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# The Supreme Court and Standing

## Implications for Texas v. United States

By John Miano

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As the *Texas v. United States* case has made its way through the courts, legal pundits have been babbling on over whether Texas and the other states have legal *standing* to bring the case. I previously described *standing* as “a complete joke posing as law”.<sup>1</sup> While scholars are less blunt, they are no more kind than I am in their descriptions of standing:

*Modern standing law is closer to a part of the political system than to a part of the legal system. It is characterized by numerous malleable doctrines and numerous inconsistent precedents. Judges regularly manipulate the doctrines and rely on selective citation of precedents to further their own political preferences. Because modern standing law is entirely a creation of the judicial branch of government, that branch bears sole responsibility for the present sad state of the law and sole responsibility to reduce the problems inherent in modern standing law.*<sup>2</sup>

The bottom line is that any pronouncement by outsiders on standing is just an argument. The only time you can be reasonably certain that a party has standing to challenge a government action is when the party is regulated by the action or the action in question is a religious display.

I received requests that I explain standing in more detail, so I will try to do so, but keep in mind that describing standing is like describing a chaotic system in physics.

The rules of standing are constantly changing. I start this description with how standing existed in the first decade of this century. In other words, what I describe here is already out of date.

The Supreme Court has defined two groups of standing requirements. The first group is constitutional requirements for standing. The second group is prudential requirements for standing. The latter are judge-made requirements “that are part of judicial self-government”.<sup>3</sup>

Let us begin with the constitutional requirements of standing: “The core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”<sup>4</sup> Under the Constitution, Article III, Section 2:

*The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.*

Hidden somewhere in that definition of the scope of judicial power are the constitutional requirements for standing:

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*[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”<sup>5</sup>*

The word *standing* does not appear in the Constitution and the current concept of standing would have been completely alien to its drafters. In fact, “The first federal judicial opinion to refer to standing as an Article III limitation was *Stark v. Wickard* [in 1944].”<sup>6</sup>

This brings us to one of the great ironies of standing. The inventor and most vigorous proponent of the current standing doctrine was former Justice Scalia who was supposed to be an “originalist” in constitutional interpretation.

## The Injury Requirement

In order to have standing you must have an injury. Normally, one thinks of an injury as being something like a broken arm. The first adjustment the non-lawyer (and even many lawyers) needs to make when thinking in terms of standing is that an injury is “an invasion of legally protected interest”.

An injury hypothetical:

*Some trash has blown on to a neighbor’s front yard. You, being a good neighbor, see the trash, walk on to the lawn, pick up the trash, and put it in a garbage can.*

You did not get permission to go on to his property, making you a trespasser. It does not matter whether you have improved the situation for your neighbor. Your neighbor has suffered an injury. You may have improved your neighbor’s yard, but he has still suffered a *legal injury*.

A standing hypothetical:

*You own a property on a river that you use for swimming. Upstream from your property are four plants on different tributaries that emit lead into the water. The government regulates the amount of lead each plant is permitted to put out.*

*The government grants a permit to one of the plants to increase the amount of lead it is allowed to emit. You believe this amount is in excess of the amount allowed by law.*

*After the permit is granted, you hire a company to test the water where you swim. They find that there are high levels of lead detectable in the water and that the amount is larger than what is naturally occurring.*

Do you have standing to challenge the grant of the permit?

Of course you have standing! You are downstream from the plant that received the permit. It is emitting lead and lead is showing up at your property. It is obvious that you have an injury.

There is no way you have standing! There are four plants upstream from you emitting lead. You cannot show that the lead molecules showing up at your property come from the plant that was granted the permit.

The question of whether you have standing is then a political one for the judge. If you get a judge who is sympathetic to environmental concerns, it is highly likely that you will have standing. If you get a judge who is hostile to tree-huggers, you will not have standing. For such a judge, standing provides a means to avoid having to decide whether it was legal for the government to grant the permit.

If a downstream property owner would not have standing to challenge an upstream discharge of pollutants, when who would have standing?<sup>7</sup>

The Supreme Court says that such an argument is not useful for standing.<sup>8</sup> The Supreme Court's view is that it is possible that no one has standing to challenge a government action. Thus, the government always has at its disposal that argument that no one could possibly even challenge an otherwise illegal action.

When you sue the government, you can expect to spend over \$100,000 as you defend against hairsplitting over standing. Any suit against the government is inherently political and the government knows that there is some judge whose political viewpoint is not aligned with your legal interest.

Standing all comes down to politics. In fact, all injuries are not created equal.

If your injury is "offense at the sight of religious symbols", your standing is automatic.<sup>9</sup> Economic injuries also tend to open the door to standing, but for most other types of injuries, standing is like putting a quarter in a slot machine.

Justice Scalia's injury-in-fact model of standing is fatally flawed. Had he been trained as an engineer, he would have given up on it years ago and tried a new approach. Instead we have, "An embarrassingly incoherent doctrine of constitutional standing."<sup>10</sup>

## Prudential Standing

In addition to the standing requirements the Supreme Court has invented out of thin air, it has also created what are known as prudential standing requirements. These are requirements that the Court imposes for efficiency. One difference between constitutional requirements and prudential standing requirements is that, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."<sup>11</sup> However, Congress cannot circumvent the constitutional requirements.

The known prudential requirements are the zone of interest test, no generalized grievances, and limits on raising the rights of another.<sup>12</sup> The Supreme Court recently declared "prudential standing" to be a "misnomer." One would expect the Court to clarify its new version of the standing rules.

The zone of interest test requires the plaintiff to be arguably within the "zone of interest" of the statute or constitutional provision alleged to be violated.<sup>13</sup> This requirement was created in the context of Administrative Procedure Act challenges to regulations, but the Court expanded that to all statutory-created causes of action.

The Supreme Court has repeatedly said the zone of interest test has a very low threshold. However, the Court has never rigorously defined the zone of interest test and the Court's statements of the test have varied over the years creating a moving target. The result is that the lower courts frequently turn the zone of interest test into another political hurdle.

The great ambiguity is that Supreme Court has never defined what a *statute* means. In some cases, the Court has inquired whether the plaintiff is within the zone of interest of entire acts.<sup>14</sup> In other cases, it has inquired whether the plaintiff is within the zone of interest of specific sections of statutes.<sup>15</sup> There are many lower court opinions that go through tortured analyses and chop statutes up in creative ways to exclude plaintiffs under the zone of interest test.<sup>16</sup>

This brings us to one of the many contradictions in standing. As stated earlier, the Supreme Court says Congress may overcome prudential standing requirements and the zone of interest test was created in the context of the Administrative Procedure Act. That act extends a right of judicial review to, "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."<sup>17</sup> By giving a right of review to any person suffering a legal wrong (with no mention of being arguably within the zone of interest of the statute), there should be no zone of interest to bring a suit requirement under the APA.

In theory, the zone of interest test might be to identify those who are “suffering a legal wrong”, “adversely affected”, or “aggrieved” by agency action. Interpreting those concepts leaves the door open to limiting the class of people who may challenge a specific action. However, the Court has never associated the zone of interest test with these requirements.

This illustrates the stark reality that the Supreme Court makes up standing rules as it goes (to allow or block specific plaintiffs) with no overall plan.<sup>18</sup>

## Conclusion

The doctrine of standing is just a joke posing law. The state of standing is so bad that the Supreme Court should throw the whole thing out and start against with a new approach. The question of whether Texas and the states have standing to challenge DAPA is not a legal question, but rather a political judgment that Supreme Court will have to make.

## End Notes

<sup>1</sup> John Miano, [“The Implications of United States v. Texas”](#), Center for Immigration Studies blog, April 14, 2016.

<sup>2</sup> Richard J. Pierce, Jr., “Is Standing Law or Politics”, 77 N.C.L. Rev. 1741, 1786–87.

<sup>3</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>4</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>5</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>6</sup> Matt Handley, “Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue”, 21 Rev. Litig. 97, 104.

<sup>7</sup> For a similar example where the plaintiff lacked standing, see *Public Interest Research Group v. Magnesium Elektron*, 123 F.3d 111 (3d Cir. 1997).

<sup>8</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1154 (2013).

<sup>9</sup> *Salazar v. Buono*, 559 U.S. 700, 711 (2010).

<sup>10</sup> Sidney A. Shapiro and Richard W. Murphy, “Eight Things Americans Can’t Figure Out About Controlling Administrative Power”, 61 Admin. L. Rev. 5.

<sup>11</sup> *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

<sup>12</sup> *Lexmark Int’l, Inc. v. Static Control Components*, 134 S. Ct. 1377 (2014).

<sup>13</sup> *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151–153 (1970).

<sup>14</sup> *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 886 (1990).

<sup>15</sup> *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 488 (1998).

<sup>16</sup> E.g., *Federation for Am. Immigration Reform v. Reno*, 93 F.3d 897 (D.C. Cir. 1996).

<sup>17</sup> 5 U.S.C. § 702

<sup>18</sup> See also *Massachusetts v. EPA*, 549 U.S. 497 (2007).