Understanding Standing: A Process of Evaluating Variables in Specific Situations

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UNDERSTANDING STANDING: A PROCESS OF EVALUATING VARIABLES IN SPECIFIC SITUATIONS

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UNDERSTANDING STANDING: A PROCESS OF EVALUATING VARIABLES IN SPECIFIC SITUATIONS
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I. Introduction: Standing as a Component of Article III Justiciability

The essence of the legal principle known as "standing to sue" in the federal courts is captured in the question: Does the particular litigant before the court present a claim in an adjudicatory form and under conditions appropriate for judicial determination?

In *United States v. Hays*, the Supreme Court instructed the federal courts as follows:

"[t]he question of standing is not subject to waiver ... we are required to address the issue even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction and standing 'is perhaps the most important of the jurisdictional doctrines.' Standing, like other justiciability elements, are threshold issues that federal courts cannot ignore and ordinarily must resolve before reaching the merits."

It is, therefore, as important to master justiciability issues, as it is to master material going to the merits of a case. Nevertheless, standing is considered a dull topic. Thus, many professionals – lawyers and some courts – are not capable of developing and presenting a cohesive standing analysis.

It is not unusual to encounter standing statements in briefs, cases and the legal literature that are little more than snippets of language lifted out of context from court opinions and strung together in a makeshift statement and offered as a legitimate prediction, argument or explanation on issues of standing. Such makeshift work is commonly proclaimed to be a result of the Supreme Court’s failure to develop an understandable statement of, nor methodology for, making a standing analysis in specific situations. Therefore, standing analysis is not useful, for

1 Professor of Law, Sturm College of Law, University of Denver. I would like to thank Professors Alan Chen, Timothy Hurley and Eli Wald for their thorough comments and suggestions on the manuscript. They truly gave of themselves. I also am indebted to Professors John Carver, Fred Cheever, Mark Hughes, Ronald Levin, Michael Massey, Richard Seamon and Mary Steefel. The valuable work of my research assistants, Stephanie Cegielski, Russell McAvey, Andrew Swan and Jason Williams was essential. Diane Burkhardt, Research Librarian, also contributed significantly to the product. I must not forget the skillful work of the support staff in the production stages of the project: Diane Bales and Anne Beblavi. Finally, I greatly appreciate the stipend generosity of Dean Jose Roberto Juarez that made it possible for me to focus on the project.


4 See *Staudt, Modeling Standing*, 79 N.Y.U. L. Rev. 612, 613-14 (2004); *Leading Cases*, 112 Harv. L. Rev. 253, 262-63 (1998); *Note: And Justiciability for All? Future Injury Plaintiffs and the Separation of Powers*, 109 Harv. L. Rev. 1066, 1070 (1996); *Note: Standing in Racial Gerrymandering Cases*, 49 Stan. L. Rev. 381, 382 (1997); *Comment: In Response to Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers do Have a Leg to Stand On*, 80 Minn. L. Rev. 123, 128 (1995). Although the multiple variables approach to standing has not been articulated comprehensively by the Court, it, nevertheless has identified the variables. The difficulty is that the Court commonly addresses only one or two variables in a single opinion, thereby not collecting them for easy identification. Two plausible reasons for not addressing all the standing variables in each opinion are: (1) not all the variables are relevant to the standing analysis in every case in which standing is in issue; (2) if the Court has concluded that one or two variables are decisive, comments on others, although possibly relevant, could serve to create a body of dicta creating confusion among lawyers and lower courts in future cases.
courts decide whimsically in each specific case whether standing has been established. The purpose of this article is to demonstrate that this criticism is not entirely justified. The Supreme Court precedents do illustrate the orderly nature of the standing inquiry and they are the sources on which the article is based.

Despite the traditional ennui, the recent Supreme Court cases of Massachusetts v. EPA, and Hein v. Freedom from Religion Foundation have sparked new interest in standing analysis. The 5-4 split on the Court, Chief Justice Roberts’ impassioned dissent in Massachusetts, the suggestion in Hein that taxpayer standing to sue should be abolished, the refusal to apply Flast v. Cohen in Hein, and the expressions of solicitude for state standing in Massachusetts, have piqued fresh interest in a range of standing related topics that are worthy of scholarly investigation.

Another reason why scholarly investigation is timely and important is the impact of a single 1992 Supreme Court case, Lujan v. Defenders of Wildlife. Despite the fact that the case is now 17 years old, Lujan continues to be the most generally cited federal court standing case. It has been cited more than 6,000 times by the federal courts. The Court has cited it at least 43 times, and in 2007-2008 it was cited by the Court at least 8 times. It was cited 14 times in Massachusetts v. EPA, 9 times in Hein v. Freedom from Religion Foundation, Inc., and 7 times in the majority opinions in its most recent environmental case.

This is a big mistake! In Lujan standing was decided on the basis of a motion for summary judgment. As such, the Court’s heightened requirements for standing in Lujan are out of place when the case is applied outside the summary judgment context. The Court has held consistently that good faith allegations of injury in fact are sufficient to establish standing on the pleadings. Widespread application of Lujan thus trumps the Court’s standing jurisprudence.

As Professor (now judge) Fletcher concluded, the law of standing cannot be made easy, and that “to think, or pretend that a single law of standing can be applied uniformly to all causes of action is to produce confusion, intellectual dishonesty, and chaos…[t]he solution …[is] …to break down what might appear to be a single, general question into discrete and particular questions….”

The premise of this article is that, by identifying and extracting from Court opinions developed and implemented standing variables and applying them as a matrix to specific situations, the standing analysis will be more comprehensive and illuminating. Thus, the article

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5 But, the basic policies have remained clear and courts are “not at sea” in applying the law of standing, 109 Harv. L. Rev. supra, at 1072.
8 549 U.S.535.
9 ___U.S. ___, 127 S.Ct. 2573.
10 392 U.S. 83 (1968).
15 Summers v. Earth Island Institute, ___U.S. ___, No. 07-463, March 3, 2009 (Slip Opinion)
goal is, first, to describe what the Court does in fact, and, second, to prescribe a model for analysis that will more reliably predict standing outcomes and facilitate more informed analysis/critique of Court decisions.

Therefore, this article presents a comprehensive multiple variable analysis and evaluation of *Massachusetts* and *Hein* to demonstrate the model for analysis and to address the impropriety of thoughtless application of *Lujan*. The product will include the Courts’ holdings, and the standing positions stated in the various Justices’ opinions.

The relevant standing variables to be considered are readily identifiable in a large collection of the Court’s opinions. Initially, the variables considered by the Justices to be relevant will be used to illustrate their functional effect in shaping their individual viewpoints in the specific context of each case. Standing variables not considered will be identified and evaluated in terms of whether they also were relevant and should have been included and how they might have affected the differing viewpoints of the Justices.

The model for standing analysis resulting from the research is included at this point to facilitate the reader’s efficiency in proceeding through the article and to enhance assimilation of the materials that follow. The model was derived from the research and by knowing what ultimately is its design the reader should more efficiently understand how and from what it was constructed. In short, it is a sort of roadmap of what is to come!

II. A Model for Standing Analysis

A. Combinations of the Major Variables in Different Contexts

These six major variables relating to federal court standing appear consistently, but not comprehensively, in federal court cases in which standing questions are discussed. To understand the “fit” or “sense” of the cases in the field, a standing analysis should account for the presence or absence of each of the variables and the weight given to each relevant variable, in each case. In a specific case, one variable may be given exclusive consideration in the opinion. In another case, some other variable may be paramount. Nevertheless, all six variables are potentially relevant and should be accounted for in making an analysis to predict the outcome of the standing question in a contemplated lawsuit. They also should be used to make a responsible, comprehensive analysis/critique of a court’s standing decision.

B. A General Model for Standing Analysis

In order to bring the predictive analysis into focus, be aware that the six major standing issues will appear in various combinations, and that all six will not necessarily be significant in every standing case analysis. Even the core requirement of alleging justiciable injury may be undisputed in a particular case, while some other issue, such as a prudential limitation, may be hotly contested.

Because the procedural main theme is prominent in the case opinions, with some exceptions, the Court’s opinions indicate it is more difficult to establish constitutional standing

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17 Notes 22-27, *infra*. The major variables are concrete injury to the plaintiff, the basis for federal court jurisdiction, private or public actions, prudential limitations on standing, the stage of the litigation, and state-created standing.
under Article III. It is less difficult to establish standing (1) based on Article III and agency statutes or (2) based on Article III and the APA. The Court recognizes that Congress may have decided the standing question.

The precedents indicate the best case scenario to establish standing is a dispute: (a) that alleges concrete personal injury in fact; (b) that is based on Article III and standing language in agency statutes or is based on Article III and the APA; (c) that is in the nature of a private action; (d) and that asserts the direct interests of the complainant. This combination also will serve to minimize or eliminate the court’s authority to apply (e) a prudential limitation, to defeat standing.

The precedents indicate the worst case scenario for standing is: (a) alleging injury to a general interest; (b) based on constitutional standing under Article III; (c) in the nature of a public action; (d) asserting the interests of a third party. This combination also will allow the court to apply (e) a prudential limitation, to defeat standing.

When preparing a brief or making an oral argument supporting standing, counsel should organize the case authorities so as to demonstrate to the court that the standing theory presented is well thought out and is cogent. That is, if the standing theory is based solely on Article III, statutory standing authorities are of little relevance. If no “relevant statute” creating substantive interests can be found, case decisions involving standing based on the APA will not be helpful. If the complainant is attempting to bring a public action, private action cases will not be persuasive.

In short, the responsible attorney will avoid simply stringing together an indiscriminate assortment of standing cases and piecing together bits of language from them in an attempt to state a standing theory. Likewise, the scholarly analyst/critic who evaluates standing in a case decision should proceed in the same manner. The standing variables matrix applied to specific situations should more reliably predict standing decisions and will facilitate more informed analysis/critique of them.

The basic principles of federal court standing and the analyses of Massachusetts and Hein will produce the matrix for identifying relevant standing variables and for making standing analyses in specific situations. Before the case analyses, however basic principles of federal court standing are reviewed.

C. Standing in the context of justiciability

Issues to be addressed in answering the question of whether the complainant in a specific case has standing are complex. Both the standing issues and the answers are influenced by elements of the larger question of justiciability. The major components of the question of justiciability consist of such issues as: whether the plaintiff has standing; whether the challenged government action is final; whether the dispute is moot, hypothetical, generalized or abstract, ripe for decision, constitutes a political question, or asks the court to render an advisory opinion; and whether the suit is friendly, feigned, or collusive.

D. Focus on the Litigant

The standing component of justiciability is unique, however. Logically, if Art. III justiciability consists of a group of required components, failure to establish any one of them
would render the claim nonjusticiable. Nevertheless, the standing component focuses on the particular litigant before the court rather than on the merits issues presented. Where standing is lacking, it means that a dispute that would otherwise be justiciable cannot be brought by this plaintiff, but if a proper plaintiff could be substituted, the same cause of action could proceed. Accordingly, the standing component does not necessarily go to the heart of the justiciability of a dispute. On the other hand, if there is no justiciable Article III injury, there is no case or controversy, which is fundamental to all federal court jurisdiction.

E. Separation of Powers influence

The justiciable injury analysis also is influenced greatly by the tripartite separation of powers concept. Indeed, the Court has said that “the law of Art. III standing is built on a single basic idea: ”the idea of separation of powers.” Allen v. Wright. 18 Both federal and state courts are affected by the notion that because the powers of government are divided among three branches, there are inherent limits on the scope of judicial authority. That is, the judiciary is without authority freely to define what it will consider to be a justiciable dispute. It must not exceed the conceptual boundaries, for to do so is not only to act without authority, but also is to usurp governmental power assigned to the other branches.

Hence, judicial authority should not be used creatively in order to justify adjudication of disputes that are assigned for determination to the executive and legislative branches. Furthermore, the Congress lacks power to reassign non-justiciable disputes to the judicial branch, for the Court has said that the judiciary will, independently, decide what is a justiciable dispute. Muskrat v. United States. 19 Therefore, the problem federal courts face is how to sort out from among the many types of disputes presented those that properly are the business of the judicial branch.

Much scholarly energy has been spent in attempting to separate and analyze independently the various components of Article III justiciability. The effort has not been altogether successful, for the components arise in a specific situation, do not occur in isolation, are interrelated, and consist of relative (not absolute) and normative (not objective) concepts. Therefore, the personal value systems and perspectives of the judges applying them can be expected to lead to variations among court rulings on each justiciability component, including standing, and, as a composite judgment on the overall question of justiciability.

If the plaintiff’s standing is in doubt, it will be analyzed. The Supreme Court has said:

“Determining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complainant’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” 20

Actually, few court opinions contain statements about all the major justiciability components. Instead, they commonly focus on a few of them, and often on only one. “Because

19.219 U.S. 346 (1911).
issues of standing, ripeness and other such ‘elements’ of justiciability are each predicate to any review on the merits, a court need not identify all such elements that a claimant may have failed to show in a particular case.... Moreover, as precedent and prudence counsel us to avoid unnecessary dicta ... we see substantial reason not to review each element of justiciability in a dispute that we ultimately conclude does not lie within our jurisdiction. With this in mind, we now turn to the only issue we must decide.”

It is important that legal scholars and professionals recognize this narrow judicial focus on review of issues of justiciability and appreciate how it may be misleading to assume the single element reviewed actually determined the outcome. In short, judicial opinions may provide little transparency into the court’s decision process. Judges may perceive the relevant variables differently, and judges may weigh the variables differently. Therefore, it is important to anticipate the possible relevance of all or most of the variables in a specific situation and account for them, whether or not overtly reviewed by the court. Professionals and critics should be comprehensive in their analyses and address the variables believed to be relevant, although not mentioned, rather than continue the current practice of assessing only what is obvious from the opinions.

As the Supreme Court has said, the justiciability doctrines “relate ... in different though overlapping ways to an idea, which is more than an intuition but less than a rigorous or explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”

Thus, it is more useful to focus on standing methodology than it is to list a series of specific rules or statements of standing doctrine. The major standing variables provide the means for stating a methodology for comprehensive analysis in specific situations.

F. Developing a methodology for standing analysis

In developing a standing analysis methodology, it is essential to keep in mind the Supreme Court’s admonition that the standing inquiry “involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise.” The constitutional limitations are important, for they cannot be eliminated by the courts, Congress, or the executive branch. In contrast, the prudential limitations on standing, which have been introduced and applied by the courts, are subject to statutory modification.

III. Major Variables to be Applied in Standing Analysis

To elaborate a comprehensive model for analyzing whether a particular plaintiff has standing to sue, it is necessary first to identify and understand the major variables to which the Supreme Court has referred consistently. To be justiciable, all disputes must be based on an

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See also *Schlesinger, Secretary of Defense v. Reservists Committee to Stop the War*, 418 U.S. 208, 214-16 (1974).
22. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Court statements about standing principles often occur in specific case contexts as part of the larger statement about justiciability. Thus, statements about standing may be influenced by the court's consideration and evaluation of other justiciability components in that particular case. Hence, elaboration of a reliable statement of the meaning of standing as abstract doctrine has been, and continues to be, as elusive as is a reliable doctrinal statement of the meaning of justiciability.
Article III case or controversy, for it is the core requirement. The standing variables mentioned repeatedly in the cases and that are essential to the methodology are:

- Alleging a justiciable injury-i.e. whether the plaintiff has alleged a specific, concrete “injury in fact” to personal interests that is traceable to the defendant, and that is likely to be redressed by the requested relief.\(^{24}\)

- The jurisdictional basis of the standing claim-i.e. whether it is based solely on the Art. III core requirement or whether it is further supported by statutory language indicating that the particular complainant in the particular situation is entitled to sue;\(^{25}\)

- The private or public nature of the action-i.e., whether the complainant’s case is one in which the direct effects on individual, private interests predominate or whether general effects on public interests predominate in the case;\(^{26}\)

- Prudential limitations on standing-i.e. whether, apart from Art. III justiciability requirements, the court may apply the judicially developed rules of self-restraint that limit the role of federal courts in deciding disputes;\(^{27}\)

- Stage of the Proceeding-i.e. whether the standing analysis is being made on a motion to dismiss (on the pleadings), on a motion for summary judgment, on a motion for a more definite statement of claims, or after trial;\(^{28}\)

- State-Determination of Standing-i.e., whether the components of the state law of standing in cases coming to the U.S. Supreme Court are consistent with the Art. III core requirement for standing in federal courts.\(^{29}\)

These major variables are illustrated in *Lujan v. Defenders of Wildlife*\(^{30}\), and *Lucas v. South Carolina Coastal Council*\(^{31}\). In addition, these earlier cases bear significantly on the standing

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analyses of *Massachusetts v. United States*\textsuperscript{32} and *Hein v. Freedom From Religion Foundation, Inc.*\textsuperscript{33}.

As each variable is identified and discussed as to *Lujan* and *Lucas*, it will be followed by a comprehensive review of when and how that variable may relate to and influence the standing analysis in specific cases. Thereafter, *Massachusetts* and *Hein* are analyzed on the foundation that has been laid.

**IV. Two 1992 Cases Illustrating the Six Major Standing Variables**

*Lujan v. Defenders of Wildlife*

Section 7(a)(2) of the Endangered Species Act of 1973 divides responsibilities regarding the protection of endangered species between the Secretary of the Interior and the Secretary of Commerce. It requires each federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not likely to jeopardize the continued existence or habitat of any endangered or threatened species.\textsuperscript{34}

Both Secretaries initially promulgated a joint regulation extending § 7(a)(2)’s coverage to actions taken in foreign nations, but a subsequent joint rule limited the section’s geographic scope to the United States and the high seas. Wildlife conservation and other environmental organizations filed an action seeking a declaratory judgment that the new regulation erred as to §7(a)(2)’s geographic scope and an injunction requiring the Secretary of the Interior to promulgate a new rule restoring his initial interpretation. The Secretary filed a motion for summary judgment on the standing issue, and the environmental organizations moved for summary judgment on the merits.

The District Court ordered the Secretary to publish a new rule. The Court of Appeals affirmed and the Supreme Court granted certiorari.\textsuperscript{35}

Justice Scalia delivered the opinion of the Court with respect to Parts I, II, III, III-A and IV, and an opinion with respect to Part III-B in which three Justices joined. The only issue the Court reached was whether the complainants had standing to seek judicial review of the rule.

His opinion began by stating the three irreducible constitutional elements of standing that must be established by the plaintiffs, i.e., injury in fact that is actual or imminent, not conjectural or hypothetical; a causal connection between the injury and the conduct complained of – traceable to the challenged action of the defendant; and likely, as opposed to merely speculatively, to be redressed by a favorable decision.\textsuperscript{36}

\textsuperscript{30} 504 U.S. 555 (1992). *Lujan* continues to be the most cited federal general standing case although it was decided 17 years ago.

\textsuperscript{31} 505 U.S. 1003 (1992). *Lucas* contains an important clarification of the holding in *Lujan*, and was decided only 17 days after *Lujan*.

\textsuperscript{32} 549 U.S. 497 (2007).

\textsuperscript{33} ___U.S. ___, 127 S.Ct. 2553 (2007).

\textsuperscript{34} 504 U.S. 558 (1992).

\textsuperscript{35} 504 U.S. at 559.

\textsuperscript{36} 504 U.S. at 560-61.
Further “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence ‘required at the successive stages of the litigation…’ At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presume that general allegations embrace those specific facts that are necessary to support the claim.’ …In response to a summary judgment motion, however, the plaintiff can no longer rest on such ‘mere allegations’, but must ‘set forth’ by affidavit or other evidence ‘specific facts,’ Fed. Rule Civ. Proc 56(e), which for purposes of the summary judgment motion will be taken to be true.37 The Court found the plaintiffs had not made the “requisite demonstration” of (at least) injury and redressability.38

The plaintiffs’ claim of injury was that the lack of consultation with respect to certain funded activities abroad “increase[es] the rate of extinction of endangered and threatened species.” The Court recognized the desire to use or to observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing, but the injury in fact test requires that the party seeking review be himself among the injured. “To survive the Secretary’s summary judgment motion, respondents had to submit affidavits or other evidence [that would satisfy the requirements of Rule 56(e)]…..”39

The affidavits of two Defenders’ members were evaluated. Ms. Kelly said that she traveled to Egypt in 1986 and observed the traditional habitat of the endangered Nile crocodile there. She intends to do so again, and will suffer harm in fact because of the American role in overseeing the rehabilitation of the Aswan High Dam on the Nile and in developing Egypt’s master water plan.40

Ms. Skilbred said she traveled to Sri Lanka in 1981 and observed the habitat of endangered species such as the Asian elephant and leopard at what is now the site of the Mahaweli project funded by the Agency for International Development. She was unable to see any of the endangered species and said this project will seriously reduce endangered, threatened, and endemic species habitat including areas that she visited, which may severely shorten the future of these species. The project harmed her she concluded, because she intends to return to Sri Lanka in the future and attempt to see these animals. However, she had no current plans, for there was a civil war going on right then.41

The Court faulted these affidavits as lacking any facts showing how damage to the species would produce “imminent” damage to Mses. Kelly and Skilbred. Their stated intentions to return to the places they had visited before was said to be “simply not enough.” It opined: “Such ‘some day’ intentions –without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”42

It conceded that “imminence” is an elastic concept, but insisted it could not be stretched beyond its purpose—to ensure that the alleged injury is not too speculative for Article III

37 Id.
38 504 U.S. at 561-62.
39 504 U.S. at 562-63.
40 504 U.S. at 563-64.
41 Id.
42 504 U.S. at 564.
purposes—that the injury is certainly impending. Thus, there must be a high degree of immediacy to avoid deciding a case in which no injury would have occurred, and, at the summary judgment stage, the plaintiffs had to adduce facts, therefore, on the basis of which it could reasonably be found that concrete injury to their members, was, as our cases require, “certainly impending.”

The plaintiffs also had contended there was standing based on a “procedural injury.” It arose out of the “citizen-suit” provision of the ESA that provides: “…any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency…that is alleged to be in violation of any provision of this chapter.” The Court of Appeals had held the injury-in-fact requirement was satisfied by the citizen suit provision. The Court rejected that view.

Regarding such statutory procedural rights, in its note 7, The Court said: “There is this much truth to the assertion that ‘procedural rights’ are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement. What respondents’ ‘procedural rights’ argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.”

In an important concurring opinion, Justice Kennedy, joined by Justice Souter, said: “In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court’s opinion to suggest a contrary view. [Citation omitted] In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements.”

Justice Stevens dissented on the Court’s standing determination that the threatened injury was not “imminent,” nor did he agree with the plurality opinion’s additional conclusion that the plaintiffs’ injury was not “redressable.” He said: “An injury to an individual’s interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat.”

Justice Blackmun, with whom Justice O’Connor joined, dissented. His first statement was “I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability.” Next, he questioned the

43 Id.
44 504 U.S. at 564.
45 504 U.S. at 571-72.
46 504 U.S. at 573 n.7.
47 Id.
49 504 U.S. at 582.
50 504 U.S. at 589.
Court’s breadth of language in rejecting standing based on the ESA citizen-suit language for “procedural” injuries.

Justice Blackmun stated the proper summary judgment practice and his conclusion that the Court had distorted it. To survive the motion for summary judgment on standing, the respondents need not prove they are actually or imminently harmed. Rather, they need only show a “genuine issue” of material fact as to standing, Fed. Rule Civ. Proc. 56(c) \(^{51}\), and that is not a heavy burden. A “genuine issue” exists so long as the evidence is such that a reasonable jury could return a verdict for the nonmoving party. \(^{52}\) The Court’s function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. \(^ {53}\)

He also pointed out the Court never mentioned the “genuine issue” standard, but instead referred to the type of evidence it felt the respondents failed to produce, i.e., “affidavits or other evidence showing, through specific facts” the existence of injury. The Court thereby confuses respondents’ evidentiary burden in withstanding a summary motion under Rule 56(e) \(^{54}\) with the standard of proof under Rule 56(c). \(^{55}\) Thus, if the Court had applied the proper standard for summary judgment, it would have concluded that the sworn affidavits and deposition testimony of Mses. Kelly and Skilbred created a ‘genuine issue” for trial.

**Lucas v. South Carolina Coastal Council**

In *Lucas*, the Court reviewed a judgment of the South Carolina Supreme Court denying Lucas recovery of damages based on his allegation that his land had been “taken” by the state without payment of just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

In 1986, Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes on them similar to those on the immediately adjacent parcels of land. At the time of purchase, the two lots were not subject to the state’s coastal zoning permit requirements. \(^ {56}\)

The South Carolina legislature enacted the Beachfront Management Act (BMA) in 1988. The Act decreed a permanent ban that prohibited Lucas from erecting any permanent habitable structures on his land. He promptly filed suit against the South Carolina Coastal Council, contending that although the Act might have been a lawful exercise of the state’s police power, its total ban on all construction deprived him of all “economically viable use” of his property. \(^ {57}\)

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\(^{51}\) Rule 56(c) provides in relevant part “…The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law…”


\(^{53}\) 504 U.S. at 590.

\(^{54}\) Rule 56(e) provides in relevant part “…the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”

\(^{55}\) See note 49, *supra*.

\(^{56}\) 505 U.S. at 1008.

\(^{57}\) 505 U.S. at 1008-09.
Therefore, Lucas contended it constituted a “taking” that required payment of just compensation. The state trial court held that the ban rendered his parcels “valueless,” and awarded Lucas damages in excess of $1.2 million. The Supreme Court of South Carolina reviewed, but prior to that court’s decision, the BMA was amended to authorize the Council, in certain circumstances, to issue special permits for construction seaward of a specified baseline.  

The state Supreme Court reversed the trial court and held itself bound, in view of Lucas’s failure to attack the Act’s validity, to accept the legislature’s ‘uncontested …findings” that any new construction in the coastal zone would threaten a valuable public resource. It ruled that, under the Supreme Court’s nuisance line of cases, when a regulation is designed to prevent “harmful or noxious uses” of property akin to public nuisances, no compensation is owed under the Takings Clause regardless of the regulation’s effect on the value of the property.

The Supreme Court granted certiorari and held, first, that Lucas’s takings claim was not rendered unripe by the state Supreme Court’s unusual disposition of the claim on the merits without considering the possibility of further state administrative and trial proceedings. Its disposition did not preclude Lucas from applying for a permit under the 1990 amendment of BMA for future construction, and challenging on takings grounds, any denial. However, it did preclude Lucas from making any takings claim with respect to his past deprivation, i.e., being denied by BMA any construction rights during the period before the 1990 amendment. The Court also noted that, unless the Supreme Court intervened, Lucas could not to obtain further state-court adjudication concerning the 1988-1990 period.

The Coastal Council contended that the BMA amendment rendered Lucas’s claim of a permanent deprivation, unripe, for he still might be able to secure permission to build on his property. In addition, the Council pointed out that “the issues of whether and to what extent [Lucas] has incurred a temporary taking…have simply never been addressed.”

Second, the Court held it would not accord with sound process to insist that Lucas pursue the late-created “special permit” procedure before his takings claim could be considered ripe. The “discretionary ‘special permit’ procedure… goes only to the prudential ‘ripeness’ of Lucas’s challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here.” Further, the Court determined that Lucas had properly alleged injury in fact in his complaint asking “damages for the temporary taking of his property” from the date of the 1988 enactment of the BMA to “such time as this matter is finally resolved.” “No more can reasonably be demanded.” The Court also stated that given the South Carolina Supreme Court’s “dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas’s takings claim, it is appropriate for us to address that component as if the case were here on the pleadings alone.”

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58 505 U.S. at 1009-1011.
60 505 U.S. at 1010.
61 505 U.S. at 1012.
62 505 U.S. at 1012-13. Ultimately, the Court subordinated ripeness to standing. In note 3, Justice Scalia made clear the case was really about standing.
63 505 U.S. at 1014, n.3.
64 Id.
65 Id.
Justice Kennedy concurred in the judgment and said that on remand, the state court must consider whether Lucas had the intent and the capacity to develop the property and failed to do so in the interim period because the state prevented him.\(^6\)

Justice Stevens dissented and stated that it was not clear that Lucas had a viable “temporary takings” claim and that on the present record it would be entirely possible that he had suffered no injury in fact even if the state statute was unconstitutional when he filed his lawsuit.\(^7\)

Justice Blackmun, dissenting, pointed out the Court had consistently held that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted.\(^8\) He also insisted that the “temporary takings” claim was not justiciable, for although facial challenges to a statute are ripe when the Act is passed, as-applied challenges require a final decision on the Act’s application to the property in question.\(^9\) Further, he said that Lucas had not demonstrated injury in fact, for he did not allege that he had any definite plans for using the property.\(^10\)

Most important to standing analysis, Justice Blackmun quoted from *Lujan v. Defenders of Wildlife*: “[S]ome day intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”\(^11\) He said the Court had circumvented *Lujan* by deciding to resolve the case as if it arrived on the pleadings alone. “But it did not. Lucas had a full trial on his claim for damages for the temporary taking of his property from the date of the 1988 Act’s passage to such time as this matter is finally resolved.”\(^12\)

Justice Scalia, responded for the majority: “Justice Blackmun finds it ‘baffling’…that we grant standing here, whereas “just a few days ago, [17 days earlier] in *Lujan v. Defenders of Wildlife…*,’ we denied standing. He sees in that strong evidence to support his repeated imputations that the Court ‘presses’ to take this case…is ‘eager to decide it…and is unwilling to ‘be denied…. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. The distinction, however, rests in law rather than chronology. *Lujan*, since it involved the establishment of injury in fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful.”\(^13\)

The Court held that the state appellate court erred in applying the “harmful or noxious uses” principle to decide the case,\(^14\) and remanded it to the state appellate court to determine the state-law question whether common-law principles would have prevented the erection of any habitable or productive improvements on Lucas’s land.\(^15\)

\(^{66}\) 505 U.S. at 1032-36.  
\(^{67}\) 505 U.S. at 1061-76.  
\(^{68}\) 505 U.S. at 1041.  
\(^{69}\) 505 U.S. at 1042 n 4.  
\(^{70}\) 505 U.S. at 1043 n 5.  
\(^{71}\) 504 U.S. at 564.  
\(^{72}\) 505 U.S. at 1043 n 5.  
\(^{73}\) 505 U.S. at 1014, n. 3.  
\(^{74}\) 505 U.S. at 1022-24.  
\(^{75}\) 505 U.S. at 1031-32.
V. Analyses of Lujan and Lucas in terms of the Standing Variables

These two cases contain all of the major variables identified by the Supreme Court for making a standing analysis. Further, they are important for (1) Lujan continues to be the most commonly cited Supreme Court standing case 76; (2) in Lucas, the Court clarified an important standing variable predominant in Lujan; and (3) the cases were decided only 17 days apart.

A. Alleging a Justiciable Injury

In both cases, injury was of major importance to the Court. To be justiciable, the complainant’s injury must be unique and personal. There must be injury in fact or an immediate threat of injury to the complainant that is traceable to the defendant’s conduct and that likely will be redressed if the lawsuit is successful.

In Lujan the Court was divided, but the majority concluded that Ms. Kelly and Ms. Skilbred did not present any facts establishing the immediacy of the threatened injury to them that they alleged would be brought about by the projects funded in part by the United States government. As indicated above, the Court also rejected the view that Congress could enact a citizen-suit provision that conferred standing on all persons an abstract, self-contained procedural right to have the Executive observe legally imposed procedures. Justices Kennedy and Souter concurred in the decision on this point.

Justice Stevens dissented from the Court’s determination that the threatened injury was not imminent. Justices Blackmun and O’Connor also dissented on both the imminence of injury and procedural right determinations.

Lucas would appear to be a case involving clear-cut injury in fact, for Lucas’s allegations were that the Coastal Council had taken his property without just compensation. Nevertheless, because of the unusual posture of the case, the Court was divided on the injury issue, The Supreme Court held the unusual state Supreme Court action precluded Lucas from making a temporary takings claim for the 1988-1990 period. It said that the claim was properly alleged and remained ripe for decision. Although there is “ripeness” discussion, in note 3 Justice Scalia expressly stated the issue to be one of standing.

Justice Kennedy concurred in the judgment, but said the question of whether there had been a temporary taking could not be decided for the necessary facts had not been developed in

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76 Since it was decided in 1992, Lujan v. Defenders of Wildlife has been cited more than 6000 times by the federal courts. The Court has cited it at least 43 times, and in 2007-08 it was cited by the Court at least 8 times. It was cited 14 times in Massachusetts v. EPA, 9 times in Hein v. Freedom from Religion Foundation, Inc., and 7 times in the majority opinions in its most recent environmental case, Summers v. Earth Island Institute, ___U.S.____, No. 07-463, March 3, 2009 (Slip Opinion). Even so, one commentator concluded that “Lujan is on the decline” because in later cases the Court has been more receptive to environmental actions, Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1801-04 (2007). Another concluded that Massachusetts v. EPA may be part of an emerging shift toward greater judicial oversight of administrative action, The Supreme Court, 2006 Term Leading Cases, 121 Harv. L. Rev. 415, 420 (2007). See also Comment: Friends of the Earth v. Laidlaw Environment Services: A Resounding Victory for Environmentalists….” 89 Geo. L. J. 1001, 1042-43 (2001) asserting the Court appears to be moving away from Lujan. But see Hein v. Freedom from Religion Foundation, Inc ___U.S.____, 127 S.Ct. 2553 (2007) strictly limiting Flast v. Cohen to its original context. Several Justices argued that Flast should be overruled.
the record. Justice Stevens dissented, saying it was not clear Lucas had a viable temporary takings claim and on the record it was entirely possible he had suffered no injury in fact.

Justice Blackmun dissented from the ripeness determination, pointing out that a land-use challenge is not ripe until a final decision about what use of the property will be permitted. He also rejected the Court’s decision that Lucas had shown injury in fact regarding the temporary takings claim, for he did not allege he had any definite plans for using the property. Nor did the state trial court make findings he had any plans to use the property from 1988 to 1990.

The next section consists of a comprehensive review of the justiciable injury standing variable.

**B. Alleging a Justiciable Injury – a Comprehensive Review**

1. **Specific, Concrete Injury to Personal Interests; Traceable to the Defendant; Likely to Be Redressed**

   - **Specific, Concrete Injury to Personal Interests**

   American federal courts have functioned primarily to adjudicate specific disputes where individual, personal legal rights are directly at stake. For many years, a federal complainant was required to show, at the outset, injury to a legally protected personal right. Known as the “legal interest” test, it is criticized on the basis that it requires a threshold determination of whether the rights asserted by the plaintiff are indeed legally protected. To separate the issue of standing from the merits, the Supreme Court has modified the justiciable injury requirement. Today, in order to establish an Article III “case” or “controversy,” the federal complainant need only assert a concrete and particularized “injury in fact” to personal interests. In the Court’s words:

   “Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the

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The constitutional case or controversy tradition, as modified, remains the core element of standing to sue in federal courts. It is now restated to require that to have standing, a complainant must be able to demonstrate, at the outset of the case, that there is a realistic possibility of its establishing, on trial of the merits, a specific, concrete injury (or an imminent threat of injury) to the complainant's personal interests, that is traceable to the defendant, and that is legally redressable. Allen v. Wright, 468 U.S. 737, 753 n. 19 (1984).

"This triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998). See FW/PBS v. Dallas, 493 U.S. 215 (1990). Congress and the courts can, and have in many cases, added to these three core requirements, but they cannot be reduced by either legislative or judicial action. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (198
complaining party have suffered a particular injury caused by the action challenged as unlawful.”

“Injury in fact” need not be economic in nature. For example, emotional distress at seeing animals mistreated by being exhibited under inhumane conditions may suffice as an injury in fact. If the injury is not actual, but only threatened, it must be “imminent” (i.e., certainly impending) and not conjectural or hypothetical.

● *To Personal Interests*

An allegation of specific individual injury to personal interests is essential to federal court standing. Whether the private interests of the complainant or the non-specific interests of the public predominate in the case, there always must be an allegation of specific individual injury to the complainant.

Therefore... the complainant must have “alleged a personal stake in the outcome of the controversy.” As refined by subsequent reformulation, this requirement of a ‘personal stake’ has come to be understood to require not only a ‘distinct and palpable injury,’ to the plaintiff... but also a ‘fairly traceable’ causal connection between the claimed injury and the challenged conduct.

Named plaintiffs who represent a class must allege and show that they personally have been injured. Also, pleading no more than what would be an attempt to vindicate “the value interests of concerned bystanders” is not justiciable injury. Alleging the violation of a right to have government act in accord with law is not sufficient, standing alone, to confer jurisdiction on a federal court.

● *Traceable to the Defendant*

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78 Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). See Flast v. Cohen, 392 U.S. 83 (1968). By meeting the concrete “injury in fact” standard, the complainant shows that its alleged injury (or imminent threat), is unique, is personal, and is, therefore, distinct from the generalized inconvenience (or harm) to the public that may result from governmental action. Thus, the injury cannot be abstract, Schlesinger v. Reservists, supra, 94 S.Ct. 2925 at 2931, conjectural or hypothetical, Allen v. Wright, 468 U.S. 737, 771 (1984).

79 A person with a long commitment to the proper care of wildlife, and who regularly visits exhibitions to observe animals, has an interest in seeing exotic animals living in a nurturing habitat. Thus, he has suffered direct, concrete and particularized injury to his aesthetic interest in observing animals living under humane conditions when he witnesses the actual living conditions of primates, which he alleges to be inhumane in violation of the Animal Welfare Act. Animal Legal Defense Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998).


There also must be a fairly traceable chain of causation between the alleged injury and the challenged government action. For example, in *Allen v. Wright*, supra, plaintiff parents alleged that IRS tax exemptions to private schools had not been administered so as to ensure that tax-exempt private schools were practicing non-discrimination in admitting students. The plaintiff parents contended that, in fact, some tax exempt private schools excluded black students. According to the plaintiffs, these private schools drew white children out of the public school systems and therefore deprived the plaintiffs’ children of the right to attend racially desegregated public schools. The Court found that the line of causation between the IRS conduct and desegregation of public schools was attenuated at best. It held the parents lacked standing because the links in the chain of causation were far too weak to show their injury was “traceable” to the challenged conduct of the IRS.  

Plaintiffs must attack specifically identifiable actions of government that are said to cause injury or threaten plaintiffs personally, and that are said to be unlawful. Rarely, if ever, may complainants judicially challenge the entire programs agencies have established to carry out their legal obligations.  

An agency regulation which allows third parties to engage in behavior that violates the Animal Welfare Act (AWA), but does not require them to do so, establishes causation because the regulation authorizes the conduct that allegedly causes the injury, if that conduct would be illegal otherwise. Regulations complying with the AWA requirement of minimum standards to govern the humane treatment of animals would have prevented the injury.  

- **Likely to be Redressed**  

The alleged injury not only must be traceable to the defendant’s allegedly unlawful conduct; it also must be “likely to be redressed by the requested relief.”  

In some cases, the plaintiff asserts procedural rights under a statute the violation of which, the plaintiff claims, causes injury in fact. For example, the National Environmental Policy Act (NEPA) requires federal agencies to prepare environmental impact statements for actions that will significantly affect the environment. The plaintiff who lives in the area that will be affected by the agency action has standing to challenge an agency’s failure to comply with NEPA procedures. The Court has said that, when a statute creates procedural rights, the plaintiff  

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86 See also *Simon v. Eastern Kentucky Welfare Rights Organization, et. al.*, 426 U.S. 26 (1976), for another example of lack of traceability.  
87 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891-893 (1990); *Allen v. Wright*, supra 468 U.S. at 759-760. Rather, they must identify the specific actions taken as part of the program that affect them personally.  
89 *Allen v. Wright*, 468 U.S. 737, 753 n. 19, (1984); *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 105-06(1998), the complaint alleged injury in fact to the association and its members because of the defendant manufacturer's failure to comply with the Act's requirement of timely filing of toxic-and hazardous-chemical storage and emission reports with EPA. Such failure was asserted to violate complainants' right to know about toxic chemical releases. The Supreme Court held the complainant had failed the redressability component of standing. The Court said: "None of the specific items of relief sought would serve to reimburse [complainants] for losses suffered by the late reporting... Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."
“can assert that right without meeting all the normal standards for redressability and immediacy [of threatened injury].” It explained:

“Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.”

Redress may be available in several forms. For example, a more stringent agency regulation governing primate living conditions will prohibit the inhumane conditions which caused aesthetic injury to one visiting an animal exhibition on several occasions. A lawful regulation also will alleviate his injury during his future visits to the exhibition. An award of civil fines, though payable to the government, may deter future illegal pollution by a company whose prior illegal pollution has injured the plaintiff’s recreational and aesthetic use of a nearby river.

Obviously, judicial analyses of allegations of justiciable personal injury may range from perfunctory to intense, from simple to complex, there may be variations due to the judicial workload, and, of course, there are always the different value positions of individual judges. These influences have led to a variety of judicial expressions that attempt to describe a justiciable injury and to explain how to determine whether one has been asserted. Those reported here are representative samples.

2. Types of personal interests that will support standing

The need for a federal court plaintiff to plead and prove concrete injury or an imminent threat of concrete injury to a personal interest is accompanied by a corollary question. That is, what types of personal interests are recognized by courts as sufficient to support standing? Four sources of legal interests should be considered.

- **Common Law**

  It is sufficient to recognize that federal courts have jurisdiction to protect common-law rights. The common-law right asserted might be the personal right to make binding contracts, or to sell, transfer title to, or otherwise dispose of property. Or, it could be the common-law right to be free from defamation.

- **Individual Constitutional Rights**

  Most of the various personal constitutional rights that might be injured and serve as the basis of a federal court action are set forth in the Bill of Rights. For example, when government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the disadvantaged group suffers “injury in fact” by

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the denial of equal treatment imposed by the barrier. Because the protected interest is that of equal treatment (not outcome), it is not necessary to allege that, “but for the barrier” complainant would have received the benefit.\textsuperscript{94}

Even a violation of the Commerce Clause may be the source of personal injury\textsuperscript{95}.

Similarly, the right of a federal taxpayer to challenge exercises of congressional power under the Taxing and Spending Clause will support a private interest federal court action alleging a violation of the Establishment Clause. \textit{Flast v. Cohen}\textsuperscript{96}.

However, citizens cannot sue to enforce the provisions of the Accounting Clause, \textit{United States v. Richardson}\textsuperscript{97}, or the Incompatibility Clause prohibiting dual office-holding, \textit{Schlesinger v. Reservists Committee to Stop the War}\textsuperscript{98}; nor may they challenge congressional action pursuant to the Property Clause authorizing the transfer of federal land to a religious organization, assertedly in violation of the Establishment Clause. \textit{Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.}\textsuperscript{99}

- **Statutory Interests**

Congress cannot, of course, define an Article III case or controversy.\textsuperscript{100} It can, however, create private rights that, if injured, confer standing.\textsuperscript{101}

Recently, the Court upheld the standing of an organization based on its statutorily created interest in obtaining information from the government about another organization that was asserted to be a “political committee.”\textsuperscript{102}

The two leading cases involving the statutory creation of personal interests, the invasion of which confers standing, arose under the Fair Housing Act of 1968. They are \textit{Trafficante v. Metropolitan Life Ins. Co.}\textsuperscript{103} and \textit{Gladstone, Realtors v. Village of Bellwood}\textsuperscript{104}. \textit{Trafficante}
involved a *statutorily authorized* challenge by tenants to the racially discriminatory housing policy of the apartment complex in which they lived. The Court upheld the tenants’ standing based on their “loss of important benefits from interracial associations.”\(^{105}\) *Gladstone* involved a *statutorily authorized challenge* by local residents to a realty company’s practice of “steering” prospective home buyers to different neighborhoods, based on their race. The Court held they had standing because they asserted that the area in which they lived “is losing its [racially] integrated character” due to defendants’ illegal conduct. In effect, the Fair Housing Act identified as legally cognizable, preexisting associational interests that did not resemble the sorts of interests that had traditionally been judicially cognizable\(^ {106} \).

- **Substantive (Legislative) Administrative Agency Rules**

  A legislative rule may prescribe the specific criteria by which a broadly stated statutory standard will be applied. For example, it may clarify the meaning of a statutory term such as “financially responsible adult” for purposes of administrative application. The Court has held that a state agency’s parole regulations could create a legal interest the invasion of which could violate the Ex Post Facto Clause.\(^ {107} \) In that situation, the regulations provide both a right protected by the Ex Post Facto clause and standing to challenge invasions of that right.

  It is not feasible to list the many personal interests created by administrative agency rules that, if injured, would support a private interest federal court action. Because agency legislative rules have the force and effect of law, they are similar to statutes. Further, they also may create substantive or procedural interests that are enforceable in court.

- **Legal Interests v. “Injury in Fact”**

  In several early cases, the Court denied standing to plaintiffs challenging government action that caused them competitive injury. For example, the Court denied standing to a power company to challenge the constitutionality of the federal statute establishing the Tennessee Valley Authority (TVA).\(^ {108} \)

  In later cases, the Court came to recognize that economic injury, standing alone, could constitute an “injury in fact” sufficient to support standing to challenge government action, regardless of whether the plaintiff had a legal right to be free of the injury.\(^ {109} \) In these cases the question of whether the interest asserted by the plaintiff was legally protected, the Court explained, went to the merits of the case, not to the issue of standing. Even so, significant to these later cases was the existence of a statute (Administrative Procedure Act) reflecting congressional intent to provide a broad right to judicial review.\(^ {110} \)

104. 441 U.S. 91 (1979).
105. 409 U.S. at 210.
108. *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939). It did not matter that the plaintiff company would, in fact, be harmed by having to compete with the TVA for customers. Since there was no law giving the company a right to be free from government, it had no "legal interest" to assert. *Id.* at 137. See also *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938).
In *Sierra Club v. Morton*, the Court explicitly recognized for the first time that injury in fact can also arise from harm to non-economic interests, including aesthetic and recreational interests. The Sierra Club organization could not rely on its general interest in environmental conservation to establish standing to challenge a construction project in a national park. Instead, it had to produce one or more individual members who could show that their personal use of the park for recreation or aesthetic fulfillment would be harmed by the project.\(^\text{111}\)

In the more recent case of *Federal Election Commission v. Akins*,\(^\text{112}\) the Court explained that there is a difference between an abstract, generalized public grievance and an injury to a personal interest that is suffered by many individuals: The Court again emphasized the importance of the fact that the plaintiffs asserted standing under “a statute which ... does seek to protect individuals such as [plaintiffs] from the kind of harm they say they have been suffering.”\(^\text{113}\)

A person with a long term commitment to the proper care of wildlife, has an interest in seeing exotic animals living in a nurturing habitat. Accordingly, he has suffered a direct and concrete injury to his aesthetic interest in observing animals living under humane conditions when he witnesses the actual living conditions of primates, which he alleges to be inhumane in violation of the Animal Welfare Act.\(^\text{114}\)

3. Alleging Personal Injury as a Foundation for Asserting the Public Interest

In *Sierra Club*, the Court also made clear that, once harm to a personal interest is established, the plaintiff may vindicate the public interest:

“[T]he fact of economic [or non-economic] injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate ... It is in a similar sense that we have used the phrase ‘private attorney general’ to describe the functions performed by persons upon whom Congress has conferred the right to seek judicial review of agency action.”\(^\text{115}\)

C. Prudential Limitations\(^\text{116}\) on Standing

Third Party Standing-Organizations

The *Lujan* case also illustrates one facet of the prudential limitations standing variable. Apart from the Article III core justiciability requirements, there are prudential limitations that

\(^{111}\) *Sierra Club*, 405 U.S. at 734.


\(^{113}\) *524 U.S. at 22*


\(^{115}\) *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972).

\(^{116}\) See *Warth v. Seldin*, 422 U.S. 249, 255 (1975), the standing inquiry “involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise... [I]n both dimensions it is founded in concern about the proper-and properly limited-role of the courts in a democratic society.”
implement the Court’s policy of self-restraint in deciding cases. They are based on concern about the limited role of courts in a democratic society. Thus, a complainant clearly satisfying the Article III minimum requirements may, nevertheless, be denied standing by a prudential limitation.

The Court has articulated three prudential limitations on standing. They are: generalized grievances are not justiciable; the plaintiff must assert his own legal rights and interests; and, the plaintiff must be within the “zone of interests” sought to be protected by the statute or constitutional provision allegedly violated by the defendant.

Although one of the limitations generally prohibits the plaintiff from asserting third parties’ rights, the Court has recognized exceptions. In *Hunt v. Washington State Apple Advertising Commission*, the Court stated the criteria to be met by an organization suing on behalf of its members. They are: the members would otherwise have standing to sue in their own right; the interests the organization seeks to protect are germane to its purposes; neither the claim nor the relief requested requires participation in the lawsuit by individual members of the organization.

In *Lujan*, Ms. Kelly and Ms. Skilbred failed to establish the essential Article III minimum requirement of injury, and that was fatal to the organizations’ lawsuit. The *Lucas* case did not involve any of the prudential limitations.

The following section consists of a comprehensive review of the prudential limitations standing variable.

D. Prudential Limitations on Standing - a Comprehensive Review

1. Introduction

Apart from the Article III core requirements for a case or controversy, the Supreme Court has developed a complementary policy of self-restraint establishing what are known as “prudential” limitations on justiciability. Like the constitutional limitations, they are “founded in concern about the proper-and properly limited-role of the courts in a democratic society...”

The Court has stated candidly that a prudential limitation is “not always clearly distinguished from the constitutional limitation.” It has, however, articulated three prudential limitations on standing.

The first two limitations were identified in *Warth v. Seldin*: “First, the Court has held that when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction... Second, even where the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement... the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties....”

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120 422 U.S. 490, 499 (1975).
In addition to these, a third prudential limitation has sometimes been articulated by the Court. It is that the plaintiff must be arguably within the “zone of interests” sought to be protected by the statute or constitutional provision that the defendant has allegedly violated. The “zone of interests” test was originally articulated as a limitation on the right of action created by the APA.\textsuperscript{121} Yet the Court has suggested that it exists as a more generally applicable prudential limitation on standing.\textsuperscript{122}

In any event, the Court also has made clear that, unlike constitutional standing requirements, prudential standing limitations can be modified or eliminated by Congress. Accordingly, the Court has often interpreted federal statutes authorizing judicial review of governmental action as modifying or eliminating one or more of the prudential standing limitations.

2. Generally the Plaintiff Must Assert Its Own Legal Rights and Interests

Although one of the prudential standing limitations generally prohibits the plaintiff from asserting the legal rights of third parties, the Court has recognized exceptions, under which an individual or an organization may do so.

• Third Party Standing-Individuals

To determine whether this policy limitation applies, the cases demonstrate that the trial court should (1) determine whether the litigant has alleged an “injury in fact” that establishes its concrete interest in the outcome; (2) weigh the closeness and the importance of the relationship between the complainant and the third party whose rights the litigant seeks to assert; (3) assess the ability of the third party to assert its own rights; and (4) evaluate the risk that third party rights would be harmed if the complainant is denied standing.\textsuperscript{123}

Fifteen years later, the Court revisited the topic of individual representational standing. In \textit{Powers v. Ohio}\textsuperscript{124}, the defendant in a criminal case sought to assert the equal protection rights of black jurors excluded from service by the prosecution’s peremptory challenges. The claim was that the challenges were race-based.

The Court stated in \textit{Powers} three criteria for standing in such circumstances: (1) the litigant must have suffered an “injury-in-fact,” establishing a “sufficiently concrete interest” in the outcome; (2) there must be a close relation between the litigant and the third party; and (3) there “must exist some hindrance to the third party’s ability to protect his or her own interests.”

Applying the \textit{Powers} criteria the Court held:

\begin{itemize}
\item \textsuperscript{124} \textit{499 U.S. 400} (1991)
\end{itemize}
First, the discriminatory use of peremptory challenges causes a criminal defendant cognizable injury and the defendant has a concrete interest in challenging it.

Second, the relationship between the criminal defendant and excluded jurors is as close as that recognized in prior third-party standing cases. Examples given included: licensed physicians and contraceptive users where there is a professional relationship (Planned Parenthood), *Griswold v. Connecticut*; a licensed beer vendor and male customers challenging a statutory age classification scheme (females may purchase at age 18, males at age 21), *Craig v. Boren*; an attorney challenge to attorney fees restriction by asserting the due process rights of the client, *United States Department of Labor v. Triplett*.

Third, “The barriers to a suit by an excluded juror are daunting.... The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights.” Thus, the Court concluded the criminal defendant could raise the third-party equal protection claims of the excluded jurors.

In a more recent case, the Court addressed the standing of plaintiffs suing under “qui tam” statutes. Those statutes allow a private party to sue on behalf of the government and share in any money award to which the government is found entitled. The qui tam plaintiff cannot claim concrete injury in his or her own right, but can claim standing as a partial assignee of the government’s claim.

- **Third Party Standing-Organizations**

  The Court has said that although there is no injury to it, “an association may have standing solely as the representative of its members. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy.”

In *Hunt*, the Washington State Apple Advertising Commission was held to have met the prerequisites to “associational standing.” The Court found the Commission performed the functions of a traditional trade association representing the Washington apple industry. Apple growers and dealers were said to possess all the indicia of membership in an organization.

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125. 381 U.S. 479 (1965);
126. 429 U.S. 190 (1976);
128. The *Powers* criterion that there must be a "close relation" between the litigant and the third party was construed in a recent case in the District of Columbia Circuit. It involved an independent money finder who sued in behalf of himself and depositors who had unclaimed deposits in three banks under FDIC receivership, but who were not known to him because the FDIC refused to publish their names. *Lepelletier v. Federal Deposit Insurance Corporation*, 164 F.3d 37 (D.C.Cir.1999).
The Hunt criteria ordinarily require that an association have actual members, and they must have standing to sue in their own right. However, persons may be sufficiently member-like to be within the Hunt criteria. The question is whether the organization is the functional equivalent of a traditional membership organization. A lower court held that three criteria are to be met in such cases: (1) the organization must serve a specified segment of the community that is the primary beneficiary of its activities; (2) the organization associates must possess all of the indicia of membership in an organization; and (3) the organization’s fortunes must be closely tied to those of its constituency. Fund Democracy, LLC v. SEC. 131

The Hunt criteria were reaffirmed in UAW v. Brock,132 and were applied in Truckers United For Safety v. Mead.133

3. Federal Courts Do Not Adjudicate Generalized Public Grievances

All constitutional provisions are not necessarily enforceable by any citizen simply because citizens are the ultimate beneficiaries. The Court has described this principle as one ordinarily precluding federal courts from recognizing standing for plaintiffs asserting only “generalized grievances,” and has identified it as a prudential limitation on standing.134

The Court explained: “Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where harm is concrete, though widely shared, the Court has found ‘injury in fact.’ 135 In Akins it gave as examples of concrete, but widely shared, injuries those suffered by the victims of a mass tort and those suffered by voters because of a jurisdiction-wide illegal voting practice. It held that the federal statute at issue there created a right of the public to receive information about “political committees.”136

4. APA § 702 Contains a Prudential Limitation on Standing

When it decided Association of Data Processing Service Organizations, Inc. v. Camp,137 the Court restated the basic standards for an Article III case or controversy, and reinterpreted the right of action language in §702 of the APA. The specific §702 language construed was “aggrieved by agency action within the meaning of a relevant statute.”

133 251 F.3d 183 (D.C.Cir.2001).
134 In Warth v. Seldin, 422 U.S. 490 (1975) the Court referred to the prudential limitations and said: "[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone does not warrant exercise of jurisdiction. In Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974), it said: '[W]e have only recently stated flatly: 'Abstract injury is not enough.' O'Shea v. Littleton, 414 U.S. 488 (1974).’" For other examples of non-justiciable grievances, see 418 U.S. 2931 n. 8. Similarly, a taxpayer was denied standing to bring an action seeking to have the Central Intelligence Agency Act declared unconstitutional on the ground that it violated the Accounting Clause of the Constitution. The Clause requires a regular statement and accounting of public funds. U.S. v. Richardson, 418 U.S. 166 (1974).
136 Id.
137 397 U.S. 150 (1970),
In *Data Processing* the phrase “arguably within the zone of interests” was used to determine whether the complainant had demonstrated that it possessed interests, but not necessarily any legally protected rights, “within the meaning of a relevant statute,” that the agency allegedly was affecting adversely. The “zone of interests” test was designed to prevent judicial inquiry into the merits of the case at the standing stage, and to restrict standing so that not all plaintiffs who had injury in fact necessarily would have standing.

Later cases began to describe the phrase “arguably within the zone of interests” as an additional, non-constitutional, prudential limitation on standing under the APA.\(^{138}\)

Apparently because of the Court’s broad statement of the question of standing, and its reference to constitutional guarantees in question in *Data Processing*, the “zone of interests” formulation has been applied in suits not involving APA review of federal administrative agency actions. *See Bennett v. Spear.*\(^{139}\) In such cases, the Court apparently uses the phrase to aid its determination of whether a citizen or taxpayer complainant has interests, distinct from those of the general public, which are immediately and directly threatened. It also is used to evaluate whether the complainant is, in fact, properly asserting the rights of third parties. That is, if the complainant itself is not within the “zone” established by a statute, it is merely asserting the rights of others and will not have standing under APA § 702.

5. A Right of Action Confirmed by Congress May Bar Application of the Prudential Limitations

As discussed earlier, Congress may intervene and, by conferring standing, limit or preclude federal courts from applying the prudential limitations. In *Association of Data Processing Service Organizations, Inc. v. Camp,*\(^ {140}\) the Court said: “Congress can, of course, resolve the question [the prudential rule of self-restraint] one way or another, save as the requisites of Article III dictate otherwise.”\(^ {141}\)

“Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules....” And later in the opinion: “... this rule of judicial self-governance is subject to exceptions, the most prominent of which is that Congress may remove it by statute. *Warth v. Seldin.*”\(^ {142}\)

In *Gladstone, Realtors v. Village of Bellwood,*\(^ {143}\) the Court stated: “Congress may by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by the prudential standing rules.... In no event, however, may Congress abrogate the Art. III minima.... “\(^ {144}\)

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140. 520 U.S. 154, 163 (1997).


144. 441 U.S. at 100.
The Court’s latest expressions on the power of Congress confirm these principles. In a 1997 case, where Congress authorized any member of Congress or any individual adversely affected by the Line Item Veto Act to challenge its constitutionality, the Court said: “It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing ... We acknowledge, though, that Congress’ decision to grant a particular plaintiff the right to challenge an act’s constitutionality ... eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit.”

In Federal Election Commission v. Akins, and citing Raines v. Byrd, the Court evaluated statutory language which gave a right of action to any party aggrieved by an order of the Federal Election Commission dismissing a complaint filed by that party and said: “Consequently, [plaintiffs] satisfy ‘prudential’ standing requirements.”

E. The Jurisdictional basis of the standing claim

A complainant can establish federal court standing on either a “constitutional” or “statutory” standing basis. Lujan and Lucas illustrate both.

Lujan illustrates a failed effort to establish standing pursuant to a citizen-suit provision in a federal statute. Although the Lujan plaintiffs failed, lower federal courts are more receptive to efforts to establish standing pursuant to such statutory language because of the authority of Congress over the lower federal courts.

The failed effort in Lujan occurred despite the fact that the lawsuit was based on the statutory language indicating any person had a right to review. The primary reason was that although Congress may by statute confer standing to obtain judicial review, it may do so only in situations where there is an otherwise justiciable case or controversy. Case law clearly declares that Congress cannot abrogate the constitutional requirements for standing, nor can it create a justiciable controversy. Public interest organizations may make use of such right of review provisions to bring public interest actions based on injury to their members, but at least one plaintiff must demonstrate injury in fact or the action will fail as it did in Lujan.

On the other hand, Lucas illustrates a successful straightforward private lawsuit based solely on the core requirements of Article III. Substantively, it was based on the constitutional right to be justly compensated for a “taking” of private property for public purposes. Hence,

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147 Id. Most of the federal statutes that the Court has construed as relaxing or eliminating a prudential limitation have concerned the prudential limitations that preclude litigation of generalized grievances or interests outside the "zone of interests." For example, the Court in Akins construed the statutory review provision in the Federal Election Campaign Act of 1971 to authorize judicial review based on an informational interest that was widely shared. The Court in Bennett construed the citizen suit provision of the ESA as, in effect, eliminating the "zone of interest" test. In one case, however, the Court construed a federal statutory review provision as altering the Hunt test for associational standing. Nonetheless, the Court held that the "individual participation" criterion of the Hunt test was prudential, not constitutional, and that Congress could therefore alter it. United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996).
Lucas established “constitutional” standing. Of course, the case originated in the state courts, but the Supreme Court disagreement on the standing issue was based on constitutional standing and nothing more.

A third type of standing—also statutory—is based on the federal Administrative Procedure Act (APA), which applies to virtually all federal agencies. It is explained in Section III (F) (3), infra.

The following section contains a comprehensive review of the jurisdictional basis of standing variable.

F. The Jurisdictional Bases of Standing Claims—A Comprehensive Review

Cases in which there is no statute supporting standing are termed “constitutional standing” for the plaintiffs rely on the minimum Article III core requirements as its basis. They may assert interests of various origins, including interests protected by the Constitution, the common law, or a statute or regulation. Commonly, constitutional standing cases are brought in federal court based on federal question subject-matter jurisdiction, pursuant to 28 U.S.C. §1331. Constitutional standing cases are not based on a statutory provision authorizing judicial review.

Cases in which plaintiffs plead a statutory provision for judicial review are termed “statutory standing” cases. The Court relied on statutory provisions (APA § 702) in abandoning the “legal interest” test of constitutional standing in favor of the more liberal “injury in fact” test. Such statutory provisions are found in the agency organic statute(s) or a substantive statute under which the agency is acting or the APA. Statutory standing cases are based on the Article III core requirements and on a legislative provision granting a right of judicial review.

The clearest expression of the distinction between constitutional standing and statutory standing is stated in Sierra Club v. Morton. 148

In Federal Election Commission v. Akins 149, the Court upheld standing, and distinguished prior case law denying standing on similar facts, in light of “a statute which ...seeks to protect individuals such as respondents [plaintiffs below] from the kind of harm they say they have suffered.” 150

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148. 405 U.S. 727, 731-32 (1972). There the Court said: “Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of repetition. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.”


150. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000). The Court relied on the illegality of defendant's pollution discharges under a statutorily authorized permit in assessing the reasonableness of the fear that led plaintiffs to avoid recreational use of river affected by discharges. Id. at 184. The Court also held that, in assessing whether civil penalties would deter future discharges and hence redress plaintiffs' injury, "congressional determination warrants judicial attention and respect." Id. at 185.
Thus, an important component of standing analysis is whether the plaintiff asserts only Art. III core requirements or whether it also relies on statutory support for standing. In general, it is more difficult to establish constitutional standing than it is to establish statutory standing for the potentially broad application to everyone permits an alleged violation to be perceived as a general grievance and not a personal injury.

1. Constitutional Standing based on the Article III Core requirements

The core standing requirements of Article III are the constitutionally required “triad,” consisting of (1) injury in fact; (2) traceable to the defendant; and (3) redressable by the judicial relief sought. Accordingly, without statutory support, constitutional standing can be difficult to establish.

2. Standing Based on the Core Requirements of Article III and Statutory Review Provisions

In many cases, standing is easier to establish if the complainant clearly indicates that the case is brought, not only on the basis of the Article III core requirements, but also on the basis of supportive statutory language that indicates it is a proper plaintiff.

Two qualifications are important, however. First, although a statute may support standing, it cannot eliminate the constitutional standing requirements of injury in fact, traceability, and redressability. The Court made this clear in a famous 1911 decision. Second, statutes supporting standing must be distinguished from statutes granting subject-matter jurisdiction to the federal courts. As detailed below, the APA supports standing for plaintiffs who could not satisfy the “legal interest” test, but the APA is not a grant of subject-matter jurisdiction to the federal courts.

● Statutory Public Interest Actions

Initially, Congress exercised its power to confer standing through language inserted in the organic statutes of government agencies. For example, in the Communications Act of 1934, Congress expressly gave the right of court appeal to “any ... person aggrieved or whose interests are adversely affected” by Federal Communications Commission action on license applications. The Supreme Court construed this language in 1940 and 1942.

In FCC v. Sanders Bros. Radio Station, a newspaper company filed an application with the FCC for a license to operate a radio station in Dubuque, Iowa. For several years, another company, Sanders Brothers, had held a license and had operated a radio station directly across...
the Mississippi River from Dubuque, Iowa-in East Dubuque, Illinois. Sanders Brothers objected to the Commission’s granting the second license in the same area on grounds of economic injury. The Court held that Sanders Brothers did not acquire a property right under the Act, and had no statutory right to be protected from competition. However, the Court said:

“It does not follow that, because the licensee of a station cannot resist the grant of a licensee to another, on the ground that the resulting competition may work economic injury to him, he has no standing to appeal [to a court] from an order of the Commission granting the application.”155

In *Scripps-Howard Radio, Inc. v. FCC*, the Court applied the same doctrine of standing. A licensee sought judicial review of the Commission’s summary action granting a permit allowing another licensee to change its frequency and increase its power, thereby causing the complainant economic injury. “But these private litigants have standing only as representatives of the public interests.”157

*Sanders Brothers* and *Scripps-Howard* are important because the Court granted standing to plaintiffs who could not meet the “legal interest” test of standing established in the Court’s precedents and followed at that time. Nonetheless, the actual threat of economic injury gave them standing. To this extent, Congress had power to confer standing on persons who did not meet the “legal interest” test that courts had traditionally applied.

The Bituminous Coal Act of 1937 contained a judicial review provision similar to that of the Communications Act. It authorized “any person aggrieved by an order issued by the [Coal] Commission in a proceeding to which such person is a party” to seek judicial review of the order. Industrial consumers of coal complained about action of the Coal Commission increasing the minimum price for coal in their market. Without the statutory language, they would not have had standing to bring a federal court action, for they had suffered no injury to a private legally protected interest at common law, nor to a private legally protected interest created by statute.158

In the Communications Act, the language was very generous. In the Coal Commission statute, to acquire standing, the plaintiff also was required to have been a party in the administrative proceeding leading to the Commission’s order. In all three cases, the complainants had standing only to represent the public interest. Their actual or threatened individual economic

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155 309 U.S. at 476. The Court explained that Sanders Brothers was a "person aggrieved or whose interest are adversely affected" by the FCC's decision and was thus within the express language of the provision in the Communications Act authorizing judicial review. To account for Congress's inclusion of such a provision, the Court said that Congress might have thought that one likely to be financially injured by the issuance of a license would be the only person sufficiently interested to raise questions of errors of law by the Commission. The Court then stated, "It is within the power of Congress to confer such standing...." *Id.* at 476.

156 316 U.S 4 (1942).

157 *F.C.C. v. Sanders*, supra, 309 U.S. at 477.”

158. The Coal Act was construed in a famous lower court decision, *Associated Industries of New York State, Inc. v. Ickes*, 134 F.2d 694 (2d Cir.1943), vacated as moot, 320 U.S. 707 (1943). There the court attempted to explain *Sanders Brothers* and *Scripps-Howard* and to reconcile them with the then existing "legally protected interest”standing doctrine. (The Article III minimum injury requirement was not reduced to "injury in fact" until 1970). The Court said that since the Congress may authorize the Attorney General to bring an action to protect the public interest, it may also designate "a person aggrieved" to do so. "Such persons, so authorized, are, so to speak, private Attorney Generals." 134 F.2d at 704.
injury empowered them to complain that the agency action violated legal requirements intended to further the public interest. In this sense, their private economic interest, alleged to have been harmed, was the basis for a public interest action.

The Supreme Court restated the doctrine established by *Sanders Brothers* and *Scripps-Howard* in *Sierra Club v. Morton*:\(^{159}\):

“Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate. It was in the latter sense that the ‘standing’ of the appellant in *Scripps-Howard* existed only as a ‘representative of the public interest.’ It is in a similar sense that we have used the phrase ‘private attorney general’ to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action.”\(^{160}\)

- **Statutory Private Interest Actions**

In *Sanders Brothers* and *Scripps-Howard*, the Court dealt with provisions in agency statutes authorizing judicial review, in the public interest, by plaintiffs with preexisting, private economic interests. Some later cases involve statutory provisions that either create or recognize private, non-economic interests that are widely shared and that, unlike economic interests, are not so obviously personal to the plaintiff. These later cases might be considered statutory “private interest” actions, as distinguished from statutory “public interest” actions. The fact that an interest is widely shared does not disqualify it from serving as the basis of a statutory private interest action.

The non-economic interests recognized as personal although widely shared, that are described in *Sierra Club*, supra,\(^{161}\) may also be asserted as the basis for private interest actions. They include: interest in health affected by agency refusal to suspend registration of pesticides containing DDT; interest of television viewers in programming of local station licensed by agency; interests in athletics, recreation, and orderly community planning affected by agency licensing of a hydroelectric project; interest of consumers of oleomargarine in fair labeling of product regulated by agency; health and safety of persons residing near the site of a proposed atomic blast.\(^{162}\)

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\(^{159}\) 405 U.S. 727 (1972):

\(^{160}\) 405 U.S. at 737-38. As restated in *Sierra Club* in 1972, it is the specific, concrete, economic “injury in fact” meeting Article III minimum requirements, that permits such statutory public interest actions to be brought. Furthermore, in *Sierra Club*, the Court stated that injuries to non-economic interests also are sufficient to bring a complainant within the meaning of such statutory language.

\(^{161}\) 405 U.S. at 738, n.13.

In the Fair Housing Act of 1968, Congress granted standing to sue to persons injured by racially discriminatory housing practices to protect themselves from specific, concrete injury to their private interests in living in racially integrated neighborhoods. 163

The Endangered Species Act of 1973 (ESA) contains a “citizen suit” provision which provides that “any person may commence a civil suit on his own behalf” to challenge any governmental agency which is alleged to be in violation of any provision of the Act. 164

The Federal Election Campaign Act of 1971 specifically provides that any person who believes a violation of its provisions has occurred may file a complaint with the Federal Election Commission. Any party aggrieved by an order of the Commission dismissing its complaint may bring an action seeking review of the dismissal. In Federal Election Commission v. Akins, 165 a group of voters brought such an action. They believed the Commission had violated the Act by failing to determine that a particular organization was subject to its requirements. As a result they could not obtain from the organization information that they believed the Act required to be made public.

The alleged injury being directly related to voting, “the most basic of political rights,” it was sufficiently concrete and specific to confirm the power of Congress to authorize its vindication in the federal courts. 166

● Summary of Private and Public Interest Standing Supported by Statutes

Courts will perceive an action as brought primarily to vindicate either private or public interests. It is helpful to establish standing on the basis of language in the statute that authorizes it, particularly if it could be considered to be a public interest action. A statute may support a public interest action on the basis of “person aggrieved” language. Upon showing personal injury in fact, the “person aggrieved” establishes standing, if only as a representative of the public interest on the basis of Sanders Brothers, Scripps-Howard, and Sierra Club.

Similarly, a public interest action may be based on a widely shared interest. Plaintiffs, by showing personal injury in fact, could establish standing which would become the vehicle for vindicating public interests based on Sierra Club, Akins and Bennett.

163 Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). There can be a public interest in creating and maintaining racially integrated residential areas in which people can live. A person can also have a personal, individual interest in being able to live in such a area. The existence of the public interest does not negate the existence of the private, personal interest. The Civil Rights Act of 1968 recognized that interest and gave it legal protection to the extent of prohibiting discriminatory housing policies.

164 Plaintiffs brought such an action in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), but failed to establish the required personal injury in fact. Five years later, however, plaintiffs claiming injury to their private interests successfully established standing under the ESA’s citizen suit provision. In Bennett v. Spear, 520 U.S. 154 (1997), two irrigation districts and ranchers within those districts complained that planned agency action to protect two species of endangered fish would concretely injure them by reducing the quantity of available irrigation water. They alleged the action was unnecessary to protect the fish, and also that it was in violation of ESA decision criteria applicable to such protective actions. A unanimous Court held they had established standing.


166 The Court said, the Act "does seek to protect individuals such as [plaintiffs] from the kind of harm they say they have suffered, i.e., failing to receive particular information about campaign-related activities."
Based on Sierra Club, Trafficante, Gladstone, Akins, and Bennett, statutory language creating or recognizing and protecting a private interest may support a private interest action even though the interest is widely shared with others.

These statutory review provisions operate in several somewhat different ways. Sometimes, as in Sanders Brothers, Scripps-Howard and Bennett, the provisions confer standing on plaintiffs with obvious, preexisting, private, economic interests. Other times, as in Trafficante and Gladstone (involving the Fair Housing Act), the provision involves a private, non-economic (associational) interest that is less obviously cognizable as injury in fact. The statute does not necessarily create the private interest, but it evidences congressional judgment that the harm to that interest is judicially cognizable.

Therefore, Congress has authority to decide the standing question by conferring it, either narrowly or broadly, publicly or privately, in otherwise justiciable cases and controversies within the Article III core requirements. Could it also enact legislation that confers a sort of omnibus or generic standing according to a prescribed formulation? That is what it did in the right of review provision of § 702 of the Administrative Procedure Act.\(^\text{167}\)

3. Standing Based on the Article III Core requirements and the Administrative Procedure Act

Congress enacted the federal Administrative Procedure Act in 1946, 3 to 4 years after Sanders Brothers, Scripps-Howard, Associated Industries of New York State, and other decisions authorizing judicial review of agency actions by “aggrieved” persons. The APA provides for judicial review of agency action as stated in § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof...  

- Interpretation of APA § 10(a) (now § 702) in 1946

As originally understood, the right of review language was read to incorporate the existing requirement of injury to a legally protected interest or right. The Attorney General had advised the Senate Committee on the Judiciary that he understood this section to be a restatement of existing law. AGM 96.\(^\text{168}\) The Supreme Court also reached the same conclusion in early cases.\(^\text{169}\) Even so, the existing non-APA law would have made judicial review available to someone who could not show injury to a legally protected interest or right, if the suit were brought under a statute that expressly authorized review by someone who was “aggrieved” (or “adversely affected”) by agency action.\(^\text{170}\)

- Interpretation of APA § 702 in 1970

\(^{167}\) 5 U.S.C. § 702.  
\(^{168}\) The Attorney General’s Manual on the Administrative Procedure Act (AGM) 96.  
In 1970, the Court changed course and held, more broadly, that persons had a right to judicial review under § 702, if they alleged that the challenged agency action (1) caused them “injury in fact”; and (2) that the alleged injury was to an interest “arguably within the zone of interests to be protected or regulated” by the statute or constitutional guarantee the agency was said to have violated.\(^{171}\)

The “injury in fact” requirement is derived from the phrase “adversely affected or aggrieved.” Establishing injury in fact meets the constitutional core injury requirement for standing imposed by Article III, under the Court’s current case law.

The “arguably within the zone of interests” requirement stems from the phrase “within the meaning of a relevant statute.” This is a statutory requirement imposed by Congress in § 702, and not a constitutional requirement.\(^{172}\)

* Interpretation of the “Zone of Interests” Requirement of § 702

The Supreme Court has often addressed the nonconstitutional “zone of interest” requirement for standing under APA § 702. The modern holdings began with a trio of cases decided in 1970. Since then, the Court’s decisions have addressed (not entirely consistently) two aspects of the zone of interest test. One question is: What does the term “relevant statute” mean? Does it refer only to the specific statutory provision that the defendant has assertedly violated or is the term broader? A second question is: What must a plaintiff show to establish that it is “within” the relevant statute? Must the plaintiff show that Congress specifically intended to protect persons or companies in the plaintiff’s position? Or is it enough to show that, while Congress may not have specifically intended to protect persons or companies like the plaintiff, Congress reasonably could have foreseen that they would have an interest in enforcing the relevant statute?

* 1970 Trilogy of “Zone of Interests” Cases

The plaintiffs in the first of the 1970 cases were data processing service companies who challenged a ruling by the Comptroller of the Currency\(^{173}\) that permitted national banks to make data processing services available to other banks and to bank customers incidental to their banking services.

In *Data Processing*, the Court said that the traditional “legal interest” test of standing goes to the merits of a case, while APA standing concerns the interests sought to be protected by a relevant statute. The statutory provision said to have been violated by the Comptroller provided:

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\(^{171}\) *Sierra Club v. Morton*, 405 U.S. at 732, referring to *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); and *Barlow v. Collins*, 397 U.S. 159 (1970). This is the current understanding of § 702. Thus, plaintiffs must meet two, separate standing requirements to establish a cause of action under § 702.


“No bank service corporation may engage in any activity other than the performance of bank services for banks.”  

The Court refused to speculate on the legislative purpose of the language of the provision restricting the activities of bank service corporations, for that would implicate the merits. Then it stated simply that the provision “arguably brings a competitor within the zone of interests protected by it.”  

In a companion case, tenant farmers challenged a Department of Agriculture regulation. It concerned a program providing money to tenant farmers for the costs of planting their crops. The tenant farmers complained that the regulation permitted their landlords to demand that they assign to the landlords, in advance, any federal benefits they were to receive under the program. Hence, the regulation made them captive consumers with no funds to purchase their farm needs elsewhere.

The Upland Cotton Program legislation and the Food and Agriculture Act of 1965 stated respectively that: “the Secretary shall provide adequate safeguards to protect the interests of tenants;” and “the Secretary shall, as far as practicable, protect the interests of tenants.” In Barlow v. Collins, The Court concluded that the tenant farmers “are clearly within the zone of interests protected by the Act.”

In the third 1970 case, the Court applied Data Processing and held that travel agents had standing to challenge a ruling by the Comptroller of the Currency permitting national banks to provide compensated travel services to their customers. The same section of the Bank Service Corporation Act applied in Data Processing was involved. The Court pointed out that in Data Processing it had not relied on any legislative purpose to protect only data processors from competition, and had indicated other competitors also were within the zone of interests of the legislative provision.

- Post 1970 “Zone of Interests” Cases

In a 1976 case, the Court said the zone of interests test relates to the statutory framework within which the claim under § 702 arises

Beyond that statement, between 1970 and 1987, the Court provided no clarifying guidance to the lower courts on the specifics of the zone of interests test. Finally, in 1987 it attempted to explain the test in Clarke v. Securities Industry Association. In that case, the Court gave a broad reading to the concept of what statute(s) is “relevant” for purposes of applying the “zone of interest” test. However, since then the Court’s reading of “relevant statute” has fluctuated.

- The Broad Reading of “relevant statute”

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The plaintiff in *Clarke* was a trade association representing securities brokers, underwriters, and investment bankers. It brought an action alleging the Comptroller of the Currency had violated the law by approving the application of two national banks to offer discount brokerage services to the public.

The Association contended that offering these services would violate the National Bank Act’s branching provisions. The Comptroller argued that the Association lacked standing because its members were not within the zone of interests protected by the National Bank Act. That is, Congress passed the Act not to protect securities dealers, but to establish competitive equality between state and national banks.

Nevertheless, the Court concluded unanimously that Congress had arguably legislated against the competition that the Association sought to challenge. Accordingly, it held that the National Bank Act created a statutory interest in the complainant sufficient to support a claim of APA standing and said:

“... In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.” 181

The majority also added: “As *Data Processing* demonstrates, we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress’ overall purposes in the National Bank Act.” 182

- The Narrow Reading of “relevant statute”

In *Clarke*, the “relevant statute” was defined by the majority to include a section of the National Bank Act in addition to the section under which the complainant sued on the merits. (E.g., § 81 was considered along with § 36.) The Court pulled back from the *Clarke* broad reading of “relevant statute,” in *Lujan v. National Wildlife Federation*. 183 There the Court said the relevant statute is “the statutory provision whose violation forms the legal basis for [the] complaint.” *Id.*

In *Air Courier Conference of America v. American Postal Workers Union*, 184 the Court explained the meaning of “relevant statute” as limited by *National Wildlife Federation*. In *Air Courier*, complainant unions attempted to establish their standing to sue on the basis of the labor-management provisions of the Postal Reorganization Act of 1970 (PRA). 185 However, they based their claim on the merits on the Private Express Statutes. 186 The Court explained that

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182. 479 U.S. at 401
In Clarke, there was an integral relationship between the two statutory provisions, whereas in Air Courier the only relationship between the different statutes was that they dealt with the Postal Service. Accordingly, the labor-management provisions of PRA (under which the unions had interests) could not serve as the “relevant statute” to support standing to bring an action on the merits under the Private Express Statutes.\(^\text{187}\)

In 1997, the Court confirmed its Air Courier approach in Bennett v. Spear.\(^\text{188}\) The case involved the Endangered Species Act. The Fish and Wildlife Service, in an attempt to preserve a particular species of fish, issued a Biological Opinion that had the effect of requiring the maintenance of minimum water levels in certain reservoirs.\(^\text{189}\)

The Court said that in applying the zone of interests test “we look not to the terms of the ESA’s citizen-suit provision, but to the substantive provisions of the ESA, the alleged violations of which serve as the gravamen of the complaint,” as it had stated in National Wildlife Federation, and Air Courier.\(^\text{190}\) It concluded this provision was intended, in part, to prevent erroneous jeopardy determinations. Accordingly, it held that Plaintiffs’ claim they were victims of such a mistake was within the zone of interests that the “best data” provision protected.\(^\text{191}\)

- Return to the Broad Reading of “relevant statute”

In 1998, the Court appeared to come full circle and return to the broader, less demanding “zone of interests” test in National Credit Union Administration v. First National Bank and Trust Co., (NCUA).\(^\text{192}\) NCUA concerned Section 109 of the Federal Credit Union Act, which provided as follows:

“Federal credit union membership shall be limited to groups having a common bond of occupation or association or to groups within a well-defined neighborhood, community, or rural district ...”\(^\text{193}\)

The Court held that because federal credit unions may, generally, offer banking services only to members, § 109 also restricted the markets that every federal credit union could serve.

\(^{187}\)498 U.S. at 529.
\(^{188}\)520 U.S. 154 (1997).
\(^{189}\)Plaintiffs, i.e., ranchers and irrigation districts, claimed a “competing interest in the water.” They alleged injury to their commercial interests in using the reservoirs for irrigation water. Plaintiffs contended the available scientific and commercial data showed that such use of the water would not have a detrimental effect on the fish. Furthermore, requiring minimum lake levels was said not to be necessary. Finally, they charged that by issuing a Biological Opinion containing unsubstantiated findings to the contrary, the Fish and Wildlife Service acted arbitrarily and in violation of a statutory provision requiring it to "use the best scientific and commercial data available" in administering the Act.

\(^{190}\)520 U.S. at 175.
\(^{191}\)520 U.S. at 176-77.
\(^{192}\)522 U.S. 479 (1998).
\(^{193}\)The Administration interpreted this provision to permit federal credit unions to be composed of multiple, unrelated employer groups, each having its own distinct common bond of occupation. Five commercial banks, and the American Bankers Association brought an action under § 702 of the APA. They claimed that the Administration's decision was contrary to law because § 109 unambiguously required that the same bond of common occupation unite each member of an occupationally defined federal credit union.
The link between § 109 and its limitation on the markets that could be served was said to be unmistakable. Thus, one of the interests “‘arguably ... to be protected’ by § 109 is an interest in limiting the markets that federal credit unions can serve.”194 The Court held the plaintiffs had standing to bring the action.

Distinguishing the Air Courier case, the Court in NCUA said four prior cases interpreting § 702 (including Data Processing, Arnold Tours, and Clarke):

“have consistently held that for a plaintiff’s interests to be arguably within the ‘zone of interests’ to be protected by a statute, there does not have to be an ‘indication of congressional purpose to benefit the would-be plaintiff’... Hence in applying the ‘zone of interests’ test we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests ‘arguably ... to be protected’ by the statutory provision at issue; we then inquire whether the plaintiff’s interests affected by the agency action in question are among them.”195

American Federation of Government Employees v. Cohen, 196 concerned a challenge by federal arsenal employees to the Department of the Army’s award of two military defense contracts to private contractors. The plaintiffs contended they were injured in fact by a Reduction in Force which had occurred because there was not enough work to operate the arsenal at its normal capacity.

Based on NCUA, the court determined that the employees were within the zone of interests protected by the Arsenal Act.197 It required that army supplies shall be made in arsenals or factories owned by the United States if economical.

4. Summary of Distinctions between Constitutional Standing and Statutory Standing

In summary, the plaintiff in a federal court case may assert standing by two different scenarios. In the “constitutional standing,” scenario the plaintiff relies solely on the core requirements of Article III. In the other, the plaintiff relies on a statute supporting standing. In the “statutory standing” scenario the statute may be (1) a special statutory provision or it may be (2) § 702 of the APA. In actions under § 702 of the APA, the plaintiff must first allege violations of some other “relevant statute” applicable to the government action being challenged. Second, the plaintiff must allege that it is within the “zone of interests” protected by the “relevant statute.”

There is a difference between standing based on a special statutory review provision and standing based on APA § 702. A special statutory review provision may broadly authorize review by any person “aggrieved” or “adversely affected.” By comparison, APA § 702 requires the plaintiff to allege it is injured in fact, and satisfy the relevant statute “zone of interests” test. Thus, when the plaintiff relies on a statute to establish standing, careful analysis of the terms of that specific statutory provision and case law interpreting it is essential.

194 522 U.S. at 479, 493.
195 522 U.S. at 479, 492.
196 171 F.3d 460 (7th Cir. 1999).
Except where alleging a direct interference by the defendant with the plaintiff’s personal interests, such as those interests protected by the Bill of Rights or the common law, it is most difficult to demonstrate “constitutional standing” based solely on Article III. Usually this is because the case law indicates that such indirect interference with personal interests may be perceived to be a “generalized grievance” not involving a “particular concrete injury,” or a “direct injury,” or the complainant may be said to have no “personal stake in the outcome.” Furthermore, in the constitutional standing cases, Congress will not have intervened to guide the court.

G. Private and Public Actions

Where specific private interests are directly at stake the action is comfortably within the jurisdictional authority of the federal courts. Standing to sue to protect those rights generally is not in question. *Lucas* was a private action case, but it originated in a state court and later was reviewed by the Supreme Court. The standing question before the Court was whether Lucas had a ripe standing claim for it to adjudicate in that situation. Holding that he did, the Court returned the case to the state courts to allow him to adjudicate his temporary takings claim.

Having shown appropriate personal injury, the plaintiff may proceed to litigate public interests on the basis of a statutory provision confirming a right of review. Plaintiffs also may litigate private rights under such statutory language. *Lujan* was really about public rights and the authority of the Executive branch, but the prerequisite private injury was lacking.

This theoretical distinction between private and public actions is difficult to apply, for plaintiffs commonly have both privately held interests, as well as generally shared public interests. Courts favor private interest actions and disfavor public interest actions. Because of the dual interests of plaintiffs, courts classify actions on the basis of whether private or public interests predominate in the case. That is, which set of interests forms the primary thrust of the action?

If the court perceives the action as public, the plaintiff will have more difficulty establishing standing, and must carefully construct all the essential elements of standing and justiciability, even when the action is based on a statutory conferral of right of review. The essential specific individual concrete injury, traceability, and redressability are critical components because they are heavily value-laden and may be viewed differently by reasonable judges as either private or public in nature. Thus, the outcome is predominantly “in the eye of the beholder.” Nevertheless, asserting a statutory basis for standing helps the plaintiff, for it is used to impress on the court that Congress has intervened and has conferred standing in that situation. The statute operates to limit the court’s discretion on the standing issue.198

Statutory standing under the APA, however, contains a prudential component that allows the court more discretion to decide the standing issue.

The following section contains a comprehensive review of the public--private action standing variable.

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H. The Private or Public Nature of the Action- a Comprehensive Review

It has been said that federal courts may adjudicate “private” actions involving private rights, but they generally may not adjudicate “public” actions involving purely public rights. Justice Harlan discussed the distinction between private actions and public actions, and the “important hazards” posed by the latter to the federal judiciary.\(^{199}\)

The theoretical distinction between “private” and “public” actions, however, is easier to state than to apply. The reason is that the entities which bring federal court actions often have both “private” and “public” interests. That is particularly true of actions involving administrative law cases, in which there is usually a governmental defendant.

Visualize a federal court complainant as one entity or a group of entities—but carrying two hats. One hat represents the direct, unique, concrete injury personal to the complainant individual, or member of the group and which must be present in all cases. The other hat represents injury to an undifferentiated, generalized interest, which is shared in common with all members of the entity or group and the public. In view of the complainant’s dual set of interests, it can often be misleading simply to categorize a federal lawsuit as being either a “private” or a “public” action. It depends on which hat the plaintiff is wearing, but that is not always clear.

The better approach, in light of the case law, is to analyze the case to determine whether its primary thrust, its functional purpose, is to seek vindication of the complainant’s public interests or its private interests. The goal is to decide which of the two hats is being worn by the complainant. Hence, the exercise assists in deciding which set of interests-public or private-predominates, i.e., functionally is at stake in the case. Formally, the case will always appear to be a “private” action, because of the Article III personal injury core requirements, which must be alleged.

1. Private Actions: The Primary Purpose Is To Protect Private Interests

Where it is obvious from the nature of the injury alleged that the complainant is suing primarily to protect its own private interests, there is no private-public action issue. The action will be considered to be “private,” and it does not matter that related “public” interests also are collaterally vindicated if the complainant is successful. In the following examples, standing was established. In keeping with the earlier discussion, the illustrations are organized according to whether the plaintiffs based their assertion of standing (1) solely on Article III, (2) on Article III and a special statutory review provision; or (3) on Article III and § 702 of the APA.

- Examples of Constitutional Standing for Private Actions

  - Private utility company had standing as a competitor to challenge TVA electricity sales alleged to violate statutory geographical limits on TVA’s area of service.\(^{200}\)

  - Political organization had standing to attack action of Attorney General listing it as a communist organization in violation of its individual First Amendment right of association and its common law right to be free from defamation.\(^{201}\)


Environmental organization, labor union, and persons living near nuclear power plant construction had standing to protect their personal rights. They attacked the validity of a federal statute limiting liability of operators of nuclear power plants for nuclear accidents. Plaintiffs contended it violated the Fifth Amendment by adversely affecting their property rights and potentially “taking” their property without assurance of just compensation.\textsuperscript{202}

- Examples of Statutory Standing for Private Actions

- A black person; a non-profit corporation whose goal was equal opportunity in housing in metropolitan Richmond, Virginia; and two of the organization’s employees had standing, based on their individual rights, to bring a statutory enforcement action charging an apartment complex owner with “racial steering” in violation of the Fair Housing Act of 1968.\textsuperscript{203}

- Area residents and a village had standing to bring a statutory enforcement action charging real estate brokers with violating their personal rights by “steering” prospective homebuyers to different residential areas according to race, in violation of the Fair Housing Act and Civil Rights Act of 1968.\textsuperscript{204}

- Voters had standing, based on individual rights created by the Federal Election Campaign Act of 1971, and as parties “aggrieved” within the meaning of the Act, to bring statutory action to review an agency order allegedly causing them injury in fact by making them unable to obtain information that the statute required a political committee to make public.\textsuperscript{205}

- Examples of APA Standing for Private Actions

- Data processing companies had APA standing as competitors to attack the validity of Comptroller of the Currency’s ruling permitting national banks to sell data processing services for other banks and bank customers.\textsuperscript{206}

- A group of wildlife conservation groups had APA standing to bring a private action to protect their members’ individual rights to engage in whale watching and studying. They contended the failure of the Secretary of Commerce to certify to


\textsuperscript{206}. \textit{Association of Data Processing Service Organizations, Inc. v. Camp}, 397 U.S. 150 (1970). Based on statutory language limiting banks to performing bank services for other banks or conducting the business of banking. \textit{See Arnold Tours, Inc. v. Camp}, 400 U.S. 45 (1970). Based on statutory language limiting banks to performing bank services for other banks or conducting the business of banking
the President that Japan had violated the International Whaling Commission’s quotas for harvesting North Pacific sperm whales had violated federal statutes directing the Secretary to certify such violations.  

- American Bankers Association and five banks had APA standing as competitors, to assert that the National Credit Union Administration’s decision permitting credit unions to be composed of multiple, unrelated employer groups violated the Federal Credit Union Act. A provision of the Act required that the same common bond of occupation unite each member of an occupationally defined federal credit union. The plaintiffs alleged the statutory “common bond” provision limited the markets federal credit unions can serve.

2. Public Actions: The Primary Purpose is to Protect General Public Interests

A person, group, or some other entity may be determined to bring a legal action to rectify some perceived governmental wrongdoing or lack of action regarding some widely shared interest. The complainant will dutifully attempt to plead a direct, unique, particularized personal injury, that is traceable to the defendant, and that is redressable by the court. The threshold standing issue will turn on whether the court agrees that the complainant has alleged such unique personal injury and is suing to protect its personal rights. If it does agree the case will be considered to be a “private” action appropriately within its jurisdiction.

On the other hand, the more indirectly, the less distinctly, and the less concretely the complainant appears to be injured by the challenged agency action, the more generalized, and undifferentiated and widely shared the injury will appear to the court. It may find that although direct, concrete injury is alleged, it, nevertheless, is (1) not particularized by affecting the complainant in a personal and individual way, or (2) is not differentiated from similar injury suffered by all others with which the injured interest is shared. Hence, it is a generalized grievance that is not justiciable.

The court may be prepared to conclude that the injury, though pled otherwise, is too indirect, too indistinct, too widely shared to satisfy the minimum Article III criteria. Concurrently, the court also will have moved closer toward perceiving the complainant’s private interests to be only peripherally at stake and included only to comply with Article III core requirements. Thus, it may be on the verge of deciding the dispute is a generalized grievance that is not within its jurisdiction. Some examples follow. They suggest that the danger of dismissal is greatest when the complainants attempt to establish constitutional standing as citizens or taxpayers. Again, the illustrations and ensuing discussions take into account whether the plaintiffs based their assertion of standing (1) solely on Article III; (2) on Article III and a special statutory review provision; or (3) on Article III and the APA.

- Examples of Constitutional Standing to Represent the Public Interest

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• Association of present and former members of the Armed Forces Reserve did not have standing as citizens to argue that Members of Congress could not also be members of the Armed Forces Reserves because such dual membership violated the Ineligibility and Incompatibility Clauses of Article I, § 6, cl. 2. The plaintiffs’ claim of injury was undifferentiated from that of all citizens. The injury was, therefore, abstract rather than concrete.210

• Federal taxpayer did not have standing to challenge the validity of the Central Intelligence Agency Act, which permits the CIA to account for expenditures at the discretion of the Director. That discretion was alleged to violate the Accounting Clause of Article I, which requires regular accounts of receipts and expenditures of public money. However, complainants could not show they were in danger of suffering any concrete injury unique from injury shared with all other taxpayers.211

There are, however, some strategies that may be employed in these potentially “generalized grievance” circumstances. There may be language in a relevant statute which will serve to support standing. The statute operates to limit the court’s discretion when ruling on the standing question. This strategy succeeded in the cases that are summarized below. In all of them Congress had included language in the agency statutes stating that persons or parties “aggrieved” by agency action could sue, and in all of them the Supreme Court found standing. The concrete injury in fact alleged by the plaintiffs made them “aggrieved” within the meaning of the statute and established their standing. They could then argue the public interest in support of their claims that the agency involved had failed to comply with its statutory mandate.212

• Examples of Statutory Standing to Represent the Public Interest

• Having neither private rights nor protection from competition under the Federal Communications Act, a radio station licensee, nevertheless, had statutory standing as a competitor to sue to vindicate the public interest as a “person aggrieved or whose interests are adversely affected” by FCC action on a license application.213

• Industrial and commercial firms who were substantial consumers of coal had statutory standing to appeal as “person[s] aggrieved” but only as “private attorney generals” to represent the public interest, a Bituminous Coal Commission order increasing minimum prices for coal in their market area.214

• Non-profit conservationist organizations, although lacking economic injury resulting from the FPC’s action, nevertheless, because of their interests in the non-economic values at risk, had statutory standing as “part[ies] ... aggrieved by an order issued by the Commission” to obtain judicial review of its decision

214 Associated Industries of New York State v. Ickes, 134 F.2d 694 (2d Cir.1943), explaining and following Sanders Brothers and Scripps-Howard.
granting a license for a large hydroelectric project near the Hudson river in upstate New York.\footnote{Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir.1965), cert. denied, 384 U.S. 941 (1966).}

The earlier analysis of \textit{Lujan v. Defenders of Wildlife}\footnote{See Section III, supra.} discussed extensively Congress’s power to authorize actions vindicating the public interest. \textit{Bennett v. Spear},\footnote{520 U.S. 154 (1997).} as did \textit{Lujan}, also involved an action under the citizen suit provision of the Endangered Species Act (ESA).\footnote{16 U.S.C. § 1540(g).} In \textit{Bennett}, the Court found there was standing; in \textit{Lujan}, it did not. The Court’s decisions in the two cases give some guidance on the extent to which the rule against federal court adjudication of “generalized grievances” is constitutional and irreducible and to what extent the rule is prudential and hence subject to modification by Congress.

\textit{Bennett v. Spear}

Writing for a unanimous Court in \textit{Bennett v. Spear},\footnote{520 U.S. 154 (1997).} Justice Scalia upheld the plaintiffs’ standing and further explained the power of Congress. The case was not before the Court at the summary judgment stage. Rather, the district court had dismissed the complaint on motion. Accordingly, the Court did not require the plaintiffs to adduce “specific facts” to support their standing, and it rejected the government’s contention that they were required to do so.\footnote{520 U.S. at 167-168.}

The plaintiffs in \textit{Bennett} were two Oregon irrigation districts and two ranchers within those districts that received irrigation water from a federal water reclamation project operated by the federal Bureau of Reclamation. The defendants were the Fish and Wildlife Service (FWS) and the Secretary of the Interior, both of whom were responsible for administering the ESA as it applied to the project. Plaintiffs complained about a Biological Opinion issued by the defendants, which concluded that the project might jeopardize the continued existence of two endangered species of fish. The Opinion identified actions that the FWS believed would avoid jeopardy to the endangered fish. They included maintaining minimum water levels in two project reservoirs.

The Court began by characterizing the “any person” phrase in ESA’s citizen suit provision as “an authorization of remarkable breadth when compared with the language Congress ordinarily uses.” Then it recited the more restrictive “any person adversely affected” language included in several other environmental statutes’ citizen suit provisions. The Court observed: “Congress legislates against the background of our prudential standing doctrine.” One aspect of that doctrine is the “zone of interests” test. It concluded that ESA’s citizen suit provision, in light of its breadth, “negates the zone-of-interest test, (or, perhaps more accurately expands the zone of interests). The zone of interests test simply did not apply to the plaintiffs’ claims under the ESA citizen suit provision.\footnote{520 U.S. at 161-66.}

The Court further determined that one of the plaintiff’s claims fell outside the ESA citizen suit provision and therefore had to be brought under § 702 of the APA. The APA claim
was that the defendants violated ESA’s requirement that they “use the best scientific and commercial data available.” The Court identified this “best data” provision as the “relevant statute” for purposes of determining whether the plaintiffs met the APA ‘702’s zone of interests test. It concluded that the plaintiffs satisfied the test, because they were arguably within the zone of interests sought to be protected by the “best data” provision. One major purpose of that provision was said “to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” Thus, this particular ESA provision protected against uninformed over enforcement of the Act.

Together, Lujan and Bennett establish that Congress has the power to enact legislation broadly authorizing private actions to enforce a statute to protect both public and private interests, and thereby to eliminate prudential, but not constitutional standing limitations. In this respect, the decisions are consistent with precedent.

- Examples of APA Standing to Represent the Public Interest

Another strategy used to avoid “generalized grievance” dismissal is to establish APA standing. Use of APA standing will not likely be as successful as use of special statutory review provisions of the sort discussed above. This is clear from the two leading cases on APA standing, Association of Data Processing Service Organizations, Inc. v. Camp, 223 and Sierra Club v. Morton. 224

APA § 702 gives a right of review to a person who is “adversely affected or aggrieved by agency action within the meaning of a relevant statute. For present purposes, the important point is that, while special statutory review provisions have often been construed to dispense with the prudential limitations variable, APA § 702 consistently has been construed since Data Processing to incorporate it and the Court may impose a prudential limitation in the case.

In Sierra Club, the Court made clear that injury in fact can take the form of injury to non-economic interests. The Court went on: “But the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured” 225 Thus, APA § 702 cannot eliminate the constitutional requirement that the alleged injury in fact be personal to the plaintiff(s). 226

In summary, the case brought will be predominantly a private or a public action. The complainant’s dual interest scheme prohibits neat classifications, but courts determine the primary thrust of the case and perceive it accordingly. The mix of private and public interests at

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222 520 U.S. at 174-77.
225 405 U.S. at 734-35.
226 Virtually all of the cases recognizing "public action" standing, e.g., Scripps-Howard Radio, Inc. v. Federal Communications Comm'n, 225 316 U.S. 4 (1942), 226; Federal Communications Comm'n v. Sanders Radio Station, 309 U.S. 470 (1940); Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir.1965), cert. denied, 384 U.S. 941 (1966), are those in which it is supported by a statutory provision that confers standing to bring a "public action" within the principles of the Muskrat case. Recall that Muskrat barred Congress from unilaterally creating Article III cases and controversies, yet the Court also has recognized that where Article III minima otherwise are met, Congress may confer standing. The Supreme Court usually has awaited such a signal from the Congress, but there are exceptions, e.g., Flast v. Cohen, 392 U.S. 83 (1968).
stake may be expected to influence the court’s decision as to how the action will be characterized in the standing analysis.

I. The Stage of the Proceeding

In *Lujan*, the Court (Justice Scalia) stated the plaintiff’s burden of establishing the Article III core requirements. It added that the burden varied with the manner and degree of evidence required at the successive stages of the litigation.

“At the pleading stage, general factual allegations of injury traceable to the defendant’s conduct are sufficient. On a motion to dismiss the courts presume the general allegations include the necessary supporting facts and deny the motion. If, however, there is a summary judgment motion, the plaintiff’s response must set forth by affidavit or other evidence specific facts, FRCP 56(e) which will be taken to be true.”

In *Lucas*, 17 days later, the Court (Justice Scalia) made clear there is a distinct difference between establishing standing on the pleadings and establishing it on a motion for summary judgment. In its footnote 3, the Court said, in reference to *Lujan* that if the same challenge to a generalized allegation of injury in fact had been made at the pleading stage, it would have failed. But for the summary judgment motion the general allegations of Ms. Kelly and Ms. Skillbred would have been sufficient to establish standing on the pleadings. Thus, a motion for summary judgment “raises the bar” for standing significantly higher than is required on the pleadings.

Older Supreme Court cases also indicate that this distinction has been long recognized. Accordingly, the Court has called for summary judgment motions, requiring amendment of the pleadings, and motions for a more definite statement of claims to determine whether there is a “genuine issue as to any material fact,” FRCP 56(c) and whether the plaintiff “set forth specific facts showing that there is a genuine issue for trial,” FRCP 56(e). Such motions would facilitate elimination of vague and meaningless assertions of standing from federal court cases.

Although commonly cited indiscriminately on standing issues, *Lujan* should not be read as modifying the basic standing requirements. The summary judgment motion placed it in a different standing context, as Justice Scalia made clear by referring repeatedly to the summary judgment stage of the litigation. The sufficiency of “general factual allegations” remains the principle applied at the pleadings stage. If there is any doubt, Justice Scalia confirmed that distinction in the Court’s footnote 3, in *Lucas*. The high demands statements in *Lujan*, properly applied, are limited to standing issues at the summary judgment stage, and should not apply in “general factual allegations” cases.

The following section contains a comprehensive review of the Stage of the Proceeding standing variable.

J. The Stage of the Proceeding—a Comprehensive Review

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227 504 U.S. at 561-62.
As part of its standing analysis in *Lujan*, the Court restated the Article III core elements that must be established by the plaintiff[s]. More importantly, the Court said that this burden varied “with the manner and degree of evidence required at the successive stages of the litigation.” At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct are sufficient for standing purposes. Where there is a summary judgment motion, however, to establish standing the plaintiff’s response must “‘set forth’ by affidavit or other evidence ‘specific facts,’” Fed. Rules Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. Establishing standing at the summary judgment stage requires the complainant to present evidence of an injury in fact; the allegations in the complaint are not sufficient.

At the final stage of the litigation the controverted facts “must be ‘supported adequately by the evidence adduced at trial.’” Because the *Lujan* plaintiffs had not made the requisite demonstration of injury and redressability at the summary judgment stage they did not have standing.

*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* was a case reviewed under the APA, with NEPA as the relevant statute. The case has been said to have stretched the causation element of standing to its limits. Even so, the Court stated clearly:

> [b]ut we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected. If ... these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issues of fact.

In a later case, the Court discussed *SCRAP* and restated with approval its holding on this point. The complaint in the case before the Court, however, was “insufficient even to survive a

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229. 504 U.S. at 561.
230. 504 U.S. at 561.
231. *Lujan* was applied in review brought under the APA in *Pye v. United States*, 269 F.3d 459 (4th Cir.2001). On motion for summary judgment the District Court dismissed the action for lack of standing. The Court of Appeals reversed, holding that the plaintiffs met the *Lujan* standing requirements for responding to a motion for summary judgment.
232. 504 U.S. at 561.
235. 412 U.S. at 689. Or, the Court said, the appellants could have moved for a more definite statement of claims, Rule 12(e), Fed. Rules Civ. Proc. Or, they could have pursued normal civil discovery devices. 412 U.S. at 689 n. 15. In 42 U.S.C. § 4331(c) NEPA states: “The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.” This language may explain, in part, the generosity of the Court in finding injury sufficient to establish standing. Note: Informational Standing under NEPA: Justiciability and the Environmental Decisionmaking Process, 93 Colum. L. Rev. 996, 1037 (1993) asserting that separation of powers does not mandate strict standing requirements in NEPA cases, Comment: In Response to Fair Employment Concil of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers DoHave a Leg to Stand On,80 Minn. L. Rev. 123, 130-34 (1995) comparing *Scrap* and *Lujan*., but not mentioning the distinction between standing at the pleading stage and at the summary judgment stage, nor the APA and NEPA as the “relevant statute” for APA standing. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 Minn. L. Rev. 547, 560-61 (1997) contending that the Court has not been receptive to NEPA.
motion to dismiss, for it fails to allege an injury that fairly can be traced to petitioners’ challenged action ... Nor did the affidavits before the District Court at the summary judgment stage supply the missing link.\(^{236}\)

In a concurring opinion in *Havens Realty Corporation v. Coleman*,\(^ {237}\) Justice Powell complained of meaningless pleading that threatened the Article III requirement of a genuine case or controversy. Quoting from *Warth v. Seldin*,\(^ {238}\) he pointed out that a district court could deal with a vague averment as to standing by requiring amendment. He also indicated that the Federal Rules of Civil Procedure permit a motion for a more definite statement of claims\(^ {239}\). He worried that suits with vague standing assertions would proceed too far unless courts took steps to assess whether the plaintiffs ultimately would be able to prove standing.

Accounting for the stage of the litigation in the standing analysis may help clarify court holdings that, otherwise, would appear to be extreme or even aberrational. *Lujan v. Defenders of Wildlife* and *SCRAP* are excellent examples of cases that may readily be misunderstood if this factor is overlooked. Fortunately, in *Lucas* note 3, Justice Scalia expressly distinguished the requirements for standing to be established on the pleadings from those required for standing to be established on motion for summary judgment.\(^ {240}\)

The relevant part of the Court’s note 3 in *Lucas*\(^ {241}\), states: “...*Lujan*, since it involved the establishment of injury in fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful.”

Unfortunately, the Court’s critical distinction between evaluating standing on the pleadings and on motion for summary judgment in *Lucas*, note 3, has not received the attention its importance requires.

Professor Sunstein, in *What’s Standing After Lujan of Citizen Suits, “Injuries,” and Article III*,\(^ {242}\) cited *Lucas* at p. 196, but did not discuss the note 3 pleadings-summary judgment distinction, nor did he address the fact that *Lujan* was decided on summary judgment motion.

In a 1993 symposium on *Lujan* and its impact, Dean Nichol, in *Justice Scalia, Standing, and Public Law Litigation*,\(^ {243}\) cited *Lucas* at p. 1251, but did not address the pleadings-summary judgment distinction in note 3, nor the fact that *Lujan* was decided on summary judgment motion. Professor Pierce, in *Lujan v. Defenders of Wildlife: Standing as aJudicially Imposed Limit on Legislative Power*,\(^ {244}\) did not cite *Lucas* nor did he address the pleadings-summary judgment distinction, and he did not address the fact that *Lujan* was decided on motion for summary judgment. John Roberts (now Chief Justice Roberts), in *Article III Limits on Statutory*
Standing, 245 did not cite Lucas, nor mention that Lujan was decided on motion for summary judgment, nor did he address the Court’s pleadings-summary judgment distinction clarification in Lucas, note 3.

The only participant in the symposium to address the pleadings-summary judgment distinction in Lucas, note 3 and recognize that Lujan was decided on motion for summary judgment, was Solicitor of Labor Marshall Breger in Defending Defenders: Remarks on Nichol and Pierce 246 Other commentaries on Lujan and Lucas have varied in their analyses. 247

K. State Determination of Standing

Lucas began in the South Carolina state courts as a direct action by Lucas against the Coastal Council. He contended the Beachfront Management Act constituted a “taking” of his property under the Fifth and Fourteenth Amendments that required payment of just compensation. The claim was based on the Act’s decree that established a permanent ban that prohibited Lucas from erecting any permanent habitable structures on his land. In his pleadings Lucas stated that although the Act might have been a lawful exercise of the state’s police power, its total ban on construction deprived him of all “economically viable use of his property.”

The trial court found that the ban rendered his land “valueless” and awarded Lucas damages in excess of $1.2 million. The case was appealed to the state supreme court. In 1990, prior to that court’s decision, the BMA was amended to authorize the Council to issue special permits for construction seaward of a specified baseline. The state Supreme Court reversed the trial court and held that because Lucas had not attacked the Act’s validity it was bound to accept the legislature’s “uncontested findings” that any new construction in the coastal zone would threaten a valuable public resource. Further, the state Supreme Court ruled that under the Supreme Court’s nuisance line of cases 248, when a regulation is to prevent “harmful or noxious uses of property” no compensation is owed under the takings clause regardless of its effect on the property value.

The Supreme Court granted certiorari but was divided on the issues of whether the case met federal court ripeness and standing requirements. In its majority opinion the Court held that Lucas’s takings claim was not rendered unripe by the state Supreme Court’s unusual disposition on the merits without considering the possibility of further administrative and trial proceedings. The state court disposition did not preclude Lucas from applying for a permit under the 1990 amendment for future construction, and challenging on takings grounds of any denial. However, it did prevent Lucas from making any takings claim with respect to his past deprivation, i.e., being denied any construction rights during the period before the 1990 amendment.

Also, given the breadth of the state Supreme Court’s holding and judgment, without Supreme Court intervention Lucas would be plainly unable to obtain further state court

248 505 U.S. at 1022-24.
adjudication concerning the 1988-1990 period. The Court noted further the discretionary permit procedure goes only to the prudential “ripeness” of Lucas’s challenge, and that it did not think it appropriate to apply the prudential requirement. Lucas having properly alleged injury in fact in his complaint, had federal court standing. Finally, the state Supreme Court’s “dismissive foreclosure” of further pleading and adjudication with respect to the pre-1990 component of Lucas’s takings claim, made it appropriate for the Court to address that matter as if the case were before it on the pleadings alone.

The other Justices’ opinions were reviewed in detail in Sec. III., supra.

The following section contains a comprehensive review of the general principles applicable to state determinations of standing.

L. State Determination of Standing-a Comprehensive Review

Long ago, the Supreme Court announced that it would not be bound by standing determinations made in cases coming to it from state courts. Under our federal structure, the quasi-independence of the states allows them to develop their own criteria for deciding questions of standing in state courts. Obviously, those state standards may or may not be consistent with the requirements of Article III. Furthermore, once established as a proper plaintiff in state court, the complainant may raise questions involving federal law, treaties, and the Constitution.

Hence, where states permit suits that could not have been brought originally in the federal courts, a petition for Supreme Court review of federal questions in such cases puts the Court in an awkward position. Although it may desire to refuse to hear the matter on grounds of failure to meet federal court criteria, such a refusal has the effect of allowing a question of federal law (Constitution, treaty, or statute), decided by a state court, to be de facto authoritative in that state. In such situations, the Court has been ambivalent in its expressions about standing requirements. Likewise, it has been inconsistent in its actions, for where the Court has wanted to hear the case, it has given standing questions a “quick brush” approach, or it has ignored them altogether. 249

VI. Two 2007 cases Illustrating the Major Standing Variables

Analyses of Massachusetts v. Environmental Protection Agency 250 and Hein v. Freedom from Religion Foundation, Inc. 251

Massachusetts v. Environmental Protection Agency

In 1998 – 1999, two successive Environmental Protection Agency general counsels concluded that “CO₂ emissions are within the scope of EPA’s authority to regulate” 252 under the Clean Air Act (CAA). In 1999, two weeks after the second general counsel reiterated that opinion before a congressional committee, a group of 19 private organizations filed a rulemaking petition asking EPA to regulate “greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.” 253 They maintained “that greenhouse emissions have significantly
accelerated climate change; that a 1995 scientific report warned that “carbon dioxide remains the most important contributor to [man made] forcing of climate change;” that climate change will have serious adverse effects on human health and the environment; and that EPA had already confirmed that it had the power to regulate carbon dioxide.254

Fifteen months later, EPA requested comprehensive public comment on all the issues raised by the petition. In 2001 the National Research Council (NRC) submitted a report titled Climate Change; an Analysis of Some Key Questions. It concluded that “greenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising.” [NRC Report 1] 255

In early September, 2003, EPA denied the rulemaking petition, giving two reasons for its decision: (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change; and (2) that even if it had the authority to set greenhouse gas emission standards, it would be unwise to do so at that time.256

In explaining that it lacked authority over greenhouse gases, EPA noted that Congress was well aware of the global climate change issue when it comprehensively amended the CAA in 1990. EPA further reasoned that because Congress had tailored specific solutions to global atmosphere issues, that counseled against reading § 202 (a) (1), 42 U.S.C. 7531 (a) (1), to confer EPA regulatory power over greenhouse gases.257

Section 307 of the CAA, 42 USC 7607 (b) (1) provides that “a petition for review of action of the administrator in promulgating – any standard under § 7521 of this title…or final action taken, by the administrator under this chapter may be filed only in the U.S. Court of Appeals for the District of Columbia…” The petitioners, et al., sought review of the EPA decision. Two of the three judges on the panel agreed that the administrator properly exercised his discretion in denying the rulemaking petition. The court therefore denied review. 258

Alleging that the EPA had abdicated its responsibility under the CAA, the Petitioners, et al., sought certiorari in the Supreme Court. Specifically, petitioners asked the Court to answer two questions concerning the meaning of § 202 (a) (1) of the Act, 42 U.S.C. § 7521 (a) (1): whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute. Section 202 (a) (1) provides: “The EPA Administrator shall by regulation prescribe…standards applicable to the emission of any air pollutant from… new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare….259

254 Id.
255 549 U.S. at 511.
256 549 U.S. at 512.
257 Id.
258 549 U.S. at 514.
259 549 U.S. at 506.
In 42 U.S.C. § 7602 (g), the Act states: “The term air pollutant means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive…substance or matter which is emitted into or otherwise enters the ambient air….”

In § 7602 (h) the Act states: “All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation; conversion, or combination with other air pollutants.”

EPA stated that it was supported in its view by the Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.* Tobacco’s unique political history was a major factor in its decision. Hence, EPA viewed climate change as having its own “political history.” Therefore, EPA concluded that it lacked the power to regulate auto emissions, and that greenhouse gases cannot be “air pollutants” within the meaning of the CAA.

Even assuming it had authority over greenhouse gases, EPA explained why it would refuse to exercise that authority. It recognized that the concentration of greenhouse gases had increased dramatically as a result of human activities. Even so, it gave controlling importance to the 2001 NRC report statement that a causal link between the two “cannot be unequivocally established”[Quoting NRC Report 17].

Finally, EPA said any regulation of motor-vehicle emissions would be a “piecemeal approach” to climate change and would conflict with the President’s “comprehensive approach” to the problem. That approach did not include actual regulation.

The Court divided 5-4, with the majority holding that the petitioners did have standing to challenge the EPA’s denial of their rulemaking petition. The Court said “…at least according to petitioners’ uncontested affidavits—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek…” The dissenters disputed petitioners’ allegations and would have denied standing.

On the merits, the Court held that the Clean Air Act does authorize EPA to regulate greenhouse gas emissions from new motor vehicles if it forms a “judgment” that the emissions contribute to climate change. It said the word “judgment” is not a roving license to ignore the statutory text, but is a direction to exercise discretion within defined statutory limits. EPA had not offered a reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its decision, therefore, was “arbitrary, capricious…and otherwise not in accordance with law.” 42 U.S.C § 7607(d)(9)(A). The Court held only that EPA “must

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260 Id.
261 Id.
263 549 U.S. at 513.
264 Id.
265 549 U.S. 526.
266 549 U.S. at 528.
267 549 U.S. at 532 33.
ground its reasons for action or inaction in the statute.” The dissenters contended the Act does not require the Administrator to make a “judgment” whenever a petition for rulemaking is filed. In their view EPA’s interpretation of the discretion conferred by the statutory reference to “judgment” was reasonable and it had acted within its authority.

Hein v. Freedom from Religion Foundation, Inc

In Hein, an organization opposed to government endorsement of religion and three of its members filed an Establishment Clause challenge to a federal agency’s use of federal money to fund conferences to promote the President’s “Faith-based initiatives.” The District Court dismissed the action for lack of standing and the taxpayers appealed. The Court of Appeals reversed, and held the plaintiffs did have standing because the conferences challenged were paid for with money appropriated by Congress. The Supreme Court granted certiorari, reversed the Court of Appeals, and held the plaintiff taxpayers lacked standing.

VII. Analyses of Massachusetts and Hein in Terms of the Standing Variables

MASSACHUSETTS V. EPA

A. Alleging a justiciable injury

(1) Injury in fact

Injury was the major issue in both cases. In Massachusetts, the Court majority held that Massachusetts had alleged injury in two capacities: (1) to protect its sovereign territory, (2) as a landowner. Another possible capacity in which Massachusetts might have alleged injury was as a “person” for the Clean Air Act, 42 U.S.C. § 7602, defines “person” to include states.

Before creation of the modern administrative state, the Court had recognized that states are distinguished from private individuals for purposes of invoking federal jurisdiction. States “are not normal litigants.” Thus, a state may sue to protect its citizens from pollution originating outside its borders. Such suits are by a state for an injury to it in its capacity of quasi–sovereign (parens patriae) to preserve its sovereign territory.

“In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped or their forests and its inhabitants shall breathe pure air.” And, in this case, that Massachusetts does in fact own a great deal of the “territory alleged to be affected” reinforces the conclusion that it has a sufficiently concrete interest in the outcome of the case to

268 549 U.S. at 535.
269 549 U.S. at 549-551.
270 549 U.S. at 518-520,522.
271 Note: Massachusetts v. EPA’s Regulatory Interest Theory: a Victory for the Climate, not Public Law Plaintiffs, 94 Va. L. Rev. 1751 (2008) analyzes the case, but does not mention that The Clean Air Act, 42 U.S.C. § 7602 defines “person” to include states.
273 549 U.S. at 520.
274 549 U.S. at 518-19.
warrant the exercise of federal judicial power. One indication of whether an alleged injury to the health and welfare of its citizens is sufficient to give the state standing to sue parens patriae is whether the injury is one the state would likely attempt to alleviate through its sovereign law making power – if it could do so.\textsuperscript{275}

EPA’s refusal to regulate greenhouse gas emissions presented a risk of harm to Massachusetts that was both actual and imminent. According to petitioners’ unchallenged affidavits, global sea levels rose between 10 and 20 centimeters over the 20\textsuperscript{th} century as a result of global warming. These rising seas have already begun to swallow Massachusetts’ coastal land. Further, because Massachusetts owns a substantial portion of the state’s coastal property, it has alleged a particularized injury as a land owner. The severity of that injury will only increase over the course of the next century.

“[N]o one, save perhaps the dissenters, disputes those allegations. Our cases require nothing more.”\textsuperscript{276}

Chief Justice Roberts joined by justices Scalia, Thomas, and Alito dissenting, contended the petitioners had not established standing within the meaning of Allen v. Wright, - i.e., injury traceable to the defendant’s conduct and likely to be redressed by the requested relief.\textsuperscript{277}

He also contended that the “Court changes the rules,” before applying this test. Thus, he objected to the Court’s statement that “states are not normal litigants for the purposes of invoking federal jurisdiction,” and that “Massachusetts’ stake in protecting its sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”\textsuperscript{278} In his view Congress treated public and private litigants exactly the same.\textsuperscript{279} However, section 7602(e) defines “person” to include individuals, states, municipalities and federal agencies. That definition may permit states to sue as persons, as well as quasi-sovereign states. (parens patriae). Further, Chief Justice Roberts did not include the Court’s entire statement. The omitted the part said Congress had recognized a concomitant procedural right to challenge the rejection of its rulemaking petition. 42 U.S.C. 7607(b)(1). “Given that procedural right and Massachusetts’ stake…the Commonwealth is entitled to special solicitude in our standing analysis.”\textsuperscript{280}

The Chief Justice also stated that parens patriae standing is distinct from an allegation of direct injury. That is, the state must show a distinct quasi-sovereign interest apart from the interests of particular private parties. The state must still show that its citizens satisfy Art. III and Tennessee Copper had nothing to do with Art. III. standing.\textsuperscript{281} He concluded that parens patriae is merely a species of prudential standing and the prudential requirements for it cannot substitute for the minimum requirements of injury, causation and redressability.\textsuperscript{282} However, he did not discuss the proposition that the Court has held a procedural right may trump prudential limitations. With respect to Massachusetts’ capacity to sue as a landowner injured by loss of coastal land, the dissenters said it must show particularized injury. If the injury is loss of coastal land, the injury must be actual or imminent, and possible future injury does not meet Art. III

\textsuperscript{275} 549 U.S. at 519.
\textsuperscript{276} 549 U.S. at 523 n 21.
\textsuperscript{277} 549 U.S. at 536.
\textsuperscript{278} Id.
\textsuperscript{279} 549 U.S. at 537.
\textsuperscript{280} 549 U.S. at 520.
\textsuperscript{281} 549 U.S. at 537.
\textsuperscript{282} 549 U.S. at 540 n 1.
requirements. Threatened injury must be certainly impending to constitute injury in fact according to Chief Justice Roberts. Therefore, he stated the allegations were pure conjecture.283

The Court countered that argument by pointing out that there was no challenge to the petitioners’ affidavits alleging injury because of a rise in sea level on the Massachusetts coast in the metropolitan Boston area.284

(2) Causation

The Court noted that EPA did not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. Thus, EPA’s refusal to regulate them “contributes” to Massachusetts’ injuries.285

EPA responded that its decision not to regulate such emissions from new motor vehicles contributed so insignificantly to petitioner’s injuries the agency action was non-justiciable. Similarly, EPA did not believe there was any realistic possibility that the relief sought would mitigate global climate change and remedy their injuries.286

The Court said that EPA erroneously assumed a small incremental step was non-justiciable. “That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law. And reducing domestic automobile emissions is hardly a tentative step.”287 That is, the U.S. transportation sector “emits an enormous quantity of carbon dioxide into the atmosphere.” MacCracken affidavit P30, Stdg. App. 219. That accounts for more than 6% of worldwide carbon dioxide emissions. Id. At 232 (Oppenheimer Decl. P3). Considering only emissions from the transportation sector, the U.S. would still rank as the third largest emitter of carbon dioxide in the world (exceeded only by the EU and China).288

Chief Justice Roberts, dissenting.

Petitioners’ reliance on Massachusetts’ loss of coastal land as their injury in fact creates insurmountable problems for them with respect to causation and redressability. They must show a causal connection between that specific injury and the lack of new motor vehicle emission standards and that the promulgation of them would likely redress that injury. Further, when challenging the government’s regulation or lack thereof, a third party establishing causation and redressability becomes “substantially more difficult.” [citing Lujan]. However, he omitted Justice Scalia’s immediately preceding Lujan parenthetical remark “(at the summary judgment stage)”…. He said the Court disregarded this particularized injury requirement and found causation and redressability in the dire nature of global warning as a bootstrap. Petitioners had not traced their alleged injuries to the fractional amount of global emissions that might have been limited with EPA standards. For him, the connection was far too speculative to establish causation.289

283 549 U.S. at 541.
284 549 U.S. at 523 n 21.
285 549 U.S. at 523.
286 549 U.S. at 523-24.
287 549 U.S. at 524.
288 549 U.S. at 524-25 n 22.
289 549 U.S. at 542-45.
(3) Redressability

Justice Stevens commented that although regulating motor vehicles may not by itself reverse global warming, the Court, nevertheless, had jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. The redressability requirement is established when a plaintiff shows that a favorable decision will relieve a discrete injury to him. He need not show that it would relieve his every injury. A reduction in domestic emissions would slow the pace of global emission increases no matter what happens elsewhere. In summary, at least according to “petitioners’ uncontested affidavits,” the rise in sea levels associated with global warming has already harmed and will continue to do so. The risk of catastrophic harm would be reduced to some extent if petitioners received the relief they seek.

Chief Justice Roberts dissenting:

When an element of standing depends on choices made by independent actors not before the courts and whose discretion the courts cannot control or predict, a party must present facts supporting an assertion that the actor will proceed in such a manner. (citing Lujan – Kennedy opinion). The declarations’ conclusory (if not fanciful) statements “do not even come close.” Even if regulation does reduce emissions, the Court never explains why that makes it likely that the injury in fact – the loss of land – will be redressed. The realities make it pure conjecture to suppose that EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts’ land. However, the dissent does not mention that a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.

B. The Jurisdictional Basis of Standing

Although the Clean Air Act contains a citizen suit provision, it was not the basis for federal court jurisdiction in the case. Instead, the petitioners filed a rulemaking petition asking EPA to begin regulating greenhouse gas emissions from motor vehicles on the basis of § 202(a)(1) of the CAA. EPA ultimately denied the petition and petitioners sought review in the Court of Appeals for the District of Columbia. Two judges on the panel concluded that the administrator properly exercised his discretion by denying the rulemaking petition. The court therefore denied review. The petitioners then alleged in a petition for certiorari to the Supreme Court that EPA had abdicated its responsibility under the CAA to regulate greenhouse gases. The Court granted the writ.
The CAA provides for judicial review of action of the administrator in promulgating any emission standard under § 7521 or final action taken by the administrator under the CAA.\textsuperscript{301} The Court of Appeals held that the EPA denial was agency action within the APA, 5 U.S.C. § 551(13), and that the denial was final agency action taken under the CAA.\textsuperscript{302} Section § 307, 42 U.S.C. 7607(d)(1) declares several sections of the APA not to apply to rule making under the CAA, but the § 551 definitions remain applicable.

The APA § 553(e) right to petition an agency for rule making is not available under the CAA, but the Court stated petitioners had an undoubted procedural right to file such a petition in this case.\textsuperscript{303} Hence, the legal bases for standing under the CAA were the right to petition for rule making and judicial review of final agency action denying the petition.

C. Private or Public Action

Ordinarily states would be assumed to be public action complainants. That is, a state would sue as representative of all its citizens in its capacity of quasi-sovereign (\textit{parens patriae}). In that capacity, however, Massachusetts “has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain….” Thus, in this case Massachusetts has an independent interest in preserving its sovereign territory.\textsuperscript{304} That stake in protecting its quasi-sovereign interests, accompanied by a procedural right to challenge the rejection of its rulemaking petition entitled Massachusetts to “special solicitude” in the Court’s standing analysis.\textsuperscript{305}

Another suggestion that Massachusetts is a private action complainant is the Court’s recognition that because it owns a substantial portion of the state’s coastal property it has alleged a particularized injury in its capacity as a landowner\textsuperscript{306}. Also implying Massachusetts had brought a private action, but not mentioned in the Court’s opinion is the fact that a state is defined as a “person” for purposes of the CAA in 42 U.S.C. § 7602(e).

In his dissent, Chief Justice Roberts complained that the Court changed the standing test by relaxing standing requirements because injuries pressed by a state are to be given “special solicitude.” He contended that had no basis in the Court’s jurisprudence.\textsuperscript{307} He also asserted that a claim of \textit{parens patriae} standing is distinct from a claim of direct injury and requires articulation of a “quasi-sovereign interest” apart from the interests of particular private parties.\textsuperscript{308} Even so, the Court had shaped its rationale to justify finding, by implication, that the state had brought a private action in the \textit{parens patriae} context.

D. Prudential Limitations

\textsuperscript{301} § 307(b)(1), 42 U.S.C. 7607(b)(1).
\textsuperscript{302} \textit{Massachusetts v. EPA}, 415 F.3d 50, 53-54 (D.C. Cir 2005).
\textsuperscript{303} 549 U.S. at 527.
\textsuperscript{304} 549 U.S. at 519.
\textsuperscript{305} 549 U.S. at 520.
\textsuperscript{306} 549 U.S. at 522.
\textsuperscript{307} 549 U.S. at 536.
\textsuperscript{308} 549 U.S. at 538.
At the outset of his dissent, Chief Justice Roberts stated that the petitioners’ challenges to the EPA denial of their rulemaking petition were nonjusticiable. Redress of grievances of the sort presented here is the function of Congress and the Chief Executive—not the federal courts.\textsuperscript{309} 

The Court has held that a conferred right of action may supersede prudential limitations.\textsuperscript{310} Accordingly, the Court makes much of the principle that Congress may intervene, confer standing and thereby preclude federal courts from applying the prudential limitations. It holds that the CAA contains such a procedural right to challenge the EPA denial action in the federal courts and states “[T]hat authorization is of critical importance to the standing inquiry.”\textsuperscript{311} 

In Chief Justice Roberts’ judgment \textit{parens patriae} is merely a species of prudential standing. Even so, a procedural right conferred by Congress could bar application of the prudential limitations. If the minimum constitutional requirements are otherwise met, the Congress has resolved the question.

E. Stage of the Proceeding

The CAA vests exclusive jurisdiction to review action of the EPA Administrator in the Court of Appeals for the District of Columbia.\textsuperscript{312} In 2002, in \textit{Sierra Club v. EPA}, the D.C. Court of Appeals held that in cases appealed from administrative agencies, when the petitioner’s standing is not self-evident, the petitioner should establish its standing in its opening brief by identifying in the administrative record evidence sufficient to support its standing, or if there is none because standing was not an issue before the agency, appending to its filing additional affidavits or other evidence sufficient to support its claim.

The petitioners filed two volumes of declarations with the circuit court. They were from scientists, engineers, state officials, home owners, users of the nation’s recreational resources, and others. They predicted catastrophic consequences from global warming caused by greenhouse gases, including loss of or damage to state and private property, frequent intense storm surge floods, and increased health costs.

According to the Court of Appeals, a respondent who continues to contest the petitioner’s claim to standing will have the opportunity to make an informed response to the petitioner’s showing. In \textit{Massachusetts v. EPA}, the Court of Appeals panel majority construed this requirement to be the same burden of production as that of a plaintiff moving for summary judgment in a district court. That is, it must support each element of its claim to standing by affidavit or other evidence. In the view of Judge Tatel, dissenting, the declarations submitted by the petitioners clearly established that Massachusetts had satisfied each element of Article III standing. He also pointed out that EPA made no challenge to the facts set forth in petitioners’ affidavits or other evidence. “EPA nowhere challenges petitioners’ declarations.”\textsuperscript{315} He

\begin{thebibliography}{99}
\item 309 549 U.S. at 535.
\item 311 549 U.S. at 516.
\item 312 42 U.S.C. § 7607(b)(1).
\item 313 292 F.3d. 895 (D.C. Cir. 2002).
\item 314 415 F.3d. 50 (D.C. Cir. 2005).
\item 315 415 F.3d. at 67.
\end{thebibliography}
concluded, therefore, that Massachusetts had adequately demonstrated its standing and the court of appeals’ jurisdiction was plain—at the “summary judgment stage” of the proceeding as it required.\textsuperscript{316}

None of the opinions filed by the Supreme Court Justices in Massachusetts indicates clearly whether the analyses were at the “on the pleadings” stage or whether they were at the “summary judgment” stage. The distinction is important because of the Court’s precedents that a good faith allegation of injury based on general facts may be sufficient for standing, absent a motion for summary judgment.\textsuperscript{317} To the contrary, at the summary judgment stage the complainant must show by affidavits or other evidence that it satisfies each of the minimum constitutional requirements for standing.\textsuperscript{318}

The initial question is, of course, whether the Court was technically bound by or felt itself functionally bound to follow the lead of the District of Columbia Court of Appeals and apply summary judgment standing standards to make its determination. There are some inferences in the opinions. For example, in the Court’s opinion, Justice Stevens refers to the petitioners’ unchallenged affidavits several times (at least five).\textsuperscript{319} He could have meant that at the summary judgment stage EPA was obliged to respond to the petitioners’ affidavits or evidence with its own affidavits or evidence. Failure to have done so made the EPA objection to petitioners’ standing much less credible and persuasive at that stage. Or, Justice Stevens may have meant that the petitioners’ general fact allegations were coincidentally supported by affidavits and were clearly sufficient to establish standing in the absence of at least something akin to a de facto motion for summary judgment.

It could be argued further that the unchallenged affidavits and the petitioners’ statutory procedural right to challenge the EPA’s denial of the rulemaking petition sufficiently confirmed their standing. Otherwise, the D.C. Court of Appeals’ imposition of summary judgment standards, whenever an appellant’s standing to appeal an administrative agency decision is not “self-evident,” would trump the Supreme Court’s jurisprudence establishing more relaxed standing standards when there is no motion for summary judgment.\textsuperscript{320}

Recall that in Lujan, Justice Scalia, for the Court mentioned repeatedly (at least eight times)\textsuperscript{321} that the case concerned standing at the summary judgment stage and it clearly was decided on that basis. In his Massachusetts dissent Chief Justice Roberts cited and quoted from Lujan repeatedly (at least ten times)\textsuperscript{322} to support his arguments against finding the petitioners had standing. Nowhere did he mention that Lujan evaluated standing at the summary judgment stage. Many of his Lujan quotations and citations, therefore, could be seriously faulted unless he was assuming Massachusetts also evaluated standing at the summary judgment stage. In his

\begin{itemize}
\item \textsuperscript{316} 415 F.3d at 64, 66-67.
\item \textsuperscript{318} Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).
\item \textsuperscript{319} 549 U.S. at 515, 515, 523 n. 21, 526.
\item \textsuperscript{320} See note 319, supra.
\item \textsuperscript{321} 504 U.S. at 559, 561, 564 n 2, 565, 567 n 3, 578.
\item \textsuperscript{322} 549 U.S. 535, 540, 541, 542, 543, 546, 547.
\end{itemize}
severe criticism of SCRAP, Chief Justice Roberts did not mention that in SCRAP the Court expressly stated its standing analysis was on the pleadings, and that if the U.S. wanted more specificity from the complainants it should have moved for summary judgment in the district court—but it did not do so.

In the causation and redressability portion of his Massachusetts dissent, Chief Justice Roberts omitted from a Lujan quotation, a parenthetical statement “(at the summary judgment stage)” that would have cast a different light on his argument at that point. Even if his premise in Massachusetts was that the analysis was at the equivalent of the pleading stage, it would have been weakened by the Court’s note 3 in Lucas. That is, if there had not been a summary judgment motion in Lujan Ms. Skilbred and Ms. Kelly would have had standing. If his premise was that Massachusetts was at the summary judgment stage, he would have been required to wrestle with the problem of EPA’s failure to challenge the petitioners’ affidavits and evidence. In short, EPA offered nothing to controvert what the petitioners advanced. EPA would be expected to respond at the summary judgment stage.

Lujan, as clarified in Lucas, note 3, recognized the Court’s established jurisprudence of two levels of standing analysis. Lujan, although skewed to a summary judgment analysis, has been cited as if it set forth a more demanding single set of standing criteria to be applied generally at the expense of the Court’s “at the pleading stage” standing jurisprudence. Unless the Court wants to jettison its “at the pleading stage” jurisprudence, it should clarify Lujan and declare when it should be used – only in summary judgment standing analysis.

In sum, the tone of the Court’s opinion in Massachusetts; its insistence that, although somewhat attenuated, (but no more so than the allegations of Ms. Skilbred and Ms. Kelly in Lujan), Massachusetts’ injury satisfied core constitutional requirements for standing; its reference to SCRAP and its quotation of a portion of the opinion; that the congressional design imposed on EPA specific obligations under the Clean Air Act; and the petitioners’ procedural right to challenge EPA’s denial of their petition for rulemaking suggest the Court applied the “pleadings” level of standing analysis in the case.

HEIN V. FREEDOM FROM RELIGION FOUNDATION, INC.

324 Id. at 688-89.: “Of course, pleadings must be something more than an ingenious academic exercise in the conceivable…But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected. If as the railroads now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. We cannot say on these pleadings that the appellees could not prove their allegations….This case came before the court on motions to dismiss and for a preliminary injunction. If the railroads thought it was necessary to take evidence, or if they believed summary judgment was appropriate, they could have moved for such relief…..” In its note 15, the Court noted the railroads objected to the fact that the allegations were not more specific. They claimed they had no way to answer such allegations which were wholly barren of specifics. The Court stated: “But if that were really a problem, the railroads could have moved for a more definite statement, see Fed Rule Civ. Proc. 12(e). And certainly normal civil discovery devices were available to the railroads.” See also Gwaltney of Smithfield, LTD v. ChesapeakeBay Foundation, Inc., 484 U.S. 49, 65-66 (1987); Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 230 (1986); Havens Realty Corporation v. Coleman, 455 U.S. 363, 383-84 (1982); Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 73-4 (1978); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 46 n. 25 (1976).
A. Alleging a Justiciable Injury

As in Massachusetts v. EPA, justiciable injury in fact was the primary standing issue in Hein. The Plaintiffs contended they met the standing requirements of Article III because they paid federal taxes. 326

The District Court dismissed the case on the basis of Flast v. Cohen327, as limited to Establishment Clause cases challenging the constitutionality of exercises of congressional power under the taxing and spending clause of Art.I §8.328 The Court of Appeals, however, read Flast as granting federal taxpayers standing to bring such challenges so long as the activities are financed by a congressional appropriation and it reversed the District Court.329

Justice Alito announced the judgment of the Court. Chief Justice Roberts and Justice Kennedy joined his opinion. He began with a reminder that Flast v. Cohen “recognized a narrow exception to the general rule against taxpayer standing.”330 In this case, Congress did not specifically authorize the use of federal funds to pay for the faith-based and community initiatives, conferences and speeches. Instead, they were paid for out of general Executive Branch appropriations.331

The White House office for the Executive Department centers was created by Executive Orders of the President. The centers were to ensure that faith-based community groups would be eligible to compete for federal financial support provided they did not use federal funds to support religious activities such as worship, religious instruction or proselytization.332 The respondents alleged that the conferences were designed to promote, and had the effect of promoting, religious community groups over secular ones.333

The constitutionally mandated standing inquiry is especially important in cases where taxpayers challenge laws of general application where their injury is not distinct from that suffered in general by other taxpayers or citizens.334 Respondents’ claim was that, having paid lawfully collected taxes into the federal treasury at some point, they had a continuing, legally cognizable interest in ensuring that those funds were not used in a way that violates the Constitution.335 This type of injury was held to be too generalized and attenuated to support Article III standing. Flast “limited taxpayer standing to challenges directed only [at] exercises of congressional power” under the Taxing and Spending clause.336

The plurality distinguished Bowen v. Kendrick,337 a case in which the Court held the requirements of Flast had been met. In that case, it was said the Court had found the requisite

326 ___ U.S. ___, 127 S.Ct. at 2559, 2561.
327 392 U.S. 83 (1968).
328 127 S.Ct. at 2561.
329 Id.
330 Id.
331 127 S.Ct. at 2559.
332 127 S.Ct. at 2560-60.
333 127 S.Ct. at 2561.
334 127 S.Ct. at 2562.
335 127 S.Ct. at 2563.
nexus between the taxpayer’s standing and the congressional exercise of taxing and spending power, notwithstanding the fact that the funding authorized flowed through and was administered by the Executive Branch. The key to that conclusion was the Court’s recognition that the Adolescent Family Life Act (AFLA) (that authorized federal grants to private community groups including religious organizations) was “at heart a program of disbursement of funds pursuant to Congress’ taxing and spending powers” and that the taxpayers’ claims “called into question how the funds authorized by Congress [were] being disbursed pursuant to the AFLA’s statutory mandate.” AFLA expressly contemplated that some of those moneys might go to projects involving religious groups.\footnote{127 S.Ct. at 2567.}

Here, however, the plaintiffs could not cite a statute whose application they challenged. At most, they could point to unspecified, lump sum congressional budget appropriations for the Executive Branch, traditionally regarded as committed to agency allocation discretion. The case, therefore, fell outside “the narrow exception” to the general rule against taxpayer standing created in \textit{Flast}.\footnote{127 S.Ct. at 2567-68.}

A broad reading of \textit{Flast} also would raise serious separation of powers issues. Thus, it is not sufficient to frame the standing question solely in terms of whether there is concrete adverseness. “We do not extend Flast, but also we do not overrule it. We leave \textit{Flast} as we found it.”\footnote{127 S.Ct. at 2571-72.}

Justice Kennedy concurred with the plurality. The public events and public speeches that the respondents questioned were part of the open discussion essential to democratic self-government. Allowing challenges to these prototypical Executive operations and dialogues would risk altering the free exchange of ideas and information. The Court should not authorize the constant intrusion on the Executive realm that would result from granting taxpayer standing in this case.\footnote{127 S.Ct. at 2572-73.}

Justice Scalia, joined by Justice Thomas, concurring:

At the outset, Justice Scalia said either \textit{Flast} should be applied to \textit{all} challenges to expenditure of tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or \textit{Flast} should be repudiated. For him, “the choice is easy,” for \textit{Flast} is wholly irreconcilable with the Article III restrictions on federal court jurisdiction that the Court has separately confirmed are embodied in the doctrine of standing\footnote{127 S. Ct. at 2573-74.}. Having said that, he began an analysis of the taxpayer standing cases which he viewed as notoriously inconsistent. To make his analysis he introduced “wallet injury” and “psychic injury” as conceptions of “injury in fact” that the Court has employed in this context.\footnote{127 S. Ct. at 2574.}

“Wallet injury” is the type of concrete and particularized injury one would expect to be asserted in a taxpayer suit. That is, a claim that the plaintiff’s tax liability is higher than it would be, but for the allegedly unlawful government action. The stumbling block for such
suits is that the plaintiff “cannot satisfy the traceability and redressability prongs of standing.” It is uncertain what the plaintiff’s tax bill would have been had the expenditure not been made, and it is speculative whether the government will, in response to an adverse court decision, lower taxes rather than spend the funds in some other manner.  

“Psychic injury,” on the other hand, has nothing to do with the plaintiff’s tax liability. Instead, the injury consists of the taxpayer’s mental displeasure that money extracted from him is being spent in an unlawful manner. This shift in focus eliminates traceability and redressability problems. Psychic injury is traceable to the improper use of taxpayer funds, and it is redressed when the improper use is enjoined. This conceptualizing of injury in fact in purely mental terms conflicts with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his complaint is the generalized grievance that the law is being violated.  

Having laid this foundation, Justice Scalia analyzed two pre-Flast cases (Frothingham and Doremus) that to him were of critical importance. Both cases were based on “wallet injury.” Flast distinguished both of them and based the decision on “psychic injury.” Doremus was said to have involved a challenge to an “incidental expenditure of tax funds in the administration of an essentially regulatory statute,” rather than a challenge to a taxing and spending statute. There was no difference between Doremus and Flast as to psychic injury. The Establishment Clause is no more a direct limitation on taxing and spending than is spending for the “defense and general welfare of the United States,” which was argued to be “limitations on the taxing power.” See e.g., Brief for Appellant in Frothingham, O.T.1922, No. 962, p.68.  

Three post-Flast cases he analyzed also were said to be incoherent and lacking in candor. Valley Forge applied Flast strictly and found lack of taxpayer standing. Plaintiffs were complaining about an Executive Branch Dept giving a 77 acre tract of government property to a religious organization. The flaw was that they were challenging a transfer of federal property under the Property Clause and not the Spending Clause. That distinction “surpassed the high bar for irrationality set by Flast’s distinguishing of Doremus and Frothingham.”  

Flast “was resuscitated” in Bowen v. Kendrick. There taxpayers were focused on whether particular grantees selected by HHS for (AFLA) Adolescent Family Life Act, to combat premarital adolescent pregnancy and sex were appropriate recipients. Kendrick was based on psychic injury. Daimler-Chrysler confirmed that Flast was based on psychic injury. Taxpayers there relied on Flast to challenge under the Commerce Clause, a state franchise tax credit. The Court rejected the analogy and denied standing. This conceptualization of Flast shows there are only two logical routes available to the Court. Is “psychic injury” consistent with art III? If so, Flast should be applied to all challenges to government expenditures violating specific
constitutional limitations that control the taxing and spending power. If not, the Court should overturn *Flast.* The psychic injury rationale of *Flast* is simply wrong, and “for that reason should not be extended to other cases. It is time – it is past time – to call an end. *Flast* should be overruled.”

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer dissenting

*Flast* said the injury alleged in Establishment Clause cases is “the very extraction and spending of tax money in aid of religion.” As noted in *Flast* that type of injury has deep historical roots going back to the ideal of religious liberty in James Madison’s memorial and remonstrance against religious assessments. That is, the government may not “force a citizen to contribute three pence only of his property for the support of any one establishment” of religion.

The right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause are not to be split off from one another. The three pence implicates the conscience and the injury is not accurately classified with the “psychic injury” that results whenever an appropriation or expenditure raises hackles of disagreement with the policy supported. In *Bowen,* we held the statute to be constitutional. Thus, after *Bowen,* the plurality’s distinction between a “congressional mandate” and “executive discretion” is arbitrary and hard to manage. If the statute is constitutional, all complaints must be about “executive discretion,” so there is no line to be drawn between *Bowen* and this case.

Though *Flast* standing to assert the right of conscience is in a class by itself, it is not unique in recognizing standing in a plaintiff without injury to flesh or purse. Cognizable harm takes account of the nature of the interest protected. The question, ultimately has to be whether the injury alleged is “too abstract, or otherwise not appropriate, to be considered judicially cognizable.”

Once one strays from the obvious cases of economic or physical injury, the enquiry can become subtle. Are esthetic harms sufficient for Article III standing? being forced to compete on an uneven playing field based on race (without economic loss); living in a racially gerrymandered electoral district?

*Flast* speaks for this Court’s recognition that when government spends money for religious purposes a taxpayer’s injury is concrete enough to be “judicially cognizable.” The taxpayers in this case have alleged the type of injury this court has seen as sufficient for standing.

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354 127 S.Ct. at 2579-81.
355 127 S.Ct. at 2584.
356 127 S.Ct. at 2584-85.
357 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901).
358 127 S.Ct. at 2585.
359 127 S.Ct. at 2586.
362 127 S.Ct. at 2587-88, citing *Allen v. Wright,* 468 U.S.737, 752.
363 127 S.Ct. at 2588.
B. Jurisdictional Basis of Standing

*Hein* was brought on the basis of constitutional standing, unaided by any statute. The theory was that the complainants’ personal constitutional rights as taxpayers had been violated because the federal government spent funds in violation of the Establishment of Religion Clause causing them injury. In *Flast*, it was the Congress that spent funds alleged to violate the Establishment Clause, and the Court refused to extend it.

C. Private or Public Action

*Flast v. Cohen* seemed to recognize a direct personal right of taxpayers to challenge congressional expenditures alleged to violate the Establishment Clause. In *Hein* the Court indicated the action was more akin to a public action. The Court indicated it had left *Flast* where it found it, and refused to extend that case to apply to the Executive Branch expenditures in *Hein*.

D. Prudential Limitations

The Court in *Hein* did not expressly include prudential limitations in its standing analysis.

E. Stage of the Proceeding

The standing analysis in *Hein* was at the pleadings stage, for there was no motion for summary judgment. Even this most relaxed standing injury variable was not sufficient to move the Court to find the taxpayers had standing to sue.

VIII. Conclusion

The model for analysis set out in Section II need not be repeated here. As was stated at the outset, the purpose of the article is to describe what the Court does in fact, and to prescribe a standing variables matrix model to be applied in specific situations. It is more comprehensive than other methods of analysis and, in the judgment of the author will more reliably predict standing issue outcomes and will facilitate more informed analysis/critique of them.