenth Amendment.[202] Although constitutional governance cases go a long way to illustrate generalized grievances, they alone do not present a complete picture of generalized grievance jurisprudence.

C. *Racial Stigmatization as a Generalized Grievance*

In a handful of cases beginning with *Allen v. Wright*[203] the Supreme Court extended generalized grievances beyond the moorings of "constitutional governance" and into stigmatic injuries associated

197. Treister, *supra* note 47, at 691.

198. Marbury v. Madison, 5 U.S. 137, 177 (1803).

199. See ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 99-105 (1987); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031 (1985). *But see generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962) (arguing that the anti-majoritarian nature of the Supreme Court requires it to avoid deciding certain constitutional issues); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (arguing for the abandonment of judicial review in areas of separation of powers and federalism.); Alexander M. Bickel, *The Supreme Court, 1960 Term: Forward: The Passive Virtues*, 75 HARV. L. REV. 40, *passim* (1961) (arguing for judicial restraint in the Supreme Court).

200. *See, e.g.*, Treister, *supra* note 47, at 701-06 (arguing that failure to interpret some constitutional provisions harms rather than furthers separation of powers).

201. *See supra* notes 125-31 and accompanying text.

202. *See infra* notes 203-44 and accompanying text.

203. 468 U.S. 737 (1984).

with the Equal Protection Clause of the Fourteenth Amendment. At the very least, application of generalized grievances to stigmatic injuries contradicts both large group[204] and constitutional governance[205] theories of generalized grievances. More importantly, inconsistent application of generalized grievance limitations in the equal protection context draws into question what interests are being served by the standing doctrine.

In *Allen*, parents of black school children filed a nationwide class action seeking declaratory and injunctive relief against the Internal Revenue Service.[206] Arguing that tax exemptions to private discriminatory schools caused cognizable stigmatic injury in and of themselves, the parents sought judicial reinterpretation of the provisions.[207] In one of the Court's most extensive treatments of standing, the Court failed to reach the merits of the parents' claims.

According to Justice O'Connor, writing for the majority, the plaintiffs had alleged a stigmatic injury "suffered by all members of a racial group when the Government discriminates on the basis of race."[208] While there was little question that "this sort of noneconomic injury [was] one of the most serious consequences of discriminatory government action,"[209] it was sufficient to meet standing requirements only in those cases in which " 'persons . . . are personally denied equal treatment' by the challenged discriminatory conduct."[210] Applying traditional generalized grievance language,[211] and relying at least in part on *Schlesinger*,[212] *Levitt*,[213] and *Richardson*,[214] the Court held that the parents had failed to allege such a personal and direct racial classification.[215]

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204. *See supra* notes 155-58 (arguing that large group theories of generalized grievance cases cannot be rectified with small group equal protection claims).

205. *See supra* notes 159-202 and accompanying text (outlining the similarity of "constitutional governance" cases).

206. *Allen*, 468 U.S. at 739.

207. *Id.* at 744-47.

208. *Id.* at 754.

209. *Id.* at 755.

210. *Id.* at 755 (quoting Heckler v. Mathews, 465 U.S. 728, 739-40 (1984)).

211. *Id.* at 754 ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

212. *Allen*, 468 U.S. at 754; *see supra* notes 168-75 and accompanying text (discussing the Court's generalized grievance decision in *Schlesinger*).

213. *Allen*, 468 U.S. at 754-55; *see supra* notes 160-63 and accompanying text (discussing the Court's holding in *Levitt*).

214. *Allen*, 468 U.S. at 754; *see supra* notes 176-85 and accompanying text (discussing the Court's holding in *Richardson*).

215. *Allen*, 468 U.S. at 755.

The Court gave several justifications for requiring a personal injury to parties alleging stigmatic injury. According to the Court, allowing federal court access whenever plaintiffs alleged a stigmatic injury would "transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' "[216] Since this would infringe on the constitutional spheres of the representative branches, such a result would violate traditional separation of powers principles.[217]

Looking only at *Allen,* without the benefit of future cases, it is unclear whether the Court meant to analyze the plaintiff's stigmatic injury as a generalized grievance. Specific reference to generalized grievances in terms of a stigmatic injury is not found anywhere in the opinion. In fact, the Court appears to distinguish stigmatic injury which occurs via government discrimination from "a claim simply to have the Government avoid the violation of law."[218] The Court's traditional generalized grievance language appears only when the court addresses this latter and broader characterization of the injury. References to *Schlesinger, Richardson,* and *Ex Parte Levitt* occur when the Court addresses whether the failure to follow the tax provisions is sufficient to constitute a cognizable injury.[219] Thus, if stigmatic injury and injury associated with the government's failure to follow the law are analytically distinct, racial stigmatization as a generalized grievance was not recognized by the *Allen* Court.

Whatever the intellectual or precedential foundation for *Allen,* recent decisions in the voting rights area suggest that *Allen* now squarely implicates generalized grievance jurisprudence. In *United States v. Hays,*[220] the Court confronted an equal protection challenge

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216. *Id.* at 756 (citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973)).

217. *Id.* at 752. The Court went on to argue that recognition of a cognizable injury suffered by the parents would have severe and irrational effects on the class of plaintiffs who could sue:

> If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school.

Id. at 755-56.

218. *Id.* at 753 ("Respondents' first claim of injury can be interpreted in two ways. It might be a claim simply to have the Government avoid the violation of law alleged in respondents' complaint. Alternatively, it might be a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race.").

219. *Id.* at 754-55.

220. 115 S. Ct. 2431 (1995).

to Louisiana's legislative apportionment scheme.[221] The plaintiffs in *Hays* argued that Louisiana's allocation of federal legislative seats was "so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race" and therefore violated the Equal Protection Clause.[222]

Holding that the plaintiffs did not have standing, the Court based its reasoning on the generalized grievance limitation to federal court access.[223] Because the *Hays* plaintiffs did "not live in the district that [was] the primary focus of their racial gerrymandering claim, and they have not otherwise demonstrated that they, personally, have been subjected to a racial classification,"[224] the plaintiffs merely alleged a generalized grievance.[225] Thus, the failure to allege a personal racial classification amounted to a mere attempt to have the government follow the law. After five years of litigation and substantial resource expenditures by attorneys on both sides, the case was dismissed.[226]

In denying Louisiana citizens judicial access to challenge the state redistricting plan, the Court undertook a reanalysis of the *Allen* decision. Any doubt that *Allen's* stigmatic injury was not a generalized grievance disappeared after the *Hays* Court's decision:

> The rule against generalized grievances applies with as much force in the equal protection context as in any other. *Allen v. Wright* made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury "accords a basis for standing only to 'those persons who are personally

221. In a ground-breaking decision, the Court in 1993 held that a plaintiff may state a claim for relief under the equal protection clause of the Fourteenth Amendment if the state "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." Shaw v. Reno, 113 S. Ct. 2816, 2832 (1993). Such a showing subjected the congressional reapportionment plan to strict scrutiny and was unconstitutional absent a showing of a compelling justification for the scheme narrowly tailored to meet that end. *Id.* at 2830.

222. *Hays*, 115 S. Ct. 2431, 2433 (1995) (citing Shaw v. Reno, 113 S. Ct. 2816, 2832 (1995)).

223. *Id.* at 2436 ("Unless such evidence [of a personal racial classification] is present, that plaintiff would be asserting a generalized grievance against governmental conduct of which he or she does not approve.").

224. *Id.* at 2433.

225. *Id.* at 2436.

226. *Id.* at 2437. In Miller v. Johnson, 115 S. Ct. 2475 (1995), decided the same day as *Hays*, the Court found standing for plaintiffs who challenged a Georgia reapportionment on the same equal protection grounds. *Id.* at 2485. The Court's conclusive statement that standing existed for plaintiffs who lived within the challenged district was the only treatment given to the topic by the majority. *Id.* The Court went on to hold that the Georgia plan failed to satisfy a compelling state interest and was therefore unconstitutional. *Id.* at 2494.

denied equal treatment' by the challenged discriminatory conduct."[227]

The *Hays* Court's citation to *Richardson* and *Schlesinger* and its explicit extension of generalized grievance language in an equal protection context suggests that the Court viewed its standing analysis as a logical extraction from governmental process injuries.[228] In other words, the Court did not differentiate between Article I injuries, such as those addressed in *Richardson*, and equal protection injuries as alleged in *Hays*. Any hope of limiting generalized grievance analysis to governmental process injuries associated with the structure of a constitutional democracy was destroyed by this extension.

The adoption of generalized grievance limitations in an equal protection context, however, appears to be limited to circumstances in which the plaintiff alleges racial stigmatization as the underlying injury. The *Hays* Court's rejection of standing based on *Powers v. Ohio*[229] illustrates how the Court has failed to apply generalized grievance analysis in other equal protection contexts. In addition, *Powers* provides ample proof of the inconsistent application of generalized grievance limitations.

In *Powers* the Court found unconstitutional the intentional use of race-based peremptory strikes[230] in a jury venire.[231] Characterizing any reliance on *Powers* to establish standing as "unavailing," the *Hays* Court attempted to distinguish peremptory cases because they involved the personal classification of individual jurors.[232]

Yet the Court's rejection of *Powers* as sufficiently analogous to establish standing ignores the basis of standing on which the *Powers* Court relied. It was the criminal defendant and not the jury member

227. *Hays*, 115 S. Ct. at 2435 (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)) (internal citations omitted).

228. *See supra* notes 159-85 and accompanying text (discussing the Court's generalized grievance holdings in governmental process cases).

229. 499 U.S. 400 (1991).

230. Peremptory strikes are used in jury trials to exclude members of the jury venire from sitting on the petit jury. The exclusions may be made without showing cause. Barbara D. Underwood, *Ending Race Discrimination In Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726 n.3 (1992).

231. *Powers*, 499 U.S. at 402. Five years earlier, in Batson v. Kentucky, 476 U.S. 79 (1986), the Court invalidated intentionally discriminatory peremptory strikes of black jurors as a denial of equal protection. For a discussion of the problem associated with peremptory strikes and who should be able to sue, see Underwood, *supra* note 230, at 750-73.

232. United States v. Hays, 115 S. Ct. 2431, 2437 (1995). According to the Court: "[W]here an individual juror is excluded from a jury because of race, that juror has *personally* suffered the race-based harm recognized in *Powers*, and it is the fact of *personal* injury that appellees have failed to establish here." *Id.*

who sued in *Powers*.[233] Thus, to establish standing, the Court in *Powers* was forced to rely upon third party standing principles.[234] Although it was the juror's constitutional rights that were violated, it was the defendant who sued.

It is important to reemphasize that third party standing requires a cognizable injury sufficient to satisfy Article III requirements.[235] To meet this requirement the *Powers* Court offered the following analysis:

> The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of the jurors "casts doubt on the integrity of the judicial process" and places the fairness of a criminal proceeding in doubt.[236]

It is difficult to find a more speculative or generalized injury than a concern about the "integrity of the judicial process."[237] Yet the Court held such an injury judicially cognizable in *Powers* and in later peremptory challenge cases barring race-based peremptory strikes in civil cases[238] and to exclusions of African-Americans[239] and males.[240] But who suffers this loss of faith in the integrity of the process inquiry? Why would a defendant suffer this loss of faith any more than a police officer who takes the stand or a homeless woman seeking shelter from the cold? Each is harmed in some amorphous way by being part of a process poisoned by stereotype. Each participant is

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233. *Powers*, 499 U.S. at 402.

234. Given the strong motivation associated with gaining a new trial, the Court in *Powers* found the defendant's interests sufficiently strong to meet the third party standing requirement of a close relationship. *Id.* at 414-15. An additional factor was that the excluded juror was unlikely to bring suit. Because of the small financial stake, the "economic burden of litigation" and the difficulty in knowing why they were excluded, there were "barriers to a suit by an excluded juror" and jurors suffered "some hinderance" in their ability to protect their interests. *Id.*

235. *See supra* note 100 and accompanying text.

236. *Powers*, 499 U.S. at 411 (citations omitted) (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

237. *Id.*

238. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

239. Georgia v. McCollum, 505 U.S. 42 (1992).

240. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994).

seeking only to have the government follow the law. As such, each participant alleges a generalized grievance.[241]

The *Hays* Court never explained why race-based peremptory strikes create a cognizable injury for defendants but race-based redistricting lines do not create a cognizable injury for voters.[242] The same integrity problems result when a state legislature redistricts on racial grounds as when a prosecutor excludes a juror on racial grounds. In both instances the government has put the integrity of a vital "incident of citizenship"[243] in jeopardy by making stereotypical assumptions about individuals. In each case the integrity of the system, be it judicial or voting, has been harmed. Yet harm to the system, without more, is a generalized grievance. Claims based on harm to the system's integrity seek to vindicate rights "shared in substantially equal measure by all or a large class of citizens."[244] The Court's adoption of a generalized harm in *Powers,* and its failure to remain true to that analysis in *Hays*, does not bode well for a coherent understanding of generalized grievances.

Despite these criticisms, a generalized grievance analysis appears implicated when racial stigmatization is the alleged injury. Simply stated, a party has alleged a generalized grievance when they fail to allege a personal and direct classification by governmental action. In the gerrymandering context, direct classification is likely to exist only if the plaintiff is a member of the district being challenged. Given the seemingly opposite conclusions in peremptory cases, trying to extend the Court's generalized grievance analysis beyond the limited confines of racial stigmatization is probably an unprofitable exercise.

D. Generalized Grievance As a Non-particularized Injury

The Article III requirement of a concrete and particularized injury has been a part of standing analysis since the Court's 1972 deci-

241. *See* Brian R. Markley, Comment, *Constitutional Provisions in Conflict: Article III Standing and Equal Protection After* Shaw v. Reno, 43 U. KAN. L. REV. 449, 458 (1995) (noting that in "both *Batson* and *Powers*, the injury suffered by the community at large resembles the abstract, generalized harm that the *Schlesinger* Court found insufficient to satisfy the Article III case or controversy requirement").

242. The similarities of voting and juror service have not gone unnoticed. Vikram David Amar, *Jury Service As Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 203-10 (1995); *see also* Underwood, *supra* note 230, at 741 n.129 (listing the sources which have drawn an analogy between jury service and voting).

243. Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 397 (1992) ("[J]ury service is a basic incident of citizenship and a basic form of participation, nearly on par with voting.").

244. Public Citizen v. United States Department of Justice, 491 U.S. 440, 449 (1989).

sion in *Sierra Club v. Morton*.[245] From a linguistic point of view, the opposite of particularized is generalized. It is not a stretch in logic to assume that generalized grievances are merely labels given to injuries which do not satisfy the concrete and particularized component of standing.

This view of generalized grievances is simple and straightforward, a trait perhaps unfamiliar to standing analysis. It does, however, explain the Court's reliance on generalized grievances in the *Lujan* decision. With the exception of *Lujan*, generalized grievances have been implicated at the Supreme Court level only in cases alleging constitutional violations.[246] *Lujan* was an aberration from past decisions because it involved a statutory claim.[247] Although such a distinction may not be analytically important, the ramifications of the distinction should be plain. If generalized grievances were prudential, Congress's citizen suit provision would be enough to confer standing.

The failure to distinguish constitutional and statutory violations is justifiable under this theory because Article III applies equally to constitutional and statutory violations.[248] Congress is therefore not afforded an opportunity to extend federal court access. Furthermore, generalized grievance access limitations can easily be extended beyond the unique fact patterns associated with constitutional governance cases. Under this theory, *Lujan* does not represent a departure from the past, but merely represents the first statutory claim which did not meet the Court's requirement of particularity and which the Court chose to label as a generalized grievance.

It is important to note that describing generalized grievances as non-particularized Article III injuries necessitates the conclusion that generalized grievance analysis is not a distinct standing requirement. At most, generalized grievances are a group of cases which do not meet the particularity requirement. They are descriptive, but that is all.

This analysis of generalized grievances fits particularly well with the Court's apparent extension of generalized grievances to the Equal

245. 405 U.S. 727 (1972).

246. Recall *Richardson* and *Ex Parte Levitt's* reliance on Article I, *Hays* and *Allen's* reliance on the Equal Protection Clause, *Schlesinger's* separation of powers claim, and *Fairchild's* focus on Article VI. In each of these cases the plaintiff alleged an injury under the Constitution. *See supra* notes 159-227 and accompanying text.

247. *See supra* notes 125-31 and accompanying text (discussing the Court's holding in *Lujan*).

248. Under Article III, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made. . . ." U.S. CONST. art. III, § 2.

Protection Clause.[249] The Court's holdings in *Allen*[250] and *Hays*[251] are better explained as Article III particularity requirements than as injuries "shared in substantially equal measure with all or a large class of people." This is true since discrete minority groups rarely constitute a large class of citizens. Furthermore, it resolves the tension between "governmental process" injuries, in which the only injury is constitutional impropriety, and stigmatic injuries, which reflect a more personal injury, but one the Court has nevertheless sought to narrow.

Despite its simplicity, this theory has problems. First and foremost, the requirement of particularity initially adopted in *Sierra Club* emerged contemporaneously with the development of generalized grievances as a prudential limitation. The argument that generalized grievances are part of the particularity requirement is difficult to make considering that courts have recognized them as analytically distinct for so long. For example, in *Gladstone Realtors v. Village of Bellwood*[252] the Court recognized both a prudential limitation against injuries "shared in substantially equal measure by all or a large class of people"[253] and an Article III requirement of a "distinct and palpable injury."[254] The Court recognized and endorsed particularity and generalized grievances as distinct concepts in several court opinions leading up to *Lujan*.[255]

As noted earlier,[256] many commentators view *Lujan* as a departure from a prudential understanding of generalized grievances. Yet lower courts have not appeared to endorse this view.[257] This tension dovetails into the second problem with equating generalized grievances and Article III particularity limitations. Even if the Court has incorporated generalized grievances within the particularity requirement, a residual prudential component to the generalized grievance concept may still exist. For example, some cases which have a particularized injury may impact so many people that the judiciary feels com-

249. *See supra* notes 203-44 and accompanying text (discussing the Court's characterization of generalized grievances in the equal protection context).

250. *See supra* notes 203-19 and accompanying text (discussing the Court's holding in *Allen*).

251. *See supra* notes 220-27 (discussing the Court's holding in *Hays*).

252. 441 U.S. 91 (1979).

253. *Id.* at 100 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

254. *Id.* (quoting *Warth*, 422 U.S. at 501).

255. Allen v. Wright, 468 U.S. 737, 750 (1984); Secretary of State of Md. v. Joseph H. Monson Co., 467 U.S. 947, 955 n.5 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982).

256. *See supra* note 136 and accompanying text.

257. *See supra* notes 141-49 and accompanying text.

pelled to defer to the other branches of government.[258] This would explain why generalized grievances still garner attention in the lower courts and why generalized grievances may encompass both an Article III and a prudential component. To understand how this might have occurred and why this notion must ultimately be rejected, it is necessary to go on.

E. Generalized Grievances as a Form of Judicial Restraint: "Questions of Wide Public Significance"

1. The Mischaracterization of Generalized Grievances

The Supreme Court's first attempt to characterize and explain generalized grievances prudentially came in its 1975 decision *Warth v. Seldin*.[259] Liberal quotation of that decision is necessary to understand the Court's later decisions. According to Justice Powell, writing for the majority:

> Apart from th[e] minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. *E.g., Schlesinger v. Reservist to Stop the War; United States v. Richardson; Ex Parte Levitt.* Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.[260]

Close analysis of this important paragraph reveals some ambiguities. First, the Court's reliance on *Levitt, Schlesinger,* and *Richardson*

258. For example, commentators have argued that the Supreme Court avoided undertaking any challenges to the war in Vietnam because of the inability of the judiciary to adequately address such a broad political, economic, and social issue. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 125-27 (1979).

259. 422 U.S. 490 (1975).

260. *Id.* at 500.

is informative. As noted earlier, *Levitt* was decided well before the modern concept of standing had developed and before prudential theories limited access to federal courts.[261] Similarly, neither *Richardson* nor *Schlesinger* expressly relied on a prudential theory to reach their holdings. In fact, *Schlesinger* was clearly rooted in an Article III analysis.[262] These cases simply do not support the recognition of a prudentially based generalized grievance. The *Warth* Court took a constitutionally based limitation and reformulated it into a prudential one.

The structure of the paragraph also yields confusion. Note that it is not until *after* a description of generalized grievances that the Court discusses the case or controversy requirement.[263] Since this case or controversy language comes after a description of generalized grievances, it would seem to place generalized grievances within an Article III framework. The language implies that generalized grievances do not meet the case or controversy requirement.

This would be the end of the inquiry, but later in the same paragraph the Court refers to both third party standing and generalized grievances as matters related to, but not directly required by, Article III. "Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance."[264] Notice the Court's treatment of these limitations in the plural form. Because only generalized grievances and third party standing are referred to in the paragraph, it seems the Court viewed them both as prudentially based. It also means that both third party standing and generalized grievances were originally justified because of an aversion toward answering "questions of wide public significance."

This misidentification of generalized grievances as prudentially based was the genesis for the confusion surrounding this area ever since. In *Valley Forge* the Court sustained the mischaracterization of generalized grievances and then added a new layer of confusion to the analysis. In the Court's opinion, Justice Rehnquist, writing for the majority, identified the now three prudential limitations of stand-

261. *See supra* notes 164-67 and accompanying text.

262. *See supra* notes 172-75 and accompanying text; *see also* TRIBE, *supra* note 8, at 125 n.7 (noting that the *Schlesinger* Court rooted its decision in an Article III particularity requirement, but that the "Supreme Court subsequently indicated that Schlesinger's standing decision was nonetheless prudential rather than constitutionally mandated").

263. *Warth*, 422 U.S. at 499.

264. *Id.* at 500.

ing.[265] Along with limits on third party standing and the requirement of a zone of interest the Court noted:

> [E]ven when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches.[266]

In support of this statement the Court relies on *Warth*.[267] But the *Valley Forge* Court's quotations from *Warth* are taken out of context and further distort the previous misapplication which occurred in *Warth*. Notice that the Court takes what originally was the justification for both third party standing and generalized grievances (abstract questions of wide public significance) and transfers it solely to the concept of generalized grievances. In doing so, *Valley Forge* continued the process of misapplying generalized grievances and distorting their original meaning. Since *Valley Forge*, most cases outlining standing requirements have adhered to a definitional formula which relies on judicial restraint as the overriding concern associated with generalized grievances.[268]

Lujan merely appears to have changed the focus of generalized grievances.[269] The *Lujan* Court characterized generalized grievances as an Article III requirement. However, this characterization of generalized grievances is not something new. It was done in *Richardson, Schlesinger, Fairchild,* and arguably *Allen v. Wright*. Yet because *Lujan* was the first time since the misapplication in *Warth* and *Valley Forge,* commentators assumed the Court was changing its position. As this Comment has attempted to demonstrate, generalized grievances, whenever expressly relied upon to deny standing, have been firmly rooted in Article III requirements of a particularized injury.[270]

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265. Between *Warth* and *Valley Forge,* the Court's opinion in *Data Processing* created the third prudential limitation known as "zone of interest." *See supra* notes 104-08 and accompanying text.

266. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)).

267. *Id.*

268. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) (describing generalized grievances as claims "more appropriately addressed in the representative branches"); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955 n.5 (1984) (describing generalized grievances as claims the "courts are neither well equipped nor well advised to adjudicate").

269. *See supra* notes 137-49 and accompanying text.

270. *See supra* notes 147-254 and accompanying text.

In fact, the Supreme Court has *never* denied standing because a party presented a prudential limitation known as generalized grievances.[271] Thus, for all its criticism in other areas, Justice Scalia's decision in *Lujan* repaired the damage which began in *Warth* and has been perpetuated ever since.

2. Political Questions Hidden in Generalized Grievance Clothing

The repair of generalized grievance jurisprudence does not explain why circuit courts continue to follow a prudentially based form of generalized grievances. Something more is going on. Subtle differences arguably exist in recent circuit court standing cases which may help to explain what underlies these decisions.

For example, in *Region 8 Forest Services Timber Purchasers v. Alcock*[272] the Eighth Circuit listed three prudential limitations. According to the court, in addition to third party and zone of interest limitations, the federal courts are barred from "adjudicat[ing] 'abstract questions of wide public significance.' "[273] The court never mentioned generalized grievances in its analysis. This trend toward defining the third prudential limitation in terms of "questions of wide public significance" without referring to generalized grievances has not been recognized by other courts after *Lujan*.[274] Nevertheless, while circuit courts generally have retained some generalized grievance language, the shift towards *defining* generalized grievances as questions of "wide public significance" is profound.[275]

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271. Nor has the Supreme Court ever expressly indicated it was rejecting a defendant's prudentially based generalized grievance argument. *See* Community Nutrition Inst. v. Block, 698 F.2d 1239, 1251 n.74. (D.C. Cir. 1983) ("It is not clear whether [generalized grievances] ha[ve] ever been applied as a non-constitutional limit."), *rev'd,* 467 U.S. 340 (1984).

272. 993 F.2d 800 (11th Cir. 1993), *cert. denied sub nom* Southern Timber Purchasers Council v. Meier, 114 S. Ct. 683 (1994). At issue in *Alcock* was whether timber companies had standing to challenge the United States Forest Service's policies regarding the protection of the endangered red-cockaded woodpecker. *Id.* at 802. The court concluded that the plaintiffs did not have injuries redressable through court action. *Id.* at 811.

273. *Id.* at 805.

274. The failure of some courts to abandon generalized grievance language in terms of prudential limitations is not surprising. Given the many pitfalls of standing jurisprudence and the ambiguity surrounding the Court's decision in *Lujan,* lower courts may have simply not recognized the reformulation which took place in 1992. It is likely Justice Scalia did not see the Court making a significant change in the understanding of generalized grievances. Furthermore, many circuit court decisions resemble a cookie cutter analysis of Article III and prudential limitations. Since the discussions of prudential limitations are usually dicta and almost never directly relevant, misapplication is understandable.

275. *See* Church v. City of Huntsville, 30 F.3d 1332, 1335 (11th Cir. 1994) ("[F]ederal courts should avoid deciding generalized grievances that present abstract questions.") (quoting Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190, 1203 n.43 (11th Cir.) (al-

It is important to distinguish the definitional posture of circuit court decisions from general rationales behind generalized grievances. In the past, "questions of wide public significance" have been invoked to *justify* standing limitations.[276] As mere justifications, concerns about the courts' larger impact in a constitutional system is appropriate. Yet, recently, lower courts have *defined* generalized grievances as "questions of wide public significance" rather than justified their application on that basis. This is significantly more important because it requires some substantive understanding of what a "question of wide public significance" is.

But what does this aversion to "abstract questions" refer to? The D.C. Circuit may have had the answer nearly thirteen years ago:

> If a question is abstract, the *constitutional* limits on standing require dismissal. If on the other hand, the concern is that other government institutions are more competent to address the question, the political question doctrine, a prudential consideration, would appear to require dismissal.[277]

An aversion to abstract "questions of wide public significance" may merely be a reformulation of the political questions doctrine.[278] Unfortunately, the political questions doctrine is in as much a state of confusion as generalized grievance analysis.[279] Initially, it should be noted that political questions and standing are separate justiciability

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terations in original), *cert. denied*, 500 U.S. 942 (1991)); Adams v. Watson, 10 F.3d 915, 918, n.7 (1st Cir. 1993) ("[C]laimants with 'generalized grievances' shared by a large class of citizens and raising 'abstract questions of wide public significance' normally will be denied standing.") (quoting Valley Forge, 454 U.S. 464, 475 (1982)); Sullivan v. Syracuse Hous. Auth., 962 F.2d. 1101, 1106 (2nd Cir. 1992) ("[C]ourts generally should refrain from adjudicating 'abstract questions of wide public significance.' "); *accord*, United States v. AVX Corp., 962 F.2d 108, 114 (1st Cir. 1992); Goos v. ICC, 911 F.2d 1283, 1290 (8th Cir. 1990); United States v. Kerner, 895 F.2d 1159, 1162 n.3 (7th Cir. 1990).

276. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982).

277. Community Nutrition Inst. v. Block, 698 F.2d 1239, 1252 n.74 (D.C. Cir. 1983), *rev'd*, 467 U.S. 340 (1984).

278. As an alternative to "wide public significance" being a reformulation of the political questions doctrine, the analysis is arguably not an independent requirement at all but rather the rationale behind third party standing. As noted *supra* notes 259-64 and accompanying text, the Court in *Warth* originally applied this "wide public significance" language to both generalized grievances and third party standing. Assuming generalized grievances are constitutionally based, questions of wide public significance are being served when the court refuses to allow claims by third parties whose rights are not implicated. Importantly, however, "wide public significance" is not what defines third party standing. Instead, it merely explains and justifies its usage. In this sense it differs from an abstract question analysis which seeks to gain meaning from issues which are of "wide public significance."

279. *See* TRIBE, *supra* note 8, at 96-107.

questions. Along with mootness[280] and ripeness,[281] the concepts of political questions and standing encompass the larger doctrine of justiciability.[282] Although tangentially related, these justiciability issues all come together to allow or deny access to federal courts.

In *Baker v. Carr*[283] the Court set out to provide an outline of factors which govern political questions. According to the Court:

> Prominent on the surface of any case held to involve a political question is found a textually demonstratable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[284]

While it is beyond the scope of this Comment to explore this complicated area of justiciability, it is enough that these factors are reasonably related to concerns about "questions of wide public significance."[285] Given the similarity between political questions and what is best described as "abstract questions of wide public significance," clarity and simplicity dictate abandoning "abstract questions" as a distinct prudential limitation. Its use has only generated confusion, and it adds little to the analysis not already addressed by the political questions doctrine.

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280. *See generally* 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.1, 218 (1984) ("Mootness decisions are concerned in large part with the determination whether any effective purposes can still be served.").

281. *See generally* WRIGHT, *supra* note 113, § 3532, 112 (1984) ("Ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision.").

282. *See* CHEMERINSKY, *supra* note 97, at 42 ("[J]usticiability includes the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine.").

283. 369 U.S. 186 (1962).

284. *Id.* at 217.

285. For a more in depth discussion of political questions, see CHEMERINSKY, *supra* note 97, at 142-54; TRIBE, *supra* note 8, at 96-107; Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125; J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887 (1994).

The abandonment of an "abstract question of wide public significance" prudential limitation is not a dramatic move. The Supreme Court has never applied this "abstract question" limitation in terms of a prudential limitation, and its failure to do so would recommend the abandonment of it by lower courts. In fact, it appears that only two cases in the circuit courts have ever expressly applied a prudentially based limitation described either as a generalized grievance or an abstract question of wide public significance.[286]

In *Community Nutrition Institute v. Block*,[287] the court rejected the use of a generalized grievance analysis to deny individual milk consumers standing. At issue were compensatory payments to producers by manufacturers of reconstituted milk products.[288] The plaintiffs claimed that such actions precluded them from buying milk products at lower and stable prices.[289] The government argued that such consumer injuries are "suffered in some indefinite way in common with people generally"[290] and therefore constitute a generalized grievance prudentially barred from adjudication. In rejecting this argument the court "refuse[d] to believe that the mere fact that a plaintiff's injury is shared by many people requires a court to dismiss his complaint."[291] As a matter of public policy, barring these consumers from adjudicating their claim would effectively destroy the ability of courts to serve as an avenue of protection for consumer complaints.[292]

In *Apache Bend Apartments v. United States Through IRS*,[293] the Fifth Circuit took a different view. At issue in *Apache Bend* was the constitutionality of the 1986 Tax Reform Act's transition rules.[294] The plaintiffs alleged that these rules provided exemptions from designated provision for a select group of taxpayers and that such exemptions violated the Uniformity Clause and the equal protection component of the Fifth Amendment.[295] In a rehearing *en banc*, the

286. This is not to say that confusion has not or will not arise in the district courts.

287. 698 F.2d 1239 (D.C. Cir. 1983), *rev'd on other grounds*, 467 U.S. 340 (1984).

288. *Id.* at 1242.

289. *Id.* at 1246-47.

290. *Id.* at 1251 (quoting Frothingham v. Mellon, 262 U.S. 447, 488 (1923)).

291. *Id.*

292. *Id.* at 1251 (citing Cutler v. Kennedy, 475 F. Supp. 838, 848 n.23 (D.D.C. 1979), *overruled on other grounds by* Chaney v. Heckler, 718 F.2d 1174, 1188 (1983)) ("If dismissal were required in such cases, consumer injuries would never be justiciable because '[c]onsumer injuries, by their very nature tend to be shared in common by many other similarly situated individuals.' ").

293. 987 F.2d 1174 (5th Cir. 1993) (*en banc*).

294. *Id.* at 1175.

295. *Id.*

court held that the plaintiffs failed to satisfy a prudentially based ban against generalized grievances.[296]

According to the court, the plaintiffs' claim was "shared in substantially equal measure by a 'disfavored class' that includes all taxpayers who did not receive transition relief."[297] This was true because the plaintiffs were not seeking transition relief for themselves, but were requesting the denial of transition relief to those who were currently receiving it.[298] While recognizing that " 'standing is not to be denied simply because many people suffer an injury' "[299] the court noted that the rationale " 'if [the plaintiffs] have no standing, no one will have standing to sue' is not a reason to find standing.' "[300] As such, the plaintiffs' "allegations of inequality resulting from the transition rules present 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."[301]

Apache Bend is a paradigm example of how lower courts may misinterpret the constitutional foundation of generalized grievances. Decided in 1993, the court had the benefit of the Supreme Court's opinion in *Lujan* and cited to that opinion in the case.[302] The court nevertheless applied a prudentially based generalized grievance using the language of the Court's misquoted opinion in *Warth*.[303] This is not troublesome because the outcome would have been different.[304] Instead, the real problem is that the court succeeds in distorting generalized grievance by applying political question considerations to a generalized grievance analysis. Consider this comment by Judge Jolly of the majority:

> Prudential principles are judicial rules of self-restraint, founded upon the recognition that the political branches of

296. *Id.* at 1175-76.

297. *Id.* at 1177-78.

298. *Id.* at 1178.

299. *Id.* at 1178 (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973)).

300. *Apache Bend Apartments*, 987 F.2d at 1179 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)).

301. *Id.* at 1180 (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982)).

302. *Id.* at 1176.

303. *Id.*, *see supra* notes 259-68 and accompanying text (discussing the *Warth* misinterpretation).

304. Given the court's liberal citations to *Schlesinger, Richardson, Levitt*, and *Fairchild*, it is likely the court would have reached the same conclusion if it had applied a constitutionally based understanding of generalized grievances rooted in the particularity concept of injury-in-fact.

> government are generally better suited to resolving disputes involving matters of broad public significance.[305]

If generalized grievances exist, and are defined as concepts of self-restraint concerning questions of wide public significance, then this is unquestionably an application of the political questions doctrine. It is a misnomer to call this analysis a prudential limitation of standing. The court is essentially developing a new form of political questions without the benefit of precedent or standards to help guide its decisions.[306]

Note that as outlined in *Baker v. Carr*, the Court has articulated a multi-factor balancing approach to the political questions doctrine.[307] Such a balancing approach has not developed in a prudentially based generalized grievance case. The absence of an underlying test lends to unprincipled and subjective applications of the political questions doctrine without ever referring to political questions in the court's analysis. The abandonment of a wide public significance test is therefore useful, sound, and lends itself to clarity. More importantly, it will lead to more principled and objective decisions in the standing area because it will remove a form of inquiry which must inherently look at the merits of the underlying claim.

Consider the Supreme Court's distinction between political questions and standing in *Simon v. Eastern Kentucky Welfare Rights Organization*.[308] According to the Court:

> Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[309]

Yet a prudential limitation concerned with whether questions are of wide public significance must necessarily look at the underlying merits.[310] Not only must the court look at the merits, but to determine if it is a question of wide public significance, it must assess the

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305. *Apache Bend Apts.*, 987 F.2d at 1176.

306. *But see* CHEMERINSKY, *supra* note 97, at 142-43 (arguing that the standards for determining a political question are unclear and not helpful).

307. *See supra* note 284 and accompanying text.

308. 426 U.S. 26 (1976).

309. *Id.* at 1937-38 (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)).

310. Unlike prudential limitations on standing, a constitutionally based concept of generalized grievances will not have to look at the merits and assess the larger impact of a favorable or unfavorable decision. For a constitutionally based generalized grievance, rooted in the particularity component, it is enough to look at the alleged injury and determine if it involves a generalized claim seeking to ensure that the government follow the law. A prudentially based limitation, rooted in questions of wide public significance, must

impact of its ruling. To do this the court must consider additional factors unrelated to a traditional standing inquiry. How a court is to undertake this analysis without considering the underlying issues is difficult to discern. The court in *Block* could not evaluate the nature of the plaintiff's claim without looking beyond the plaintiff to see how its decision would affect consumers. Nor could the *Apache* court conclude tax exemptions would affect only a small portion of taxpayers without an analysis of the underlying issues of the plaintiff's complaint. Any focus on the party without looking at the underlying issues would not reveal whether coequal branches of government are better suited to resolving a particular issue. Since standing focuses on the party and not the claim,[311] questions of wide public are for all intents and purposes political questions hiding in a standing framework. The Supreme Court and the lower courts should recognize this and abandon notions of a prudential limitation based on any form of a generalized grievance.

V. CONCLUSION

As the jurisdictional doctrine of standing gains more and more influence in federal courts, a more sound and coherent doctrine must emerge. Despite attempts to limit public law litigation in federal courts, challenges against governmental action remain essential to the continued vitality of the Constitution as a living document. Contradictory and confusing standing doctrines create the appearance of injustice and lead to inefficient adjudication of issues. Litigants are left wondering whether the courts are a last resort or a parody of injustice.

Clarity in the field of generalized grievances would be a significant step in the right direction. In an effort to achieve this goal, this Comment has attempted to outline and explore the concept of generalized grievances. Five theories or fact patterns have been presented and subjected to critical analysis. The first, injuries suffered by a large group, adds little to an understanding of generalized grievances. The second, injuries associated with constitutional governance, while not without criticism, is a more coherent concept. Its major structural flaw results from the removal of constitutional provisions from judicial review. The third, concerning racial stigmatization, is a particularly inappropriate application of generalized grievances given the Court's incongruous results in jury cases and the Court's reliance on specula-

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do more. It must assess the impact of the claim on others and look at the underlying issues to discern if it is institutionally competent to address the claim.

311. *See supra* note 36-37 and accompanying text.

tive non-imminent injuries. The fourth, associated with the particularity requirement of injury-in-fact, stands on the firmest ground. Under this approach, however, generalized grievances are merely a category of abstract injuries which do not satisfy injury-in-fact.

The fifth theory of generalized grievances as a prudentially based policy of self-restraint should be completely abandoned. A prudentially based generalized grievance has never been applied at the Supreme Court level. Its creation resulted from unfortunate misapplication by the Court. Further adherence to it in the Court's standing litany only adds confusion.

At the circuit court level generalized grievances have been perverted into a broad-based inquiry into political questions masquerading as a standing analysis. It is here where the greatest threat to a coherent standing analysis exists. If lower courts continue to look at the underlying merits and assess judicial competency, generalized grievances may eventually broaden the application of political questions and distort the court's traditional focus on the party and the injury. Explicit language removing generalized grievances from prudential inquiry is therefore necessary, important, and principled. The Supreme Court should take this simple step and in the process begin the journey toward clarifying the beleaguered doctrine of standing.

RYAN GUILDS