Standing in Texas: Exploring Standing Under the Original Meaning of the Texas Constitution

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Although federal standing doctrine has received considerable scholarly attention, there has been little scholarship on standing under the Texas constitution. Despite the Supreme Court of Texas deciding several standing issues each term in recent years and the fact that standing plays a role in some of the most significant cases in Texas courts, only two articles have examined the doctrine at any length. But the doctrine has changed since both articles were written, and neither article discusses whether standing is justified under the Texas constitution's original understanding, an inquiry of pressing importance given the Texas Supreme Court's move toward originalism. This Note thus seeks to offer a needed synopsis of standing doctrine in Texas today, while also providing the first in-depth examination of whether the Texas constitution's original meaning supports the current doctrine of standing. Specifically, this Note will conclude that standing's general contours, including Texas's liberal taxpayer standing rules, are consistent with the Texas constitution's original understanding. But it will also conclude that prudential standing and the current federal view of "concrete" injuries are inconsistent with the original meaning of the Texas constitution.

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Introduction

The federal doctrine of standing receives considerable attention. Standing regularly plays an important role in some of the most politically fraught cases before the United States Supreme Court. Just this term, the Supreme Court decided that a challenge to the FDA's loosening of regulations of mifepristone, a popular abortifacient drug, could not proceed because the challengers lacked standing.[1] Two of the blockbuster cases from last term, which dealt with the Biden Administration's ability to cancel student loan debt and the legality of affirmative action in college admissions, began with the threshold issue of whether the challengers had standing.[2] And the most recent challenge to the Affordable Care Act, otherwise known as Obamacare, floundered because the plaintiffs lacked standing.[3] The list is far

1. FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1552 (2024).

2. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2365–68 (2023) (holding that Missouri had standing to challenge the Biden Administration's student loan debt cancellation plan); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2157–59 (2023) (holding that Students for Fair Admissions had standing to challenge affirmative action policies at Harvard and the University of North Carolina).

3. California v. Texas, 141 S. Ct. 2104, 2112 (2021).

from exhaustive.[4] Moreover, in recent years, the Supreme Court has been particularly interested in clarifying and reforming the law of standing.[5]

Even beyond the Supreme Court, federal standing doctrine is a recurring and crucial issue. There are currently several circuit splits on standing issues.[6] Further, district courts consider motions to dismiss for lack of standing as a core part of their docket. Given the important role standing plays in federal court, commentators have written a multitude of articles on federal standing doctrine.[7]

Although many state courts regularly hear issues of standing, there is much less scholarship on standing under state constitutions.[8] The Texas Supreme Court, for example, has considered standing issues in dozens of cases in recent years. Yet there have only been two articles—one from 1995 and one from 2008—discussing Texas's standing doctrine at length.[9] Neither

4. *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530, 537 (2021) (addressing various theories of standing to challenge SB8, the Texas Heartbeat Act); Murthy v. Missouri, 144 S. Ct. 1972, 1981 (2024) (dismissing for lack of standing a suit against Executive Branch officials who pressured social media companies to suppress speech); United States v. Texas, 143 S. Ct. 1964, 1971 (2023) (holding that Texas lacked standing to enjoin the Biden Administration to enforce certain immigration laws); Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (holding, over a vigorous dissent, that Massachusetts had standing to challenge the EPA's denial of its rulemaking petition to limit carbon emissions in order to attempt to combat climate change).

5. *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016) (clarifying that an injury must be both particularized and concrete); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (concluding that the mere violation of a federal statute alone is not a concrete injury); Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 20–22 (2023) (granting certiorari to address whether a plaintiff had standing to challenge violations of the Americans with Disabilities Act even though she was unlikely to ever use the defendant's premises). Although the Court declined to address the difficult standing issue in *Acheson Hotels* because the case became moot on appeal, the Court granted certiorari solely to further refine federal standing doctrine. *Acheson Hotels*, 144 S. Ct. at 21.

6. There is currently a circuit split on whether a common law claim without factual harm is a concrete injury. *Compare* Dinerstein v. Google, LLC, 73 F.4th 502, 518–22 (7th Cir. 2023) (finding that breach of contract, absent more, is not a concrete injury), *with* Denning v. Bond Pharmacy, Inc., 50 F.4th 445, 451 (5th Cir. 2022) ("[A] breach of contract is a sufficient injury for standing purposes."). In *Acheson Hotels*, 144 S. Ct. at 22, the Supreme Court declined to resolve a three–three circuit split on whether informational injuries are sufficient to confer standing. *Compare, e.g.*, Laufer v. Arpan LLC, 29 F.4th 1268, 1273–74 (11th Cir. 2022) (standing), *with* Harty v. W. Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022) (no standing). Another circuit split was recently resolved among the circuits. *See* Drazen v. Pinto, 74 F.4th 1336, 1343–46 (11th Cir. 2023) (en banc) (aligning itself with several other circuits by holding that a single text is a sufficient injury for standing under the Telephone Consumer Protection Act). And there are others still.

7. *E.g.*, William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197 (2016); Matthew Hall & Christian Turner, *The Nature of Standing*, 29 WM. & MARY BILL RTS. J. 67 (2020); Jeffrey G. Casurella, *Why Standing Matters*, 74 MERCER L. REV. 557 (2023).

8. *See, e.g.*, Rebekah G. Strotman, Note, *No Harm, No Problem (In State Court): Why States Should Reject Injury in Fact*, 72 DUKE L.J. 1605, 1606–07 (2023) (highlighting that "justiciability doctrines, including standing, have largely been left out of the discussion" at the state level).

9. *See* William V. Dorsaneo, III, *The Enigma of Standing Doctrine in Texas Courts*, 28 REV. LITIG. 35, 37 (2008) (arguing that standing doctrine in Texas should be a nonjurisdictional procedural defense); Theresa M. Gegen, *Standing on Constitutional Grounds in Texas Courts: Effect of* Texas Association of Business v. Texas Air Control Board, 47 BAYLOR L. REV. 201, 203

of those works analyzed the original understanding of standing doctrine under the Texas constitution. This Note will do just that. Particularly, this Note will examine whether the original understanding of the Texas constitution supports the doctrine of standing.

This question is especially timely. Both standing and the theory of originalism have grown in prominence in recent years—at the federal level and in Texas. Several Texas Supreme Court justices—and perhaps even the entire court—have explicitly endorsed originalism.[10] And standing issues are not only common, which is unsurprising given that standing is a threshold jurisdictional matter, but standing also plays an important role in some of the most significant cases in Texas state courts.

Consider just one example from this term. Several women and doctors sought an injunction against the enforcement of three Texas laws—including the Heartbeat Act, otherwise known as SB8—that impose civil and criminal liability for providing an abortion.[11] The women alleged that they "suffered serious complications during their pregnancies," which, they argued, meant that either abortion providers fit within a statutory exemption from liability or the statutes violated the Texas constitution.[12] But the women alleged that

(1995) (summarizing and predicting the effects of the Texas Supreme Court decision that explicitly adopted a jurisdictional view of standing). One recent article does consider Texas's standing doctrine but does so in only a few paragraphs. *See* Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 229–31 (2022) (briefly summarizing part of Texas's current standing doctrine). There are a few other articles that discuss Texas standing rules in a narrow context and another that writes about standing before it was a jurisdictional requirement, but these articles are not particularly relevant to a general discussion of Texas's standing doctrine. *E.g.*, Franklin S. Spears & Jeb C. Stanford, *Standing to Appeal Administrative Decisions in Texas*, 33 BAYLOR L. REV. 215 (1981); Taylor Seaton, *Standing Up for Nontraditional Families: How Third-Party Standing Prevents Courts from Examining the Best Interest of the Child in Texas*, 52 TEX. TECH L. REV. 937 (2020); Paige Ingram Castañeda, *O Brother (or Sister), Where Art Thou: Sibling Standing in Texas*, 55 BAYLOR L. REV. 749 (2003); Alejandro R. Almanzán, *Standing to Sue: Extending Third-Party Standing to Physician-Providers to Enforce the Medicaid Act*, 8 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 17 (2005).

10. *See*, *e.g.*, Miles v. Tex. Cent. R.R. & Infrastructure, Inc., 647 S.W.3d 613, 623 (Tex. 2022) (opinion of Lehrmann, J.) ("We agree with the dissent that courts must give a statutory provision the ordinary meaning that it had at the time it was enacted."); *id.* at 633 (Young, J., concurring) ("I wholeheartedly share the view that 'the meaning of a statute that governs is the ordinary meaning commonly understood at the time of enactment.'" (quoting *id.* at 643)); *id.* at 643 (Huddle, J., dissenting) ("After all, the meaning of a statute that governs is the ordinary meaning 'commonly understood at the time of enactment.'" (quoting Thompson v. Tex. Dep't of Licensing & Regul., 455 S.W.3d 569, 570 (Tex. 2014))); Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC, 619 S.W.3d 628, 642 (Tex. 2021) (Blacklock, J., concurring) ("The meaning of the Constitution does not change with the weather."); ETC Mktg., Ltd. v. Harris Cnty. Appraisal Dist., 528 S.W.3d 70, 90 (Tex. 2017) (Brown, J., concurring) ("The text of the Constitution, interpreted in light of its original meaning, should prevail over slavish devotion to judge-made, form-over-substance, multi-factor tests.").

11. Texas v. Zurawski, 690 S.W.3d 644, 654 (Tex. 2024).

12. *Id.* at 653–54.

they were "delayed in receiving abortions" or could not receive abortions in Texas at all because doctors "were hesitant . . . for fear of legal consequences."[13] One of the central questions in the case was that of standing—whether the Texas courts could even hear the challenge at all.[14] Although the Texas Supreme Court held that one of the plaintiff-doctors had standing,[15] she alone had standing to sue only one defendant on only one of her several claims.[16] The court made clear that other suits with either different plaintiffs, different defendants, or different factual evidence supporting the threat of enforcement could yield a different result.[17] If, for example, only the women themselves had sued, the court made clear that they would not have had standing.[18] As cases like this show, an examination of whether standing—and the outcome-determinative, jurisdictional effect courts give it—is supported by the original meaning of the Texas constitution is of crucial importance.

Moreover, an exploration of Texas's standing doctrine is also apt as federal standing requirements have become stricter, requiring more plaintiffs to sue in state court and wrestle with different jurisdictional requirements.[19] Because many violations of the Fair and Accurate Credit Transactions Act, the Fair Credit Reporting Act, and other similar federal laws might not be actionable in federal court,[20] plaintiffs' only alternative is state court. It is thus essential to examine the jurisdictional limits in Texas state court.

This Note will first compare the current view of standing in federal courts to standing in Texas courts. It will establish that Texas's standing

13. *Id.* at 654.

14. *See id.* at 657–60 (discussing standing).

15. *Id.* at 653.

16. *See id.* at 660 (holding that Dr. Karsan had standing to sue the Attorney General for her claims against the civil, not criminal, enforcement of the Human Life Protection Act but not the Heartbeat Act or the Texas Penal Code).

17. *See id.* at 658–59 & n.14 (noting that "Dr. Karsan has not shown that the Texas Medical Board has threatened enforcement" and thus has no standing to sue it, and also explaining that "[o]ther than the letters [from the Attorney General] threatening enforcement against Dr. Karsan, the Center made no showing of state enforcement against any plaintiff"); *id.* at 659–60 (concluding that there is no standing to sue the state of Texas and that there is only standing to sue the Attorney General concerning one of the three statutes at issue); *id.* at 660 n.26 (holding that the patients' injuries "cannot be redressed by an injunction" and thus they have no standing); *id.* at 660 n.27 (reserving the question whether a doctor has third-party standing to sue on behalf of her patients).

18. *Id.* at 660 n.26.

19. *See* TransUnion v. Ramirez, 141 S. Ct. 2190, 2224 n.9 (Thomas, J., dissenting) (noting that the majority's holding that the violation of a private right guaranteed by statute is not a concrete injury "may leave state courts . . . as the sole forum for such cases"); Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211–12 (2021) (discussing how recently heightened federal standing requirements lead plaintiffs to state courts, which vary significantly in their jurisdictional requirements).

20. *See TransUnion*, 141 S. Ct. at 2200 (holding that a violation of the Fair Credit Reporting Act, by itself, is an insufficient injury for purposes of standing).

requirements closely track federal law. But it will also show that Texas's standing doctrine is not identical to federal doctrine. Texas has yet to decide whether to follow the new federal understanding of concrete injuries, and Texas's taxpayer standing rules differ in several ways from federal law.

This Note will then examine whether the original understanding of the Texas constitution supports Texas's standing doctrine. It concludes that standing's general contours, including taxpayer standing, are consistent with the Texas constitution's original meaning. But it also argues that prudential standing and the federal view of "concrete" injuries are inconsistent with the original understanding of Texas's constitution.

I. Comparative Analysis

This Part will compare federal standing doctrine with Texas's standing doctrine. It will begin with federal law before turning to Texas doctrine.

A. Federal Standing Doctrine

This subpart will provide a brief overview of standing in federal court by considering three aspects of the doctrine: its nature, source, and general rules.

1. Standing's Nature.—Standing is a jurisdictional requirement.[21] Specifically, standing implicates courts' subject matter jurisdiction—their power to hear and decide certain disputes.[22] As such, standing is not waivable but is a threshold requirement in every case.[23] Parties thus can argue at any time that the plaintiff lacks standing, even for the first time on appeal.[24] This also means that courts have the power—and the duty—to consider standing *sua sponte*.[25] Because standing is jurisdictional, it does not depend upon or resolve the merits of a case.[26]

2. Standing's Source.—The source of standing under federal law is primarily the United States Constitution. Standing "is built on a single basic idea—the idea of separation of powers."[27] The Constitution vests only "judicial Power" in federal courts,[28] and it "confines" that power "to the

21. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

22. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102–03 (1998).

23. *Id.*

24. 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.15 (3d ed. 1998).

25. Juidice v. Vail, 430 U.S. 327, 331 (1977).

26. *Steel Co.*, 523 U.S. at 89.

27. Allen v. Wright, 468 U.S. 737, 752 (1984).

28. U.S. CONST. art. III, § 1.

resolution of 'Cases' and 'Controversies.'"[29] Standing is a core "landmark[]" of true "Cases" and "Controversies."[30] It is largely based on the "oldest and most consistent thread in the federal law of justiciability": the prohibition of advisory opinions.[31] Federal courts do not answer "hypothetical or abstract" legal questions.[32] Rather, they resolve concrete disputes between adverse parties by issuing judgments binding on the parties.[33] Standing, by allowing a court to proceed only if it could remedy a plaintiff's injuries with a favorable decision, ensures that courts are not merely giving legal advice.[34] Standing requires that a plaintiff is injured.[35] Without an injury, there is nothing for the court to remedy.[36] Standing also requires that the defendant caused the injury.[37] Without the right defendant, a court order cannot properly remedy the injury. An injunction against the wrong defendant, for example, would do nothing to stop or even mitigate the plaintiff's ongoing injury. Standing finally demands that the court can properly redress the asserted injury with a favorable decision.[38] Without each requirement, the court's opinion would be advisory.[39]

As such, standing "ensure[s] that federal courts do not exceed their authority as it has been traditionally understood,"[40] and "prevent[s] the judicial process from being used to usurp the powers of the political branches."[41] Standing thus maintains "the proper—and properly limited—role" of unelected judges "in a democratic society."[42]

The federal courts are an additional source of some aspects of standing. The doctrine of standing "embraces several judicially self-imposed limits on the exercise of federal jurisdiction," which are regularly referred to as prudential standing.[43] These additional, court-created limits on a plaintiff's

29. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

30. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

31. Flast v. Cohen, 392 U.S. 83, 96 (1968) (internal quotation marks omitted) (quoting CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 34 (1963)). But some scholars have argued that this is not quite right because dicta is advisory in character. Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 784 (1998).

32. *TransUnion*, 141 S. Ct. at 2203.

33. Muskrat v. United States, 219 U.S. 346, 361 (1911).

34. Carney v. Adams, 141 S. Ct. 493, 498 (2020).

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

36. *See id.* (explaining that a plaintiff must suffer an actual or imminent injury to have standing).

37. *Id.*

38. *Id.* at 561.

39. *See Carney*, 141 S. Ct. at 498 (explaining that standing and its requirements "implement[]" the bar on advisory opinions).

40. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

41. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

42. Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

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

ability to establish standing "express merely prudential considerations that are part of judicial self-government."[44] In other words, even if a plaintiff has Article III standing—thus giving the court jurisdiction—the court will decline to exercise its jurisdiction if it would be unwise or imprudent to do so. Aspects of prudential standing have included restrictions on third-party standing, the bar on generalized grievances, and the zone-of-interests requirement.[45]

But the Court has grown increasingly skeptical of prudential standing, as it "is in some tension with" the principle that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[46] Some prudential requirements have thus been folded into constitutional standing.[47] Other elements have been removed from standing altogether.[48] But although prudential standing is currently disfavored, the Court has not ruled that prudential standing is inappropriate.[49] Prudential standing, therefore, still stands as an uncomfortable additional source of some aspects of federal standing doctrine.

3. Standing's Requirements.—Standing contains three requirements. First, the plaintiff "must have suffered an 'injury in fact.'"[50] Second, the plaintiff's injury must be "fairly traceable to the challenged action of the defendant."[51] Third, "it must be 'likely' . . . that the injury will be 'redressed by a favorable decision.'"[52] The plaintiff "bears the burden of establishing these elements."[53] Moreover, the plaintiff must establish standing for each claim brought.[54] Briefly analyzing each element will further elucidate the doctrine.

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44. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

45. *Allen*, 468 U.S. at 751.

46. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014) (internal quotation marks omitted) (quoting Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013)).

47. *See Lujan*, 504 U.S. at 573–74 (holding that the bar on generalized grievances is a constitutional requirement).

48. *See Lexmark*, 572 U.S. at 127 & n.3 (holding that the zone-of-interests test is a merits inquiry and not part of the standing analysis).

49. The Court reaffirmed third-party standing as a legitimate exercise of prudential standing in *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). But its standing analysis was called into question in *Dobbs*, 142 S. Ct. at 2275–76, though the Court's critique was not clearly concerned with whether third-party standing is prudential or constitutional.

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

51. *Id.* (alterations omitted) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).

52. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38).

53. *Id.*

54. Town of Chester v. Laroe Ests., Inc., 137 S. Ct. 1645, 1650 (2017). In a multiple-plaintiff suit—particularly, but not exclusively, suits for prospective equitable relief—if one plaintiff has

a. Injury.—The injury-in-fact requirement is "the 'first and foremost' of standing's three elements."[55] The plaintiff's injury must be (1) "concrete," (2) "particularized," and (3) "actual or imminent."[56]

A "concrete" injury is "real, and not abstract."[57] "[H]istory and tradition offer a meaningful guide" in determining whether an injury is concrete.[58] Specifically, the Court has instructed that injuries bearing a "'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts" are concrete.[59] Physical and monetary harms easily qualify, and some "intangible harms," such as "reputational harms, disclosure of private information, and intrusion upon seclusion," do as well.[60]

If the plaintiff's claim arises from a statutory violation, "Congress's views may be 'instructive'" on whether that injury is concrete.[61] Yet Congress cannot establish a concrete injury and thereby confer standing.[62] "[B]are procedural violation[s], divorced from any concrete harm" are insufficient.[63] Thus, an accurate consumer report that lacks statutorily required notice[64] or a credit report containing false information in violation of a statute but which has not been (and will not be) disseminated to others are not, by themselves, concrete injuries.[65] Congress may only "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[66] The reason? Article III requires an injury in

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standing, the court may adjudicate the merits "of the entire case, *as to all plaintiffs*." Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 487 (2017). This "one-plaintiff rule," which seems to conflict with the principle underlying the claim-by-claim approach, is puzzling and ripe for criticism. *Id.*

55. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (alterations omitted) (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 103 (1998)).

56. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021). The Court may have added an additional requirement last term. Although the Court recognized that "[m]onetary costs are of course an injury," the Court held that in the specific context there at issue, this injury was not "legally and judicially cognizable," and thus there was not a sufficient injury for purposes of standing. United States v. Texas, 143 S. Ct. 1964, 1970 (2023) (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997)). The Court did not connect this analysis to either "concreteness" or "particularization."

57. *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted).

58. *TransUnion*, 141 S. Ct. at 2204 (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008)).

59. *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).

60. *Id.*; *see also* FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1556 (2024) ("An injury in fact can be a physical injury, a monetary injury, an injury to one's property, or an injury to one's constitutional rights, to take just a few common examples.").

61. *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 136 S. Ct. at 1549).

62. *Id.* at 2205.

63. *Spokeo*, 136 S. Ct. at 1549.

64. *Id.* at 1550.

65. *TransUnion*, 141 S. Ct. at 2209–10.

66. Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992).

fact—and "an injury in law is not an injury in fact."[67] Merely alleging the violation of legal rights is insufficient to establish standing in federal court.

An injury is "particularized" if it "affect[s] the plaintiff in a personal and individual way."[68] In other words, it must be the plaintiff who suffers the harm, not someone else—though an injury may be "widely shared," such as the "injuries from a mass tort."[69] A plaintiff's injury is not particularized, however, if "he has merely a general interest common to all members of the public."[70] Such a "generalized grievance" is inappropriate for courts to determine, for it is the political branches' role to "[v]indicat[e] the *public* interest."[71]

Finally, the harm must be "actual or imminent." An actual injury has already happened or is currently happening—a "present injury."[72] Imminence concerns probabilistic injuries.[73] An "imminent" injury is "not 'conjectural[,]' 'hypothetical[,]'" or "speculative."[74] Generally, the "threatened injury must be *certainly impending* to constitute injury in fact."[75] But the Court has been inconsistent in the standard required and has also held that "'substantial risk' that the harm will occur" is also sufficient.[76]

An important application of the injury requirement is the bar against federal taxpayer standing. "[T]he payment of taxes is generally not enough to establish standing."[77] But a narrow exception exists when "there is a logical nexus between the status asserted and the claim sought to be adjudicated."[78] Specifically, a taxpayer must challenge a statute enacted under the Tax and Spend Clause as exceeding constitutional limits on the

67. *TransUnion*, 141 S. Ct. at 2205. Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, wrote a dissent that vigorously rejected this proposition as itself completely ahistorical and misguided. *See id.* at 2215–25 (Thomas, J., dissenting) (concluding that the allegation of the violation of a private right is a sufficient injury).

68. *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1).

69. *Id.* at 1548 n.7.

70. *Lujan*, 504 U.S. at 575 (quoting *Ex parte* Lévitt, 302 U.S. 633, 634 (1937)).

71. *Id.* at 575–76 (first quoting United States v. Richardson, 418 U.S. 166, 173 (1974)).

72. 33 CHARLES ALAN WRIGHT, CHARLES H. KOCH, JR. & RICHARD MURPHY, FEDERAL PRACTICE AND PROCEDURE § 8337 (2d ed. 2018).

73. *Id.*

74. *Lujan*, 504 U.S. at 560, 564 n.2 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

75. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (discussing *Whitmore*, 495 U.S. at 158).

76. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 414 n.5). Perhaps judges cannot comprehend a difference between a certainly impending injury and a substantial risk of injury because human "cognitive limitations" allow for only de novo or "deferential review." *See* Sch. Dist. of Wis. Dells v. Z.S. *ex rel.* Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002) (opinion of Posner, J.) (discussing the appropriate deference to administrative action).

77. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007).

78. Flast v. Cohen, 392 U.S. 83, 102 (1968).

clause.[79] The Establishment Clause is the Court's only recognized limitation.[80] And this already narrow exception has been "sharply limit[ed]" to the point that "there is not much left to overrule."[81]

The rule against federal taxpayer standing implicates all three injury requirements.[82] The injury from illegal tax expenditures is suffered "in common with people generally" and is "essentially a matter of public and not of individual concern."[83] Thus, the injury is not particularized. Moreover, "unconstitutional federal expenditure[s]" do not "cause[] an individual federal taxpayer any measurable economic harm,"[84] and the effects upon the plaintiff are "minute and indeterminable."[85] So the injury is not concrete. Finally, the asserted injury "rest[s] on unjustifiable economic and political speculation."[86] The injury is therefore not actual or imminent. And because the same "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers," the same rules apply to state taxpayers.[87]

The illegal use of municipal funds, however, can satisfy the injury-in-fact requirement. Municipal taxpayers have a more "direct and immediate" interest in government expenditures than federal or state taxpayers.[88] Thus, their injury is more personal, significant, and certain. As such, "resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation."[89]

b. Traceability.—Standing's second element is traceability. The plaintiff's injury must be "fairly traceable to the challenged action of the defendant."[90] This prong is even less susceptible to clear rules than the injury prong, and "courts vary the strictness with which they apply it."[91] The basic question is whether "the line of causation between the illegal

79. *Id.* at 102–03.

80. 33 CHARLES ALAN WRIGHT, CHARLES H. KOCH, JR. & RICHARD MURPHY, FEDERAL PRACTICE AND PROCEDURE § 8339 (2d ed. 2018).

81. *Id.*

82. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344–45 (2006).

83. Frothingham v. Mellon, 262 U.S. 447, 487–88 (1923).

84. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007).

85. *Frothingham*, 262 U.S. at 487.

86. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 136 (2011).

87. *DaimlerChrysler*, 547 U.S. at 345.

88. *Frothingham*, 262 U.S. at 486.

89. *Id.* Although the Court has not officially reaffirmed this holding, it spoke favorably about it in a 1952 case, *Doremus v. Board of Education of Borough of Hawthorne*, 342 U.S. 429, 433–34 (1952), and has not questioned it.

90. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations omitted) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41 (1976)).

91. 33 CHARLES ALAN WRIGHT, CHARLES H. KOCH, JR. & RICHARD MURPHY, FEDERAL PRACTICE AND PROCEDURE § 8341 (2d ed. 2018).

conduct and injury [is] too attenuated" or "speculative."[92] If so, the injury is not *fairly* traceable to the defendant's actions.[93] An injury is too "attenuated" when the "government action is so far removed from its distant (even if predictable) ripple effects."[94] An injury is too "speculative" if it involves links in the chain of causation that are "not sufficiently predictable."[95] Moreover, if the "plaintiff is not himself the object of the government action or inaction he challenges," the causation analysis "'depends on the unfettered choices made by independent actors not before the court[],'" making this prong difficult to satisfy.[96] Despite this language suggesting a proximate causation analysis, federal courts seem to require only but-for and not proximate causation.[97]

c. Redressability.—Standing's final element is redressability. Here, courts "consider the relationship between 'the judicial relief requested' and the 'injury' suffered."[98] To satisfy redressability, "it must be 'likely,'" not "'speculative,' that the injury will be 'redressed by a favorable decision.'"[99] Courts are somewhat inconsistent in making that determination.[100] The

92. Allen v. Wright, 468 U.S. 737, 752 (1984).

93. *See id.* at 756–57 (concluding that the claimed injury, a "diminished ability to receive an education in a racially integrated school," was "not fairly traceable to the Government conduct respondents challenge as unlawful" because the "line of causation" between the "IRS's grant of tax exemptions to some racially discriminatory schools" was "attenuated at best").

94. FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1557 (2024). For example, doctors lack standing to "challenge general safety regulations," such as power plant emissions standards or gun regulations, "as unlawfully lax" even if there is an increased risk of having to treat more injuries because "[t]he chain of causation is simply too attenuated." *Id.* at 1562.

95. *Id.* at 1557.

96. Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)).

97. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct."); Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 74–78 (1978) (concluding that the traceability prong was satisfied because there was a "'but for' cause"); Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1260 (2011) (arguing that although the Court sometimes uses proximate cause language, this language is "intended as cause in fact, rather than proximate cause, language"). *But see* Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1544 (2008) ("The common law analogue to the fairly traceable test is the proximate cause requirement in torts."); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.5 (3d ed. 1998) ("The complexity and malleability of causation analysis are augmented when it mimics the tort-law concerns reflected in such theories as proximate or intervening cause.").

98. California v. Texas, 141 S. Ct. 2104, 2115 (2021) (quoting Allen v. Wright, 468 U.S. 737, 753 n.19 (1984)).

99. *Lujan*, 504 U.S. at 561 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38, 43 (1976)).

100. 33 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD MURPHY, FEDERAL PRACTICE AND PROCEDURE § 8342 (2d ed.). This is unsurprising, given that "causation and

remedy, however, need not completely redress the asserted injury—a partial remedy is enough.[101] But it is the court's "judgment, not its opinion, that remedies an injury."[102] Thus, when a "defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury."[103]

B. Standing in Texas State Court

This subpart will detail Texas's standing doctrine by considering the same three aspects as it did with federal standing: its nature, source, and general rules. In doing so, it will explore the relationship between Texas's standing doctrine and federal standing doctrine.

1. Standing's Nature.—Texas's standing doctrine mirrors federal standing doctrine in many respects. As with federal law, standing under Texas law is a "component of subject matter jurisdiction."[104] Because subject matter jurisdiction concerns the court's power to hear and decide a case, standing "cannot be waived and may be raised for the first time on appeal."[105] Indeed, Texas courts have the power and duty to confirm their own jurisdiction and thus can and must consider standing *sua sponte*.[106] And as a jurisdictional doctrine, standing does not turn on whether "some other legal principle may prevent [the plaintiff] from prevailing on the merits."[107]

Although this matches the nature of standing in federal court, it was not always so. In the years prior to 1993, standing was a waivable procedural requirement that could not be raised *sua sponte*.[108] But the Texas Supreme Court explicitly overruled its prior holding to that effect, relying heavily on federal law.[109]

2. Standing's Source.—The primary source of standing in Texas is the Texas constitution. The Texas constitution does not include a textually

redressability [] are often 'flip sides of the same coin.'" *All. for Hippocratic Med.*, 144 S. Ct. at 1555 (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 288 (2008)).

101. *See* Massachusetts v. EPA, 549 U.S. 497, 525–26 (2007) ("The risk of catastrophic harm" from climate change "would be reduced *to some extent* if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge EPA's denial of their rulemaking petition." (emphasis added)).

102. Haaland v. Brackeen, 143 S. Ct. 1609, 1621 (2023).

103. *All. for Hippocratic Med.*, 144 S. Ct. at 1555.

104. Meyers v. JDC/Firethorne, Ltd., 548 S.W.3d 477, 484 (Tex. 2018).

105. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 445 (Tex. 1993).

106. *Id.* at 446; *Meyers*, 548 S.W.3d at 484.

107. Perez v. Turner, 653 S.W.3d 191, 198 (Tex. 2022) (quoting Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 696 (Tex. 2021)).

108. Dorsaneo, *supra* note 9, at 48.

109. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 444–46 (concluding, based in part on explicit analogies to federal law, that standing is jurisdictional).

identical counterpart to the Federal Constitution's Case or Controversy Clause. But the Texas Supreme Court has identified two constitutional provisions that provide the basis for standing: the separation-of-powers provision and the open courts provision.[110]

Unlike the Federal Constitution, the Texas constitution explicitly requires the separation of powers:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[111]

Texas courts have read this provision to bar the judiciary from issuing advisory opinions.[112] Answering "abstract questions of law without binding the parties"[113] is not a judicial function but an executive one.[114] The judicial function is to issue binding judgments to resolve concrete disputes between adverse parties.[115] The Attorney General, however, an executive branch official,[116] has the power to "give legal advice in writing to the Governor and other executive officers."[117]

Standing protects the separation of powers by preventing Texas courts from issuing advisory opinions. If the plaintiff has not been injured, any opinion would be advisory because "the judgment addresses only a hypothetical injury" and could not remedy the plaintiff.[118] Likewise, if the defendants did not cause the injury or if the court is powerless to redress the injury, a court would be rendering an advisory opinion. Standing thus ensures that courts hear and decide a "case or controversy" and do not give mere legal advice.[119]

Standing's second stated constitutional basis is the open courts provision: "All courts shall be open, and every person for an injury done him,

110. Heckman v. Williamson Cnty., 369 S.W.3d 137, 147 (Tex. 2012).

111. Tex. Const. art. II, § 1.

112. Brown v. Todd, 53 S.W.3d 297, 302 (Tex. 2001).

113. *Id.*

114. *See* Garcia v. City of Willis, 593 S.W.3d 201, 206 (Tex. 2019) ("[T]he issuance of advisory opinions is a function of the executive branch, not the judicial.").

115. *See* The State Bar of Tex. v. Gomez, 891 S.W.2d 243, 245 (Tex. 1994) (explaining that subject matter jurisdiction requires that there must "be a live controversy between the parties" and the court must be capable of issuing a binding decision).

116. Tex. Const. art. IV, § 1.

117. Tex. Const. art. IV, § 22.

118. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993).

119. Brooks v. Northglen Ass'n, 141 S.W.3d 158, 163–64 (Tex. 2004).

in his lands, goods, person or reputation, shall have remedy by due course of law."[120] The doctrine of standing is "implicit" in this provision because it "contemplates access to the courts only for those litigants suffering an injury."[121] In other words, the provision implies that courts function to remedy injuries, which is essentially what standing requires.

Although the constitutional provisions that support standing under the federal and Texas constitutions are textually different, the justifications for standing are essentially the same. Under federal and state law, standing is primarily rooted in the separation of powers.[122] And the separation of powers has been understood under both governments to prohibit the promulgation of advisory opinions and to thus require courts to adjudicate live disputes in which the court can remedy a plaintiff's injury. Indeed, the Texas Supreme Court noted this similarity and partially relied on the federal justification as support for grounding standing on the separation of powers.[123] The court has also likened the open courts provision to the federal constitutional provision limiting federal court jurisdiction to "cases" and "controversies" because both provisions imply that courts may only remedy a plaintiff's harms.[124]

The primary difference between their justifications for standing relates to democratic concerns. Federal courts are careful to maintain the separation of powers through standing in part because federal judges are unelected.[125] Federal standing doctrine thus prevents the least democratic branch from answering every legal question and thereby continually monitoring the democratic branches.[126]

Democratic concerns are not as salient in Texas because judges are regularly elected by the people, but they are still present to some degree. Although Texas judges are elected, they are likely less responsive to current popular will than the other branches because judges are neutral arbiters that

120. Tex. Const. art. I, § 13.

121. M.D. Anderson Cancer Ctr. v. Novak, 52 S.W.3d 704, 708 (Tex. 2001).

122. *See supra* notes 27, 112–119 and accompanying text.

123. *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

124. *See id* at 444–45 (juxtaposing the federal "cases" and "controversies" requirement with the Texas open courts provision).

125. *See* Allen v. Wright, 468 U.S. 737, 750 (1984) (explaining that standing derives in part from "the constitutional and prudential limits [on] the powers of an unelected, unrepresentative judiciary in our kind of government" (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring))).

126. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) (stating that standing "serves to prevent the judicial process from being used to usurp the powers of the political branches"); Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009) (explaining that standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society" (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975))).

merely apply the law to the facts before them.[127] The legislative and executive branches, on the other hand, permissibly make at least some decisions with an eye toward gaining support from the public in order to bolster their election results.[128] It is true that Texas courts can make changes to the common law and are not merely interpreting the law in such instances.[129] But the common law is by nature slower to change and conform with popular will than statutory law enacted by the legislature.[130] The Texas judiciary, therefore, is more democratic than the federal judiciary, but less democratic than the Texas legislature and executive branch. As a result, standing is justified more with respect to safeguarding democracy under federal law than under Texas law.

A second possible source of standing is the Texas courts themselves. The Texas Supreme Court has been unclear about prudential standing's status. In 2008, the court said that prudential standing was an open question: "This Court has not indicated whether standing is always a matter of subject-matter jurisdiction."[131] But prior to that, in the context of taxpayer standing, "a judicially created exception to the general standing rule," the court held, "for *prudential* reasons, that paying sales tax does not confer taxpayer standing."[132] Then in 2011, the court stated that some aspects of standing—specifically third-party standing—are prudential.[133] And in 2017, the court

127. *See* Elephant Ins. Co. v. Kenyon, 644 S.W.3d 137, 157 (Tex. 2022) (Young, J., concurring) ("Our branch's core role is unchanging, though, because our core role is not to *adjust* or *make* the law, but to *interpret* and *apply* it.").

128. *See* Pierre Lemieux, *The Public Choice Revolution*, 27 REGUL., Fall 2004, at 22, 24–25 (explaining that politicians are self-interested and want to get elected, so they often make decisions to appeal to the median voter).

129. *See* Ford W. Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEXAS L. REV. 801, 825–26 (1950) (concluding that Texas courts apply traditional common law concepts unless they are "so out of line with local conditions as to make [their] application to the particular case arbitrary or unreasonable"); *Elephant Ins.*, 644 S.W.3d at 145 ("Before a duty is recognized, courts must weigh the 'social, economic, and political questions and their application to the facts at hand' to determine whether a duty exists and what it is." (quoting Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 182 (Tex. 2004))). It is possible that under the Texas constitution as originally understood, this might not be true because the Texas constitution was adopted prior to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

130. *See* Alan Schwartz & Robert E. Scott, *Obsolescence: The Intractable Production Problem in Contract Law*, 121 COLUM. L. REV. 1659, 1668–69 (2021) (explaining that the common law's "[d]efault rules are slow to form" and that because courts are confined to the specific facts of the case before them, they do not take into account a broader understanding of societal conditions). *But cf.* Adrian Vermeule, *Customary Law and Popular Sovereignty*, IUS & IUSTITIUM (Jan. 12, 2022), https://iusetiustitium.com/customary-law-and-popular-sovereignty/ [https://perma.cc/R3X2-JMN2] (suggesting that "customary law" is not less democratic than statutory law).

131. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 9 n.16 (Tex. 2008).

132. Williams v. Lara, 52 S.W.3d 171, 180 (Tex. 2001) (emphasis added).

133. *See* Andrade v. NAACP of Austin, 345 S.W.3d 1, 16 (Tex. 2011) (stating that there is a "prudential standing requirement that a plaintiff 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties'" (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975))).

reiterated that the related justiciability doctrine of ripeness has prudential aspects.[134] In a footnote, the court seemed to approve of prudential standing. Even though the United States Supreme Court "recently questioned prudential standing," the court said, "'it is highly doubtful that many important doctrinal principles, including prudential ripeness, are to go by the wayside.'"[135] This is in part because "[j]udges have always formulated rules for the decision of cases that constrain their powers more narrowly than external sources . . . would permit."[136]

In 2020, the Texas Supreme Court suggested a shift away from prudential standing. Relying on federal law, the court held that "determin[ing] whether a plaintiff 'falls within the class of persons authorized to sue' or otherwise has 'a valid cause of action'" is not "standing in its proper, jurisdictional sense" but is a merits issue.[137] Once again in a footnote, it said that the United States Supreme Court "has rightly retreated from the concept of so-called 'prudential' standing."[138]

Although prudential standing now seems disfavored in Texas, its status remains uncertain. First, the court has not squarely held that prudential standing is prohibited. The most recent dictum takes a negative attitude toward prudential standing, but the court's previous dicta did the opposite. Second, it is unclear if every category of prudential standing is disfavored. Although the court suggested that all prudential standing is misguided, its justifications were specific to the zone-of-interests test and it relied on the United States Supreme Court's example. It is unclear what the court would do with prudential standing aspects unaddressed or approved by the federal courts. Third, it is uncertain what will happen to prudential standing requirements if prudential standing is prohibited. They could be constitutionalized into standing proper,[139] become a merits inquiry,[140] or be

134. *See* King St. Patriots v. Tex. Democratic Party, 521 S.W.3d 729, 735–38 (Tex. 2017) (addressing "whether, as a prudential matter," the case was ripe).

135. *Id.* at 738 n.41 (alterations omitted) (quoting Ernest A. Young, *Prudential Standing After* Lexmark International, Inc. v. Static Control Components, Inc., 10 DUKE J. CONST. L. & PUB. POL'Y 149, 163 (2014)).

136. *Id.* (quoting Young, *supra* note 135, at 163).

137. Pike v. Tex. EMC Mgmt., LLC, 610 S.W.3d 763, 773–74 (Tex. 2020) (alterations omitted) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 & n.4 (2014)).

138. *Id.* at 774 n.5.

139. This is what the United States Supreme Court did with the bar on generalized grievances under federal law. Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992). Although the Texas Supreme Court recently reserved the question whether doctors had third-party standing to challenge laws violating their patients' constitutional rights, it did not refer to the bar on third-party standing as prudential and seemed to treat it as an ordinary part of standing proper. *See* Texas v. Zurawski, 690 S.W.3d 644, 660 n.27 (2024) (reserving the third-party standing issue but also quoting two cases that treated the general bar on third-party standing as part of constitutional standing).

140. This is how the United States Supreme Court handled the zone-of-interests test. *Lexmark Int'l, Inc*., 572 U.S. at 125–28.

abandoned altogether. Like with federal law, prudential standing's legitimacy and extent is unsettled in Texas.

3. Standing's Requirements.—The Texas Supreme Court has articulated standing's "general test" as requiring two principles: "a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought."[141] That test has been interpreted to "parallel[] the federal test for Article III standing."[142] Standing in Texas, therefore, requires the same three elements required in federal court: "(1) an 'injury in fact' that is (2) 'fairly traceable' to the defendant's challenged action and (3) redressable by a favorable decision."[143] As with federal law, it is the plaintiff's burden to prove that it has standing for each of its claims.[144] This Note will consider standing's three elements in turn.

a. Injury.—The type of injury required in Texas is an "injury in fact."[145] Texas courts, echoing federal law, require that injury to be "concrete and particularized, actual or imminent."[146]

The particularized injury requirement closely tracks federal law. A "particularized" injury "affects the plaintiff in a personal and individual way."[147] The plaintiff, "rather than a third party or the public at large," must be injured.[148] Put differently, an injury is particularized if it "is distinct from [an] undifferentiated injury to the public."[149] A "widely shared" injury, however, can still be particularized.[150] Although the standard is somewhat

141. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993) (quoting Bd. of Water Eng'rs v. City of San Antonio, 283 S.W.2d 722, 724 (Tex. 1995)).

142. Heckman v. Williamson Cnty., 369 S.W.3d 137, 154 (Tex. 2012).

143. Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives, 647 S.W.3d 681, 690 (Tex. 2022) (quoting *In re* Abbott, 601 S.W.3d 802, 808 (Tex. 2020)).

144. *See id.* at 693 (stating that "the party who invokes the courts' jurisdiction" must establish standing); *Heckman*, 369 S.W.3d at 153 (A "*claim-by-claim* analysis is necessary to ensure that a particular plaintiff has standing to bring each of his particular claims."); *see also Zurawski*, 690 S.W.3d at 658–59 ("When multiple plaintiffs seek relief against enforcement of a law, the existence of one plaintiff with standing is sufficient to support litigation of the claim as to that plaintiff."). The Texas Supreme Court, however, seems to have adopted the federal view that a "plaintiff-by-plaintiff analysis" is not necessary "in suits seeking to enjoin enforcement of a law." Texas v. Loe, No. 23-0697, slip op. at 10 (Tex. June 28, 2024), *available at* https://search.txcourts.gov/Case.aspx?cn=23-0697&coa=cossup [https://perma.cc/7HLH-NZQ9].

145. Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 696 (Tex. 2021).

146. *Heckman*, 369 S.W.3d at 155 (quoting DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299, 304–05 (Tex. 2008)).

147. *Data Foundry*, 620 S.W.3d at 696 (alterations omitted) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016)).

148. *Heckman*, 369 S.W.3d at 155.

149. *See In re* Hotze, 627 S.W.3d 642, 648 (Tex. 2020) (concluding that "merely alleging that the government is violating the law does not invoke the courts' jurisdiction").

150. *See* Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives, 647 S.W.3d 681, 693 (Tex. 2022) (quoting Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998)) (holding

vague, a widely shared but personal injury, as opposed to an injury affecting the general public in the same way, is particularized.

Next, the injury must be "concrete." The classic example of a concrete harm is "direct economic harm."[151] But the exact contours of the concreteness requirement are unclear, as the Texas Supreme Court has not decided whether to follow the United States Supreme Court's new understanding of concreteness—specifically, whether an injury must be factual, not merely legal, and have a close common-law analogue. The court has twice avoided answering whether a statutory violation alone—a legal injury—is a concrete injury. In one case, defendants argued that "the mere omission of a [statutorily required] lease term is not a concrete injury."[152] The court noted that the United States Supreme Court "recently wrestled with similar arguments regarding legislative attempts to confer standing based on 'informational injury' alone."[153] But the court did not address the issue.[154] In another case, plaintiffs argued that "because the Legislature created this private right of action and they fall within the class of persons authorized to sue, they need not plead an injury in fact."[155] The defendant responded by noting that "the U.S. Supreme Court recently rejected a similar argument."[156] Once again, the court declined to reach the issue.[157]

Even before federal law's recent development, the court did not clearly define concrete injuries. At times, it contrasted concrete injuries with "abstract and indefinite" injuries.[158] But the court has also implied that a factual injury is required, as it regularly refers to the necessary injury as an "injury in fact"[159] and one that is not "too slight."[160] These statements sound similar to federal law's factual injury requirement and suggest that mere legal injuries are not concrete. This would mean that the violation of statutory, constitutional, or common law rights is not, by itself, a concrete injury.[161]

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that county residents "deprived of their right, under the Texas Constitution, to two representatives fully devoted to serving the interests of those residents rather than the residents of" that county and a neighboring one suffer a particularized harm, even though it is "shared among county residents").

151. Mosaic Baybrook One, L.P. v. Simien, 674 S.W.3d 234, 251 (Tex. 2023).

152. Am. Campus Cmtys., Inc. v. Berry, 667 S.W.3d 277, 288 n.6 (Tex. 2023).

153. *Id.* (citing TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021)).

154. *Id.*

155. Dohlen v. City of San Antonio, 643 S.W.3d 387, 398 (Tex. 2022).

156. *Id.* (citing *TransUnion*, 141 S. Ct. at 2205).

157. *Id.*

158. Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives, 647 S.W.3d 681, 693 (Tex. 2022) (quoting Fed. Election Comm'n v. Akins, 524 U.S. 11, 23 (1998)).

159. Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 696 (Tex. 2021).

160. DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299, 304–05 (Tex. 2008). A "prototypical" example of such an injury is monetary loss. Mosaic Baybrook One, L.P. v. Simien, 674 S.W.3d 234, 251 (Tex. 2023) (quoting Collins v. Yellen, 141 S. Ct. 1761, 1779 (2021)).

161. The United States Supreme Court in *TransUnion* does suggest that the "traditional harms" that will satisfy its new concrete injury test "*may* also include harms specified by the Constitution

But that conflicts with other statements from the court. For example, the court has declared that "[c]onstitutional harms . . . are sufficient" injuries,[162] even though the violation of a constitutional right may involve only a legal injury. The court also recently indicated that the legislature could confer standing. "Generally, *unless standing is conferred by statute*, 'a plaintiff must demonstrate . . . an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury.'"[163] Although this statement focuses more on particularization, it has important implications for concreteness for two reasons. First, the court was writing before the United States Supreme Court explicitly separated particularization and concreteness as different requirements.[164] Second, the statement clearly says that standing can be conferred by statute. Federal courts have rejected that proposition because of their understanding of the concrete injury requirement.[165] Moreover, older Texas precedent also permits the legislature to bypass injury requirements.[166] The court's conflicting statements about whether only a factual, not legal, injury is sufficient show that the concrete injury requirement remains unsettled in Texas.[167]

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itself." *TransUnion*, 141 S. Ct. at 2204 (emphasis added). And in *Uzuegbunam*, the Court seemed to assume—without specifically holding—that bringing a First Amendment claim without proving actual damages was a sufficient injury. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) ("Because 'every violation [of a right] imports damage,' nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms." (quoting Webb v. Portland Mfg. Co., 29 F. Cas. 506, 509 (C.C.D. Me. 1838))). But it is less than clear whether a given constitutional violation alone will satisfy the new concreteness standard in federal court. Moreover, it is uncertain whether a violation of a common law right, without a showing of factual harm, is enough to satisfy *TransUnion*'s test. *Compare* Dinerstein v. Google, LLC, 73 F.4th 502, 518–22 (7th Cir. 2023) (breach of contract, standing alone, is not a concrete injury), *with* Denning v. Bond Pharmacy, Inc., 50 F.4th 445, 451 (5th Cir. 2022) ("[A] breach of contract is a sufficient injury for standing purposes.").

162. Heckman v. Williamson Cnty., 369 S.W.3d 137, 155 (Tex. 2012).

163. Sneed v. Webre, 465 S.W.3d 169, 180 (Tex. 2015) (emphasis added) (quoting Williams v. Lara, 52 S.W.3d 171, 178–79 (Tex. 2001)). *Accord* Andrade v. Venable, 372 S.W.3d 134, 137 (Tex. 2012).

164. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) ("Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'").

165. *See TransUnion*, 141 S. Ct. at 2205 ("[A]n injury in law is not an injury in fact.").

166. *See* Scott v. Bd. of Adjustment, 405 S.W.2d 55, 56 (Tex. 1966) ("Within constitutional bounds, the Legislature may grant a right to a citizen or to a taxpayer to bring an action against a public body or a right of review on behalf of the public without proof of particular or pecuniary damage peculiar to the person bringing the suit.").

167. In the oral argument for *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), which addressed federal jurisdictional questions under the Texas Heartbeat Act, Justice Alito suggested that individuals without an injury in fact suing in Texas state court would lack standing under the Texas constitution because Texas standing doctrine "follow[s]" federal standing doctrine. Transcript of Oral Argument at 9–11, Whole Woman's Health, 142 S. Ct. 522 (2021) (No. 21-463). In response, counsel for the petitioners aptly described the current state of Texas law on this point as "unclear." *Id.* If a legal injury, without more, were insufficient to confer standing in Texas state

Last, the injury must be "actual or imminent." An "actual" injury is already realized—currently or in the past.[168] An "imminent" injury is a future injury that is "not conjectural or hypothetical."[169] The court's guidance on the appropriate standard for identifying an imminent injury has been inconsistent. The court has held that "the 'threatened injury must be certainly impending to constitute injury in fact.'"[170] But the court has twice said that "a substantial risk of injury is sufficient."[171] Neither case, however, clearly connected that standard to the imminence requirement. Most recently, the court emphasized that a future injury must be "certainly impending" to be imminent,[172] but then later briefly noted it was also sufficient if the plaintiff was "at least subject to 'a substantial risk'" of harm.[173] The standard in Texas for an "imminent" injury, as under federal law, is still uncertain, but either standard seems to be sufficient.

Although federal law effectively prohibits federal and state taxpayer suits based on standing's injury requirement, Texas permits wider latitude for taxpayers to sue. Taxpayers generally "do not have a right to bring suit to contest government decision-making" and "must show as a rule that they have suffered a particularized injury distinct from that suffered by the general public."[174] But there is "a limited exception to this general rule."[175] Taxpayers may "sue to enjoin the illegal expenditure of public funds" without establishing a particularized injury.[176] The exception only enables "challeng[ing] proposed illegal expenditures," not "'unwise or indiscreet'" spending measures, and does not permit suits "to recover funds previously expended."[177]

The exception has two general requirements: "(1) that the plaintiff is a taxpayer; and (2) that public funds are expended on the allegedly illegal

court, most—if not all—plaintiffs suing abortion providers under the Texas Heartbeat Act would likely lack standing.

168. *Cf. In re* Abbott, 601 S.W.3d 802, 808, 812 (Tex. 2020) (noting that a plaintiff can, under certain circumstances, "establish standing based on a perceived threat of injury that has not yet come to pass").

169. Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 696 (Tex. 2021).

170. *In re Abbott*, 601 S.W.3d at 812 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

171. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 447 (Tex. 1993). *Accord* Grassroots Leadership, Inc. v. Tex. Dep't of Fam. & Protective Servs., 646 S.W.3d 815, 820 (Tex. 2022).

172. USAA Cas. Ins. Co. v. Letot, 690 S.W.3d 274, 280 (Tex. 2024) (quoting *In re Abbott*, 601 S.W.3d at 812).

173. *Id*. at 281 (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014)).

174. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555–56 (Tex. 2000). This is the "bar against generalized grievances." Andrade v. Venable, 372 S.W.3d 134, 137 (Tex. 2012).

175. Williams v. Lara, 52 S.W.3d 171, 179 (Tex. 2001).

176. *Andrade*, 372 S.W.3d at 137.

177. *Williams*, 52 S.W.3d at 180 (quoting Osborne v. Keith, 177 S.W.2d 198, 200 (Tex. 1944)).

activity."[178] The court understands these requirements to "mirror" federal municipal taxpayer standing rules, so it still looks to federal law for guidance.[179] Paying property taxes satisfies the first requirement, but paying sales taxes does not.[180] To meet the second requirement, plaintiffs must show that "the government is actually expending money on the activity" challenged, not a related activity,[181] and that the expenditure is a "significant" one "that would [not] have been made" without "the allegedly illegal activity."[182]

In addition, two criteria help courts determine the exception's scope. First, courts must recall taxpayer standing's "rationale," which is to "protect[] the public from the illegal expenditure of public funds without hampering too severely the workings of the government."[183] Second, courts must consider whether "'there has been a pecuniary injury to the taxpayers generally' such that 'the taxpayer's interest is direct enough.'"[184]

Taxpayer standing is thus one of the few areas where Texas's standing rules differ from federal standing rules. Taxpayers have more leeway to sue in Texas, though that right is not unlimited. But even as Texas departs from federal law, it does not stray far, for the Texas Supreme Court heeds federal municipal taxpayer standing rules. The federal courts, however, have not robustly developed these rules, so this is perhaps the only area of standing that the Texas Supreme Court is navigating without the aid of federal law.

b. Traceability.—Standing under Texas law demands that the plaintiff's injury is "'fairly traceable' to the defendant's conduct."[185] The injury, therefore, cannot "result[] from the independent action of some third party not before the court."[186] The defendant's action does not have to be the "sole cause of harm," but it must be a cause of the injury.[187] These requirements generally match the federal requirements for traceability, but they are currently less developed than federal law's requirements.

178. *Id.* at 179.

179. *Id.* at 181.

180. *Id.* at 180–81.

181. *Id.* at 181.

182. Andrade v. Venable, 372 S.W.3d 134, 138 (Tex. 2012).

183. Perez v. Turner, 653 S.W.3d 191, 199 (Tex. 2022) (quoting Jones v. Turner, 646 S.W.3d 319, 324 (Tex. 2022)).

184. *Id.* (alterations omitted) (quoting *Andrade*, 372 S.W.3d at 138).

185. Heckman v. Williamson Cnty., 369 S.W.3d 137, 155 (Tex. 2012) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

186. Meyers v. JDC/Firethorne, Ltd., 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman*, 369 S.W.3d at 154).

187. Grassroots Leadership, Inc. v. Tex. Dep't of Fam. & Protective Servs., 646 S.W.3d 815, 820 (Tex. 2022).

c. Redressability.—Finally, a plaintiff must establish that his injury is "likely to be redressed by the requested relief."[188] It cannot be "speculative,"[189] as there must be a "substantial likelihood" that a favorable decision remedies the plaintiff's injury.[190] A "partial remedy" is sufficient.[191] But if the requested remedy "could not possibly remedy" the plaintiff, this prong is not satisfied.[192] This prong, too, mirrors federal requirements.

4. The Relationship Between Federal and Texas Standing Doctrine.—Standing in Texas courts closely corresponds to federal standing. But what exactly is the relationship between the two? The Texas Supreme Court regularly says that its standing requirements "parallel" federal law.[193] But recently it has claimed to have "adopted" federal standing requirements.[194] On almost every issue of standing—its elements and their components—Texas law has relied upon and adopted federal standards.

But to say that Texas has adopted federal standing in its entirety is an overstatement.[195] The Texas Supreme Court has not decided whether to follow the federal view of concrete injuries. And if it decides to embrace the federal understanding, that will conflict with other standing principles in Texas. Moreover, Texas has rejected central tenants of taxpayer standing under federal law. And although it has followed some federal components of taxpayer standing, it has developed a host of rules in the absence of federal decisions. Given these open questions and deviations from federal law, it is more accurate to say that Texas courts "look to the more extensive jurisprudential experience of the federal courts"[196] but adopt their own standards, which often parallel federal law.

II. Standing Under the Texas Constitution's Original Understanding

Having explored standing in Texas, this Note will now examine whether the current doctrine is consistent with the original understanding of the Texas

188. *Heckman*, 369 S.W.3d at 154 (quoting *Allen*, 468 U.S. at 751).

189. *Id.* at 154–55 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)).

190. *Meyers*, 548 S.W.3d at 485.

191. Mosaic Baybrook One, L.P. v. Simien, 674 S.W.3d 234, 249 (Tex. 2023) (quoting Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801 (2021)).

192. *Heckman*, 369 S.W.3d at 155.

193. *E.g.*, Tex. Propane Gas Ass'n v. City of Houston, 622 S.W.3d 791, 799 (Tex. 2021) (quoting *In re* Abbott, 601 S.W.3d 802, 807 (Tex. 2020)).

194. *In re* Hotze, 627 S.W.3d 642, 646 (Tex. 2020).

195. *See* Rhodes & Wasserman, *supra* note 9, at 230 (claiming that, while Texas has adopted some federal standing principles, Texas standing doctrine is "more complicated and less certain" than federal standing doctrine).

196. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993).

constitution, adopted in 1876.[197] This analysis is particularly relevant as multiple members of the Texas Supreme Court—and perhaps the entire court—have adopted originalism.[198] This sentiment, however, is not new.[199] Nor is originalism without significant support.[200]

This Part will establish that the Texas constitution's original meaning supports the general contours of standing, including taxpayer standing. But it will also show that prudential standing and the federal rules concerning concrete injuries are inconsistent with the Texas constitution's original meaning.

This Part is organized by the two constitutional provisions that purportedly ground standing. It first briefly analyzes the open courts provision's text and relevant history. It concludes that this provision is at best suggestive of standing and cannot singlehandedly justify it. It also briefly notes that prudential standing conflicts with this clause. This Part then considers the separation-of-powers provision. In conjunction with that provision, this Part explores several related provisions in Articles IV and V that bolster the separation-of-powers argument. It begins with textual arguments, before considering the historical record. It concludes that the text provides more support for standing than the open courts provision but is not dispositive. It finally argues that the historical evidence firmly supports the bulk of the modern doctrine, including taxpayer standing. The historical evidence, however, undermines prudential standing and the federal factual injury requirement.

197. When this Note uses the terms "original understanding," "original meaning," or "originalism," it is broadly referring to the view that the meaning of the constitution—or any legal instrument—is fixed at the time it was adopted. *See* ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 11 (2017) (defining originalism "broadly as the idea that the Constitution should be interpreted as its words were originally understood by the Framers who wrote the Constitution . . . and by the public that ratified it"). It is beyond the scope of this Note to discuss which of the various theories of originalism is correct. As such, it will draw on sources bearing on original public meaning and original intent.

198. *See supra* note 10 and accompanying text.

199. *See* Cox v. Robison, 150 S.W. 1149, 1151 (Tex. 1912) ("The meaning of a Constitution is fixed when it is adopted; and it is not different at any subsequent time when a court has occasion to pass upon it.").

200. *See generally* Holden T. Tanner, *Lone Star Originalism*, 27 TEX. REV. L. & POL. 25 (2022) (arguing that states, particularly Texas, should adopt the theory of originalism). *Cf.* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989) (providing several arguments why originalism is better than nonoriginalism); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (arguing that, as a positive matter, originalism is our law); WURMAN, *supra* note 197 (arguing that the meaning of any text is its original meaning and that the Constitution is sufficiently just to merit following its original meaning).

A. The Open Courts Provision

Texas courts have argued that the open courts provision supports standing. This subpart will analyze whether this provision's original understanding justifies standing. It will begin with a textual analysis before briefly considering historical evidence. It argues that the provision's text and history provide little support for standing doctrine and indicate that prudential standing is impermissible.

1. Textual Analysis.—The open courts provision states: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[201] The court argues that this provision supports standing because it "contemplates access to the courts only for those litigants suffering an injury."[202]

There are at least two difficulties with this interpretation. First, the provision does not require plaintiffs to meet minimum standards to access courts. If a plaintiff has a remediable injury, courts must remedy that injury. That is a sufficient condition for plaintiffs to access courts and their remedies. The text nowhere indicates that this is also a necessary condition for suit. It does not say plaintiffs *must* be injured to access courts and be remedied.[203] And that is what standing requires.

A second problem with the court's interpretation concerns the provision's function. This provision is in Article I. Article I does not detail the judiciary's nature, extent, or jurisdiction—Article V does that.[204] Article I is a bill of rights.[205] The provision thus gives individuals a right that courts must recognize: Plaintiffs, if injured, have a right to a remedy in court. To read this provision as a jurisdictional requirement that plaintiffs must satisfy, and as a limit on the courts' power that is raisable at any time, is to ignore the provision's surrounding context.[206]

Although there are significant shortcomings to the textual argument that this clause requires standing, it is suggestive of the courts' limited role and thus of standing. The text connects access to courts with injuries—either legal or factual in nature, as the text does not clearly specify the kind of injury—and remedies, subtly implying that courts operate to remedy injuries to personal rights. Indeed, without an injury, courts cannot remedy anything. The text, therefore, suggests that courts' ordinary function is to remedy

201. Tex. Const. art. I, § 13.

202. M.D. Anderson Cancer Ctr. v. Novak, 52 S.W.3d 704, 708 (Tex. 2001).

203. *Cf.* Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 469–70 (Tex. 1993) (Doggett, J., concurring and dissenting) (arguing that gleaning jurisdictional requirements from the open courts provision makes the courts more "closed," which is a strained reading of the provision).

204. *See* Tex. Const. art. V (establishing the "Judicial Department").

205. *See* Tex. Const. art. I (titling Article I of the Texas constitution a "Bill of Rights").

206. *See* Gegen, *supra* note 9, at 211–12 (making a similar point).

personal injuries—what standing requires. The open courts provision's text, therefore, contemplates something like the principles undergirding standing, but by itself, it does not mandate or codify the doctrine of standing.

The provision's text, however, undermines prudential standing. Prudential standing requirements are non-constitutional reasons to decline to exercise jurisdiction a court possesses.[207] Put differently, courts have the power to proceed but choose not to.[208] Yet the open courts provision demands that courts "shall be open" and that they "shall" remedy injured plaintiffs "by due course of law."[209] This provision is mandatory. If courts lack jurisdiction, they cannot remedy individuals "by due course of law" because they have no authority to act. But if they can proceed, they must. The right guaranteed by the open courts provision undercuts prudential standing.

2. Historical Analysis.—The open courts provision has remained unchanged since the adoption of the current Texas constitution in 1876. In fact, the provision has been a part of each of the six constitutions of Texas.[210] Other than a few minor and irrelevant differences in punctuation and a substitution of "person" in place of "man," the clause has not changed at all since the adoption of the Constitution of the Republic of Texas in 1836.[211]

The open courts provision's history provides no support for standing. There is no record of any discussion concerning the open courts provision in the 1875 constitutional convention beyond a resolution referred to the Committee on Bill of Rights with similar language to the provision.[212] Nor

207. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014) (noting that prudential standing is not a jurisdictional requirement but a decision to decline to exercise jurisdiction).

208. *See* Allen v. Wright, 468 U.S. 737, 751 (Prudential standing "embraces several judicially self-imposed limits on the *exercise* of federal jurisdiction." (emphasis added)).

209. Tex. Const. art. I, § 13.

210. *Cf.* Austin Travis Williams, *Stare Decisis and* Autran v. State*?*, 2 TEX. WESLEYAN L. REV. 375, 393 (1995) (noting that Texas had five constitutions prior to adopting its current constitution in 1876).

211. *Compare* Rep. Tex. Const. of 1836, amend. 11, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 23 (Austin, Gammel Book Co. 1898) ("All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law."), *with* Tex. Const. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.").

212. *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS 120 (1875) ("*Resolved*, That the courts of justice shall be open to every person, and a certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."). Two contemporaneous newspapers made note of this resolution, which could suggest that the resolution may have been at least briefly discussed in the convention despite not appearing in the convention journal. *See Constitutional Convention*, DENISON DAILY NEWS, Sept. 18, 1875, at 1, https://texashistory.unt.edu/ark:/67531/metapth722205/m1/1/?q=%22open%20courts%22 [https://perma.cc/V59S-RPF6] (noting that the resolution was made); *Con[v]ention Proceedings*, WKLY. DEMOCRATIC

are there any recorded discussions surrounding the clause in the preceding constitutional conventions.[213] The closest reference comes from a report made during the 1861 constitutional convention, which said that "it is the general province of municipal law to afford a remedy for loss of property" and "the absence of such a remedy implies a dereliction in the local government to perform its duty, unless some conventional law intervenes to supersede such duty."[214] This comment, though it does not explicitly cite the open courts provision, suggests that the provision protects an individual right to judicial remedies for injuries to property and creates a duty in the government to provide such remedies. The records of the various constitutional conventions provide no hint of a jurisdictional *limit* implicit in the clause.

Furthermore, early case law never highlights implicit jurisdictional limits. Instead, the decisions often found fault with arguments trying to narrowly constrain jurisdiction.[215] For example, the Texas Supreme Court held that the provision allowed plaintiffs to sue in the courts of the county out of which a new county was formed if the newly formed county lacked courts,[216] and that the right of appeal could not be contingent upon paying a bond.[217] Moreover, in the course of holding that amount-in-controversy requirements could not prevent ordinary suits for injunctions, the court said the open courts provision would be a "mockery" if "no courts [had] the power to hear and determine a multitude of questions which affect the welfare of the people most vitally."[218] It similarly said that if "no court" can "secure an adjudication upon" plaintiffs' property rights, the open courts provision would be "the merest bombast."[219] These decisions indicate that the open courts provision guaranteed a right to have one's personal rights adjudicated

STATESMAN, Sept. 23, 1875, at 2, https://texashistory.unt.edu/ark:/67531/metapth277544/m1/2/?q=%22Reynolds%20courts%22~25 [https://perma.cc/SKF9-GLJV] (same).

213. *See generally* DEBATES: THE TEXAS CONVENTION (William F. Weeks 1846); JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861 (Ernest William Winkler, 1861); JOURNAL OF THE TEXAS STATE CONVENTION (1866); JOURNAL OF THE RECONSTRUCTION CONVENTION (1868).

214. JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, *supra* note 213, at 171.

215. *See* William B. Mateja, *The Current Status of the Open Courts Provision and the Discovery Rule in Texas: In a State of Limbo after* Krusen, 16 TEX. TECH L. REV. 765, 770 (1985) ("Texas courts have long relied on the open courts provision to provide that citizens cannot be denied the opportunity to bring their legal claims in court.").

216. H. Runge & Co. v. Wyatt, 25 Tex. 291, 294 (Supp. 1860).

217. Dillingham v. Putnam, 14 S.W. 303, 305 (Tex. 1890).

218. Cnty. of Anderson v. Kennedy, 58 Tex. 616, 622–23 (1883). Federal courts, however, have made clear that not every legal question—not even many important ones—can be heard and decided by federal courts. *See supra* note 126 and accompanying text.

219. Tex. Mexican Ry. Co. v. Locke, 63 Tex. 623, 628 (1885).

in court.[220] They do not even hint at jurisdictional limits like standing.[221] The historical evidence for standing is essentially nonexistent.

3. Concluding the Open Courts Provision.—The open courts provision is at best suggestive of a jurisdictional doctrine like standing. The text provides little, and its history does not provide any, support for the doctrine. As an original matter, the open courts provision offers weak evidence for standing. In addition, the open courts provision's text and history seriously conflict with prudential standing.

B. The Separation of Powers and the Judicial Power

Texas courts also argue that the separation-of-powers provision justifies standing. Because additional provisions from Article V—though unmentioned by the Texas Supreme Court—and Article IV further support standing, this subpart will consider them too, beginning with the text before turning to historical arguments for standing.

1. Textual Analysis.—The separation-of-powers provision explicitly "divides" government powers, giving courts only "Judicial" power.[222] This provision's text offers little indication about whether standing is justified. An argument that judicial power necessarily requires a dispute between parties, in which the court can remedy an injured person, is not an especially strong textual argument.[223] While this is one permissible meaning, the term does not necessarily carry that linguistic content. True, federal courts prior to the Texas constitution's adoption held that judicial power conveyed that

220. James C. Harrington, *The Texas Bill of Rights and Civil Liberties*, 17 TEX. TECH. L. REV. 1487, 1520 (1986) ("From early on, the Open Courts Provision has been viewed as a substantive right to redress.").

221. One might try to overread these quotations as suggesting that standing is inconsistent with the open courts provision. But that simplistic argument would eliminate all jurisdictional requirements, something the Texas Supreme Court has (obviously) never implied. And indeed, that argument would run headlong into the significant support for the core of standing doctrine presented later in this Note.

222. The separation-of-powers provision of the Texas constitution states:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. art. II, § 1.

223. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992) (noting that the meaning of the language in the Federal Constitution giving judicial power to the federal courts is not apparent from the text alone).

meaning under the Federal Constitution and thus barred advisory opinions.[224] But they relied heavily on structural and historical arguments.[225] Moreover, since the country's inception, some states have permitted or even required rendering advisory opinions.[226] Merely pointing to this provision's text is insufficient.

Other constitutional provisions provide additional textual support for standing. First, Article IV, Section 22, explicitly gives the Attorney General power to "give legal advice in writing to the Governor and other executive officers."[227] If the Attorney General, an executive official, was expressly given this power and the judiciary was not, that suggests that giving legal advice was tasked only to the executive branch.[228] By explicitly giving the power to one branch, the constitution implicitly denied it to the others: *expressio unius est exclusio alterius*.[229]

This argument gives additional credence to the view that judicial power, as used in the constitution, excludes advisory opinions. But it is not dispositive. A negative-inference argument's strength "depends on context,"[230] which is uncertain here. One could easily argue that judicial power naturally includes giving legal advice, so the constitution gave the Attorney General power to provide advisory opinions to ensure that courts are not the only institution so authorized. This provision is suggestive but not conclusive either.

There are additional provisions, though unmentioned by the courts, that bolster the textual argument for standing. The Federal Constitution explicitly limits courts' jurisdiction to "Cases" and "Controversies."[231] Although the Texas constitution does not have an identical provision, it includes a similar limitation. Article V, Section 2 limits the Supreme Court to nine members

224. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (concluding that opinions which do not finally bind the parties are advisory and thus not judicial); *Correspondence of the Justices (1793)*, *in* HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50, 50–52 (Richard H. Fallon Jr. et al. eds., 7th ed. 2015) (reasoning that the separation of powers precludes advisory opinions).

225. *See Hayburn's Case*, 2 U.S. at 410 n.† (relying on historical and separation-of-powers arguments); *Correspondence of the Justices (1793)*, *supra* note 224, at 50–52 (relying on separation-of-powers principles).

226. Jonathan D. Persky, "*Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1166–68 (2005). Several states still allow their courts to provide advisory opinions. *Id.* at 1168–69.

227. Tex. Const. art. IV, § 22.

228. *See* Garcia v. City of Willis, 593 S.W.3d 201, 206 (Tex. 2019) (making the same negative-inference argument). The United States Supreme Court made the same argument shortly after the Founding. *Correspondence of the Justices (1793)*, *supra* note 224, at 52.

229. *Cf.* Alston v. Robinett, 37 Tex. 56, 57 (1872) (applying the *expressio unius* canon of construction).

230. Forest Oil Corp. v. El Rucio Land & Cattle Co., 518 S.W.3d 422, 429 (Tex. 2017) (quoting Marx v. Gen. Revenue Corp., 568 U.S. 371, 381 (2013)).

231. U.S. CONST. art. III, § 2, cl. 1.

and states that "the concurrence of five shall be necessary to a *decision of a case* . . . ."[232] This key language has been present since the 1876 constitution.[233] Article V, Section 3 also limits the Supreme Court's jurisdiction to "cases." The original version said that the Supreme Court's jurisdiction "shall only extend to civil *cases* of which the [d]istrict [c]ourts have original or appellate jurisdiction."[234] It also allowed interlocutory appeals "in such *cases* and under such regulations as may be provided by law."[235] This provision's wording and extent has changed, but the current version also explicitly limits the court's jurisdiction to "cases": The Supreme Court's "appellate jurisdiction shall be final and shall extend to all *cases* except in criminal law matters and as otherwise provided in this Constitution or by law."[236]

These provisions indicate that the judicial power extends only to "cases." The repeated appearance of the term, which is "presumed" to have been "carefully selected,"[237] implies that courts resolve disputes among parties and do not answer hypothetical questions. And that suggests that standing—or at least something resembling it—is textually required.

But even the term "case" does not conclusively justify standing.[238] Much work must still be done by the term's historical understanding. Even so, the term provides significant support for limiting courts' role to adjudicating concrete disputes. The Texas constitution's text, therefore, provides some legitimate support for standing but is not dispositive.

2. Historical Analysis.—This section will show that the historical evidence provides robust support for standing, including taxpayer standing, but not a factual injury requirement or prudential standing. It is organized as follows. First, it briefly analyzes the convention debates. Second, it considers the case law around the time of the constitution's adoption. The early decisions establish three basic principles. First, judicial power extends only to proper cases, which require a concrete dispute between parties. Second, courts have jurisdiction only if a favorable decision could remedy a plaintiff's injury. Importantly, the violation of private rights, or the violation of public

232. Tex. Const. art. V, § 2(a) (emphasis added).

233. Tex. Const. art. V, § 2, cl. 1 (amended 2001) ("The Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to the decision of a case.").

234. Tex. Const. art. V, § 3, cl. 1 (amended 2001) (emphasis added).

235. *Id.* at cl. 2.

236. Tex. Const. art. V, § 3(a) (emphasis added). Other provisions in Article V also mention "cases." *E.g.*, Tex. Const. art. V, §§ 4(b), 5(a), 5(b), 6(a), 7(d).

237. Mellinger v. City of Houston, 3 S.W. 249, 252 (Tex. 1887).

238. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992) (noting that the meaning of "Case" and "Controversy" in the Federal Constitution is not apparent from the text alone).

rights accompanied by factual harm, was a sufficient injury, though taxpayers had an exception to this injury requirement. Third, if courts have jurisdiction, they have a positive duty to exercise it. Together, these principles justify standing's general contours, including taxpayer standing, but undercut a factual injury requirement and prudential standing.

a. The Convention Debates.—There was little discussion in the 1875 convention debates about judicial power, but the debates still provide some clues about its extent. The primary word associated with the courts and their operation was "cases."[239] Others referred to "decisions of the courts," and noted that courts "adjudicate[] their rights."[240] Moreover, one framer's comments provide some additional insight into the judicial function. He says that "[t]he judiciary deals with the person and property of the individual members of society, while the other departments deal only with the general body politic."[241] He continues: "Wrongs" committed by courts "fall upon the individual . . . because the unjust judgment is law to him and his case."[242] This comment indicates three things. First, courts deal with individual parties, not hypothetical questions. Second, judicial power does not extend to public matters that do not personally affect an individual. Third, courts do not give advice—they pronounce judgments.

The final noteworthy evidence from the convention concerns one of the convention's primary goals: strictly limiting government spending. This concern was apparent throughout the convention.[243] Indeed, "'[r]etrenchment' was the watchword of the hour, and everything was sacrificed to gain that end."[244] Given this pervasive and overarching concern with limiting government spending, it is reasonable to infer that courts might have some role to play in stopping illegal government expenditures. This is consistent with a broader theory of taxpayer standing.

b. Early Court Decisions.—Unsurprisingly, judicial decisions around the time of the Texas constitution's adoption in 1876 provide the richest evidence about the original extent of the judicial power in Texas. The early court decisions establish three principles concerning the judicial power[245] that

239. *E.g.*, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 59–66, 69, 81–84, 234–37, 381–85 (Seth Shephard McKay ed., 1930). The term was used in many other contexts as well, however.

240. *Id.* at 84, 428–29.

241. *Id.* at 428.

242. *Id.*

243. *See, e.g.*, *id.* at 25–28 (discussing the recurring theme of retrenchment); *id.* 424–33 (debating how much to reduce the salaries of various judicial officials).

244. Terrell v. Middleton, 187 S.W. 367, 372 (Tex. App.—San Antonio 1916, writ denied).

245. It is important to remark on what is not meant by the judicial power in the constitution. The judicial power, as used in the constitution, concerns the courts' power. Some courts around the

support current standing doctrine but conflict with a factual injury requirement and prudential standing. This Note will analyze each in turn.

i. Courts decide cases—concrete disputes between parties.—Early court decisions show that judicial power extends only to resolvingcases—that is, disputes between adverse parties.

Prior to 1876, the Texas Supreme Court repeatedly held that courts could only answer legal questions presented in a proper case. In 1841, the court said that it had the "duty," before proceeding to "decide the several points made in this case," to determine whether it was a "proper case for the interposition and decision of this court."[246] This comment not only requires a proper case before resolving the merits—which means that the requirement is jurisdictional—but it also says that courts must consider whether there is a proper case as a threshold matter. In 1859, the court similarly held that courts could not answer certain legal questions. Referring to disputes within the executive branch, in which "inferior officers" failed to "follow the judgment of the governor," the court said that such conflicts "cannot be adjudicated or settled by the judiciary" because the "judiciary act[s] on past facts."[247] Instead, this was a matter for the legislature, which "shape[s] future events."[248] This comment indicates that courts cannot answer every legal question, especially ones that merely set down a future rule that does not bind specific parties. Then in 1862, the court again said it could not "express a judicial opinion" on an important legal question until "a case is presented calling for a decision."[249] And finally in 1873, the court reiterated that it can exercise judicial review only when "the question is brought before us in any real and proper case."[250]

Shortly after the Texas constitution was adopted, the court restated the requirement of a proper case. The "district court," the court held, "had the

time of the constitution's adoption occasionally used "judicial" in another sense to describe "the act of an executive officer, who in the exercise of his functions is required to pass upon facts, and to determine his action by the facts found." Mo., K & T Ry. Co. of Tex. v. Shannon, 100 S.W. 138, 141 (Tex. 1907). This is clearly not the sense used in the constitution. *Id.*

246. Texas v. Laughlin, Dallam 412, 412 (Tex. 1841).

247. Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 343–44 (1859).

248. *Id.* at 344.

249. *Ex parte* Coupland, 26 Tex. 386, 432 (1862); *see also id.* at 435 ("Whenever, therefore, a case shall arise under the legislation of congress, it will become the province of the judiciary to decide whether such legislation is warranted by the grant of powers in the constitution.").

250. *Ex parte* Rodriguez, 39 Tex. 705, 751 (1873); *see also id.* at 762 ("Being required to declare what the law is in the cases which come before them, they must enforce the constitution as the paramount law whenever a legislative enactment comes in conflict with it."). The court suggested two ways that a case would not be proper: (1) if there were a "feigned issue," or (2) if the question were one given to the political branches and not meant for the judiciary. *Id.* at 742–43, 751.

power, in a proper case, by injunction, to restrain the defendants."[251] The judicial power extends only to proper cases.

Moreover, a proper case fundamentally requires a dispute among parties that the court can resolve with a binding decision. Many pre-1876 cases so held. In 1849, the court said that jurisdiction is "the power to hear and determine a cause. It is *coram judice*, whenever a case is presented, which brings this power into action."[252] Jurisdiction, the court continued, "is the power to hear and determine the subject-matter in controversy between the parties to a suit; to adjudicate or exercise any judicial power over them."[253] The court similarly said in 1864 that "jurisdiction of a court means the power or authority conferred upon it by the constitution and laws to hear and determine causes between parties, and to carry its judgments into effect."[254] Then just a year before the constitution's adoption, the court again described jurisdiction as "the power to hear and determine a cause—the authority by which judicial officers take cognizance of and decide them."[255]

The court repeated the familiar refrain not long after the constitution was in effect. In an 1893 concurrence, Chief Justice Stayton said that "[j]urisdiction of a given cause means the power to hear and determine the right of the parties."[256] He also admonished that "this court has no jurisdiction advisory in character."[257] In a later case, the court likewise said that "the province of the courts so provided for is to hear and determine causes between parties affecting the right of persons as to their life, liberty, and property."[258] Many other decisions are in accord.[259]

These cases shortly before and after the constitution's adoption show that courts only had jurisdiction or judicial power to decide proper cases—specific disputes between parties that the court could resolve by issuing a judgment. Courts thus have no power to pronounce opinions on abstract matters disconnected from specific parties before them.

ii. Courts have jurisdiction only if there is a remediable injury.—Early decisions also required that plaintiffs must be injured and that the court must be able to redress that injury with a favorable decision. A legal injury,

251. Caruthers v. Harnett, 2 S.W. 532, 525 (Tex. 1886).

252. Banton v. Wilson, 4 Tex. 400, 403–04 (1849).

253. *Id.* at 404.

254. Withers v. Patterson, 27 Tex. 491, 491 (1864).

255. City of Brownsville v. Basse & Hord, 43 Tex. 440, 449 (1875).

256. Darnall v. Lyon, 22 S.W. 304, 306 (Tex. 1893) (Stayton, C.J., concurring).

257. *Id.* at 309.

258. Mo., K & T Ry. Co. of Tex. v. Shannon, 100 S.W. 138, 141 (Tex. 1907).

259. *E.g.*, Williams v. Taylor, 19 S.W. 156, 157 (Tex. 1892); Templeton v. Ferguson, 33 S.W. 329, 332 (Tex. 1895); Scott v. Hunt, 49 S.W. 210, 211 (Tex. 1899); San Antonio & A. P. Ry. Co. v. Blair, 196 S.W. 1153, 1160 (Tex. 1917) (Hawkins, J., dissenting); Bd. of Water Eng'rs v. McKnight, 229 S.W. 301, 307 (Tex. 1921).

however, was sufficient if the plaintiff alleged the violation of personal rights. When public rights were violated, on the other hand, plaintiffs also had to show special damage—except for taxpayer suits.

Multiple pre-1876 cases prove that courts lack jurisdiction if the plaintiff is not injured. In 1857, the court held that because plaintiffs, citizens challenging the election to move their county seat, had no "vested right in the locality of the county seat by living in it, or near it, or by living in the county," the court was without jurisdiction.[260] In other words, because no private right was allegedly violated, the court lacked jurisdiction. A few years later, the court described the "characteristics of a judicial proceeding" necessary for jurisdiction as involving "a right to be determined," and "parties having an interest in the right, regularly brought into court to prosecute and defend."[261] Put differently, a harm to one's rights is a prerequisite for suit. And then in 1874, the court held that a suit over the "result of an election" raises a question that is "part of the process of political organization, and not a question of private right."[262] Apart from a statutorily created right to sue over a contested election,[263] therefore, the claim was not a "suit[], complaint[], or plea[],"[264] the constitutional language originally circumscribing the district courts' jurisdiction.[265] Although that specific language is no longer in the constitution, courts can only hear cases, language synonymous with "suits, complaints, or pleas."[266] Thus, without an injury to one's personal rights, courts could not proceed.

One case decided the year after the constitution's adoption further establishes that an injury is required. It held that "a legal voter has no such legal right or interest in the locality of the county-seat."[267] But the district court's "subject-matter" jurisdiction required "a recognized legal right, or legal injury of person or property."[268] And because an ex parte proceeding to

260. Walker v. Tarrant Cnty., 20 Tex. 16, 21 (1857). This opinion is not pellucid as to whether this is a jurisdictional holding or a merits holding. But a later case seems to treat it as jurisdictional. *See* Wright v. Fawcett, 42 Tex. 203, 206 (1874) (citing *Walker* and other cases in support of the principle that the district courts do not have "jurisdiction" to determine a matter of political organization that does not affect one's private rights).

261. McKinney v. O'Connor, 26 Tex. 5, 22 (1861).

262. *Wright*, 42 Tex. at 206.

263. The legislature had, in fact, created a statutory right to sue over contested elections, but the plaintiff did not follow the statutory "pre-requisites." *Id.* at 207. As a result, there was no jurisdiction under the statute either. *Id.* at 206–07.

264. *Id.* at 206.

265. *Id.*; Tex. Const. art. V, § 8 (amended 1985) ("The District Court shall have original jurisdiction . . . [over] all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to five hundred dollars exclusive of interest.").

266. *See Ex parte* Towles, 48 Tex. 413, 434 (1877) (using "case" and "suit" interchangeably).

267. *Id.*

268. *Id.* at 432.

challenge such an election involves "no contesting parties, no legal status of a party to be determined, no judgment to be enforced by execution, and no values to be adjudged," the matter was "wanting in each and all of the attributes of a case or suit cognizable in the District Court."[269] It is important to note that the court was referring to a specific provision of the 1876 constitution outlining the district courts' jurisdiction, which included an amount-in-controversy requirement.[270] Even so, it is fair to infer that the court's holding concerns the nature of the judicial power generally as involving a "legal right" or "legal injury," "contesting parties," a "legal status to be determined," and an enforceable "judgment." Indeed, the court clarifies that it is speaking about judicial power generally, for it concludes that resolving the county-seat election was "extra-judicial" because it presented an "abstract" question that merely related to "public convenience," making any court order like a legislative rule.[271] According to the court, therefore, if a plaintiff lacks a personal legal injury caused by the defendant that the court can remedy, any court opinion would be merely advisory or legislative and not judicial in nature.

Other post-1876 cases provide additional evidence for an injury requirement. In 1877, the court again dismissed a similar case for lack of jurisdiction because "no such vested right exists as will authorize this proceeding in court to redress it."[272] A few years later, the court considered another election challenge and held that it was "not a judicial question" because it was "not a case between parties in which a judgment can be rendered in favor of one as against the other."[273] Any judgment here would be improper, the court reasoned, because it would not be "for the sake of restoring a right to the injured party."[274] Without the allegation of a private right's violation—a legal injury—the court has nothing to remedy and thus lacks jurisdiction. Another case likewise concluded: "Being deprived of no

269. *Id.* at 434. Interestingly, the "Commissioner's Courts," which were vested with "such powers and jurisdiction over all county business as is conferred by" the 1876 constitution, were able to hear such suits. *Id.* at 431–32. These courts' "proceedings are not judicial proceedings, in the ordinary sense of those terms, although it is a court, embraced within the judicial department" and the 1876 constitution vested judicial power in them. *Id.* But the 1876 "Constitution makes no connection between this court and any other court in reference to a control of, or appeal from, its determinations." *Id.* Thus, the Commissioner's Courts were able to determine matters that other Texas courts—those that were bound by the ordinary understanding of judicial proceedings and the limits of judicial power—could not, for their "functions are peculiar." *Id.* at 432.

270. *See* Tex. Const. art. V, § 8 (amended 1985) ("The District Court shall have original jurisdiction . . . [over] all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to five hundred dollars exclusive of interest.").

271. *Ex parte Towles*, 48 Tex. at 436–37.

272. Worsham v. Richards, 46 Tex. 441, 447 (1877).

273. State v. Owens, 63 Tex. 261, 266 (1885).

274. *Id.*

right, the depreciation in the value of his property is not a wrong for which a court of equity, in the absence of a legal remedy, would invent the means of redress."[275] In other words, without a personal right, there is "no such interest as will form the basis of a suit or action."[276] Finally, in 1891, the court stated that the "universal[]" rule to "maintain an action" requires plaintiffs to possess "an interest in the subject-matter of litigation, either in his own right or in a representative capacity."[277] A proper case requires an injury.

Closely connected with the jurisdictional requirement that plaintiffs suffer an injury is the requirement that courts must be able to redress the plaintiff's injury with a favorable decision. As several of the above cases made clear,[278] early Texas Supreme Court decisions establish this rule as well: Courts lack jurisdiction if they lack the ability to remedy the plaintiff's injury. Other cases further establish this point. For example, in 1877, the court "dismissed" a case "for the want of jurisdiction" because the district court would have "no power to carry into effect the judgment of this court" and because "a decision would be useless and inoperative."[279]

The following year, the court similarly dismissed a case for lack of jurisdiction when the suit became moot and involved "nothing more than the cost" to be determined.[280] The court noted that it was not "customary in this court to decide questions of importance after their decision has become useless, merely to ascertain who is liable for the cost," primarily because it would waste judicial resources.[281] It dismissed the case as follows: "As the condition of the case is now such that the court could not render an effective judgment upon its reversal, the case is dismissed."[282] Although the court's reasoning seems more concerned with practicalities than power, it still supports the view that when courts lack the ability to remedy the plaintiff with a favorable decision, courts lack jurisdiction. This must be true because the court dismissed the suit for lack of jurisdiction.[283] Additionally, if there were no costs to be determined—if the opinion were completely advisory—it would have been dismissed without discussion. There was only a question of whether the court should continue because the parties still had some interest. And the court concluded that the interest was too minute to prevent

275. Harrell v. Lynch, 65 Tex. 146, 152 (1885).

276. *Id.* at 151.

277. State v. Farmers' Loan & Tr. Co., 17 S.W. 60, 65 (Tex. 1891).

278. *See supra* notes 271–277 and accompanying text.

279. Gordon v. State, 47 Tex. 208, 209 (1877).

280. Lacoste v. Duffy, 49 Tex. 767, 768 (1878).

281. *Id.* at 769.

282. *Id.*

283. Although the court did not explicitly state that it dismissed the case for lack of jurisdiction, in dismissing the case, it cited only *Gordon v. State*, which was explicitly dismissed for lack of jurisdiction. *Id.* (citing *Gordon*, 47 Tex. at 209).

dismissal. The ability to redress injuries, therefore, is essential to jurisdiction. The court reiterated this holding multiple times.[284]

The preceding cases required a redressable injury, but the nature of that injury was purely legal. The general rule, therefore, was that the violation of a private right was sufficient for jurisdictional purposes. But public rights were treated differently. In such cases, alleging a legal wrong was insufficient. One must also suffer special damage—a factual injury—distinct from the public for the court to have jurisdiction.

Three early cases establish that a special factual injury is required if the plaintiff's public rights are violated.[285] In 1875, the court held that plaintiffs could "maintain this suit" for a public nuisance only if they suffered "special damages" which were distinct from the public.[286] Then in 1880, the court similarly held that a public nuisance claim was justiciable because the plaintiff "suffered special damages therefrom different from that which is common to the public."[287] This was sufficient because it "constitute[d] such a particular injury to plaintiff as entitles him to redress."[288] It was "a principle established by the overwhelming weight of authority," the court held a few years later, that "no action lies to restrain an interference with a mere public right, at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself."[289] The "underlying" reason for this principle "is that individuals have a right to sue for a redress of their own private injuries, but for such as affect all the public alike an individual is not the representative of the public interest."[290] This statement strongly implies that this was a jurisdictional holding concerning the power of the court rather than a merits holding concerning the elements of a public nuisance claim.[291] And because the court cites *Williams*[292] and *Shephard*[293] as supporting and applying this exact principle, it also clarifies that those were jurisdictional

284. *E.g.*, Robinson v. State, 29 S.W. 649, 650 (Tex. 1895); McWhorter v. Northcutt, 58 S.W. 720, 721 (Tex. 1900); Watkins v. Huff, 64 S.W. 682, 682 (Tex. 1901).

285. *See infra*, notes 286–90 and accompanying text. For a few more examples, see Sansom v. Mercer, 5 S.W. 62, 65 (Tex. 1887) and Kimberly v. Morris, 31 S.W. 808, 809 (Tex. 1895).

286. Williams v. Davidson, 43 Tex. 1, 29 (1875).

287. Shephard v. Barnett, 52 Tex. 638, 640–41 (1880).

288. *Id*.

289. City of San Antonio v. Stumburg, 7 S.W. 754, 755 (Tex. 1888).

290. *Id*.

291. *See* Dorsaneo, *supra* note 9, at 43–45 (concluding that this principle concerned justiciability).

292. Williams v. Davidson, 43 Tex. 1 (1875).

293. Shephard v. Barnett, 52 Tex. 638 (1880).

holdings as well.[294] The injury requirement in cases of public rights is clear.[295]

Taxpayer suits may seem to conflict with the principle that the allegation of a public right is an insufficient injury for jurisdictional purposes, yet early decisions repeatedly held that taxpayer suits were permitted. In 1883, the court stated that "private persons, in certain instances," were permitted "to sue . . . officers of the county who may be misapplying or wasting the public funds, or doing other acts which injuriously affect the private citizen."[296] The court continued: "The jurisdiction of courts of equity to restrain the proceedings of municipal corporations, at the suit of citizens and tax-payers, where such proceedings encroach upon private rights and are productive of irreparable injury, may be regarded as well established."[297]

Not long after, the court similarly held that the interest of "residents and tax-payers" will "generally suffice" to permit them to sue to enjoin illegal government conduct.[298] Taxpayers are thus "proper parties to enjoin unauthorized expenditures of county funds by a county judge."[299] But the court provided some additional nuance by stating that taxpayers' rights must be "*greatly* and irreparably injured."[300] These conclusions generally match the holding from the previous case, but the language of a "great and irreparable" injury might add an additional bar. It is unlikely that this language severely limited taxpayer suits, however, because the court clearly stated that taxpayers generally have a sufficient interest to maintain suit. [301]

In the 1890s and early 1900s, the court further elucidated the doctrine permitting taxpayer suits. First, it held that taxpayers could enjoin "the collection of an illegal tax."[302] The court then held that taxpayers could sue "to restrain a municipal corporation from issuing bonds" if alleged to be

294. *See Stumburg*, 7 S.W. at 755 (first citing *Williams*, 43 Tex. 1; then citing *Shephard*, 52 Tex. 638) (reiterating that for the courts to have jurisdiction over a claim of public right, the plaintiff must "show[] some special damage").

295. The rule for public rights adds additional support for the rule for private rights as well. If public rights require a factual injury in addition to the legal injury, then private rights do not require any factual injury.

296. Looscan v. Cnty. of Harris, 58 Tex. 511, 516 (1883).

297. *Id.* (internal quotation marks omitted) (quoting JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS 468 (Chicago, Callaghan & Co. 1874)).

298. Caruthers v. Harnett, 2 S.W. 523, 525 (Tex. 1886).

299. *Id.*

300. *Id.* (emphasis added).

301. It is unclear what a "great and irreparable" injury means. One could reasonably argue that any illegal expenditure of public funds created a great and irreparable injury once it was complete because the taxpayer's money was unlawfully spent and nothing could undo it. If that is true, then this additional language does not add any additional requirement.

302. Morris v. Cummings, 45 S.W. 383, 385 (Tex. 1898).

illegal and to result in increased taxation.[303] Then in 1902, the court held that taxpayers have a "right" to bring suit for an injunction to "prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they in common with other property holders of the county" must pay.[304]

These cases show that taxpayers may sue in equity to stop the illegal use of public funds. These decisions primarily dealt with local levels of government—though their application is not necessarily so limited—and generally required the taxpayer to show a sufficient interest to proceed. An increased tax burden was certainly enough, and taxpayers "generally" had a sufficient interest.

The understanding of the courts' jurisdiction over taxpayer suits shortly after 1876, therefore, generally matches the modern understanding. Taxpayers may sue to enjoin illegal expenditures, so long as the plaintiff has a sufficient interest. But the plaintiff need not establish the special damage required in other public rights suits.

iii. If courts have jurisdiction, they must exercise it.—Early court decisions also establish that there is a judicial duty to resolve a dispute if the court has jurisdiction. "[T]he function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline," the court held in 1841.[305] "While it is bound not to take jurisdiction if it should not, it is equally true that it must take jurisdiction if it should."[306] The court repeated this holding in 1872. If a statute's constitutionality is properly raised, "we shall not hesitate to discharge the duty which the law devolves upon us."[307] The court restated the point a year later: If a constitutional question "is brought before us in any real and proper case," the court is duty bound to answer it.[308] Finally, shortly after the constitution's adoption, the Chief Justice continued the thread, stating that "[a] court can no more surrender or refuse to exercise a jurisdiction conferred on it by law than can it acquire a jurisdiction not given by law."[309]

c. Concluding the Historical Analysis.—The three preceding principles and the convention debates demonstrate that standing is generally consistent with the judicial power's original understanding. Courts only have jurisdiction to decide proper cases—concrete disputes between adverse parties that a court

303. Polly v. Hopkins, 11 S.W. 1084, 1085 (Tex. 1889). The court reiterated that holding the following year. Altgelt v. City of San Antonio, 17 S.W. 75, 77 (Tex. 1890).

304. City of Austin v. McCall, 68 S.W. 791, 794 (Tex. 1902).

305. Morton v. Gordon, Dallam 396, 397 (Tex. 1841).

306. *Id.*

307. Ward v. Ward, 37 Tex. 389, 392 (1872).

308. *Ex parte* Rodriguez, 39 Tex. 705, 751 (1873).

309. Darnall v. Lyon, 22 S.W. 304, 307 (Tex. 1893) (Stayton, C.J., concurring).

can resolve with a binding judgment. Furthermore, courts function only to remedy plaintiffs' personal injuries. At bottom, that is all standing doctrine requires. The core of Texas's modern standing jurisprudence, therefore, was plainly present at the time Texas's constitution was adopted.Although Texas has not yet decided what the nature of the required injury must be, the early decisions are abundantly clear: The violation of private rights is sufficient, and a factual injury is only required if public rights are violated.[310] Thus, the violation of a constitutional, statutory, or common law right, without more is enough of an injury for the court to have jurisdiction. There is no need for proving real-world harm beyond the violation, nor is there a need to look to historical analogues. To the extent that the modern doctrine in Texas tends to focus on factual, not legal, injuries, it conflicts with the general understanding at the time the Texas constitution was adopted.

While the stated injury requirements might suggest that taxpayer standing is impermissible, there is strong and consistent historical support for such suits. Several early cases permit taxpayer suits to enjoin illegal government expenditures, which is essentially the scope of the modern doctrine. Although the modern doctrine has formulated additional rules and boundaries concerning taxpayer standing, that is to be expected when new questions arise. But the core of taxpayer standing today fits well with the original understanding of the judicial power's scope. And indeed, this exception for taxpayer suits is not surprising given the framers' concern with strictly limiting government spending.

Finally, the duty to answer properly raised legal questions shows that prudential standing is inconsistent with the judicial power's original scope. Prudential standing is not a decision that the court has no power to proceed but that it would be unwise to do so. It is a refusal to exercise the jurisdiction the court possesses. This refusal to hear and decide a case over which the court has jurisdiction runs headlong into the "duty" to exercise jurisdiction if the court has it.[311] Under the original understanding of the judicial power, courts are "not at liberty" to turn plaintiffs away because they would rather not answer the question.[312]

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310. Notably, this is Justice Clarence Thomas's view of the required injury under federal law. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting) ("At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community.").

311. *See* Ward v. Ward, 37 Tex. 389, 392 (1872) ("[W]hen we find ourselves totally unable to administer a law by reason of its uncertainty or ambiguity, or believe it to be unconstitutional, we shall not hesitate to discharge the duty which the law devolves upon us.").

312. *See* Morton v. Gordon, Dallam 396, 397 (Tex. 1841) ("Fortunately, however, for the people, the function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline. While it is bound not to take jurisdiction if it should not, it is equally true that it must take jurisdiction if it should . . . .").

Conclusion

Standing is an important aspect of modern jurisprudence in Texas. Although the term and the doctrine's explicit enunciation did not appear in Texas until the late twentieth century, its core—including taxpayer standing—was present at the Texas constitution's inception, largely based on the widely understood role of courts and judicial power. The textual and historical evidence, however, contradicts a factual injury requirement and undermines any notion of prudential standing. If the Texas Supreme Court is serious about originalism, it would do well to adhere to the original understanding of standing doctrine. By doing so, the court would ground its standing inquiry in something more objective and discernable, and it would feel less obligated to follow the federal courts wherever they go. Even though standing was pioneered by the federal courts, the Texas courts should remain true to their own unique tradition—and indeed, their own law.