The Shifting Frontiers of Standing: How Litigation Over Border Wall Funding Is Exposing Standing’s Current Doctrinal Fault Lines

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ABSTRACT

When President Trump announced that he was diverting funds from other items in the federal budget to satisfy a campaign promise to build a wall on the U.S.–Mexico border, a range of litigants lined up to challenge this action in the courts, including nonprofit organizations; state governments; the border county of El Paso, Texas; and the U.S. House of Representatives. At the heart of many of these cases is the question whether the plaintiffs have standing to challenge the Trump Administration’s actions. Because of the range of plaintiffs, and the diversity of harms they allege they have suffered as a result of these actions, this litigation provides a useful lens through which to view the current state of standing doctrine and explore the frequently shifting frontiers of standing jurisprudence: where it is has been, where it is now, and where it may be going in the future. Any inquiry into a plaintiff’s standing to sue necessarily entails an analysis of the now familiar standard set forth by the Court in Lujan v. Defenders of Wildlife, which requires that a plaintiff establish that she has suffered an injury in fact that is fairly traceable to the challenged conduct and redressable by a court of law. But there are also other questions that often arise, like whether a plaintiff falls within the zone of interests of the protections under which she is suing, whether the litigant can pursue so-called third party standing, whether groups can assert the rights of their members, and whether government actors can invoke the courts to address violations of the law or constitutional claims about the functioning of government. This Article explores these and other questions to show how the border wall litigation, with a range of plaintiffs raising a range of claims, is a useful medium through which to view the current state of standing doctrine and where it may go next.

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In early January 2019, President Donald Trump entered into budget negotiations with the U.S. Congress to expand the border wall between the United States and Mexico. When these efforts failed, the President attempted to shift funding that had been allocated by Congress for other priorities towards what many considered the fulfillment of a campaign promise: to “build that wall.” Predictably, litigants lined up to challenge this action. Those challengers have included: nonprofit organizations committed to the protection of the environment or the fair treatment of immigrants along the border; state governments that had federal funding to their states reduced because of the planned diversion of funds; a border county—El Paso, Texas—that claimed it suffered “reputational” harm because the President portrayed it as one of the most dangerous places in the United States; and the U.S. House of Representatives, which alleged its duly-enacted appropriations actions were undermined by the President’s unilateral reallocation of funds. This litigation—consisting of several different lawsuits—is currently working its way through the courts, and at least one of these cases was heard by the U.S. Supreme Court on an emergency basis. At the heart of many of these cases is the question of whether the plaintiffs have standing to challenge the Trump Administration’s actions. Because of the broad range of plaintiffs and the diversity of harms they allege to have suffered, this litigation provides an excellent lens through which to view the current state of standing doctrine and explore the frequently shifting frontiers of standing jurisprudence.


2. See infra Part II (describing litigants and their claims).

3. See Trump v. Sierra Club (Sierra Club III), 140 S. Ct. 1 (2019). For a description of the competing claims of irreparable harm in the absence of a stay, which led to the apparent need for an emergency application by the government, see id. at 1–2 (Breyer, J., concurring in part and dissenting in part from the grant of the stay).

4. For critical overviews of standing doctrine as it has emerged over the years, see, for example, Richard H. Fallon, Jr., The Fragmentation of Standing, 93 TEX. L. REV. 1061, 1068 (2015).
For example, in its ruling on the application for an appellate stay of the lower court’s injunction in a case brought by the Sierra Club and the Southern Border Communities Coalition, the Supreme Court stated that these plaintiffs may “have no cause of action to obtain review” of the underlying decision to reallocate funds. The question for the Court, which appears from the arguments of the parties, is whether the plaintiffs prosecuting these cases are within the “zone of interests” of the statute that forms the basis of their action. Traditionally, the zones-of-interest analysis has been a part of the question of whether a particular plaintiff has standing to sue. Since the Supreme Court’s decision in Lexmark International, Inc. v. Static Control Components, Inc., however, courts have begun to separate the zones-of-interest inquiry from the standing analysis. But the fact that the government has challenged whether the plaintiffs in Trump v. Sierra Club (Sierra Club III) fall within the zone of interests of the statutes raised by those plaintiffs reveals the larger opportunity the border wall litigation presents: That is, with a range of plaintiffs pressing a variety of claims, these cases provide a useful lens through which to view the ongoing evolution of standing jurisprudence.

Any inquiry into a plaintiff’s standing to sue necessarily entails an analysis of the now-familiar standard set forth by the Court in Lujan v. Defenders of Wildlife, which requires that a plaintiff establish that it has suffered an injury-in-fact that is fairly traceable to the challenged conduct and redressable by a court of law. But there are other questions that often arise, as the border wall cases show, like (arguing that “[f]ar from becoming more elegant and unified, standing doctrine has grown more complex and variegated with nearly every recent Supreme Court Term”); Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 Mich. L. Rev. 163, 168–97 (1992) (providing an overview of the evolution of modern standing doctrine). See also William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 223 (1988) (describing the “apparent lawlessness” of many standing decisions); Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C.L. Rev. 1741, 1758 (1999) (noting that the “malleable” nature of standing doctrine permits judges to “further their ideological agendas”).

5. Sierra Club III, 140 S. Ct. at 1. For an identification of the plaintiffs by the lower court, see Sierra Club v. Trump (Sierra Club II), 929 F.3d 670, 676 (9th Cir. 2019). For a description of the budgetary decisions made by the Trump Administration to reallocate funds toward the border wall, see id. at 679–83.

6. See, e.g., Appellees’ Answering Brief at 26–40, Sierra Club II, 929 F.3d 670 (No. 19-16102) (outlining the arguments of Plaintiff-Appellees (Sierra Club)).


8. See, e.g., Mendoza v. Perez, 754 F.3d 1002, 1016–18 (D.C. Cir. 2014) (conducting the zone-of-interests analysis apart from the standing inquiry in light of Lexmark); see also Lexmark, 572 U.S. 118 (recognizing that a competitor has standing to sue for alleged false advertising claims under applicable federal law).


10. See id. at 560.
whether a plaintiff falls within the zone of interests of the protections under which she is suing, whether the litigant can pursue so-called third-party standing, whether groups can assert the rights of their members, and whether government actors can use the courts to address violations of the law or constitutional claims about the functioning of government.

This Article explores these and other questions to show how the border wall litigation, with a range of plaintiffs raising a variety of claims, is a useful medium through which to view the current state of standing doctrine and predict where it may go next. In Part I, I provide the factual setting for the challenges that are working their way through the courts and then discuss the various lawsuits themselves. In Part II, I address the standing questions raised by these lawsuits, including an analysis of the plaintiffs’ ability to satisfy the Lujan factors, as well as the questions raised about whether these different classes of plaintiffs—state governments, the House of Representatives, nonprofit groups, and one county government—fall within the zone of interests of the statutes at the center of their claims. Part III then discusses the future implications for standing doctrine that these cases may portend.

I. EXECUTIVE ACTION AND THE LITIGATION CHALLENGING IT

A. The President Is Foiled by Congress and Then Takes Action

As the Ninth Circuit explained when describing the factual background of the border wall litigation, prior to the winter of 2018–19, President Trump had “made numerous requests to Congress for funding for construction of a barrier on the U.S.–Mexico border.”11 These included requests in prior budget proposals and during budget negotiations. As described earlier, the President had long promised to build a wall between Mexico and the United States, and it was considered a centerpiece of his campaign for the presidency.12 In the federal government’s 2018 budget, roughly $1.5 billion was allocated towards such an effort.13 At the same time, numerous bills proposed in Congress sought much more than this amount,
but all failed. In December 2018, Congress and the President had “reached an impasse” over funding border wall construction, and the federal government experienced a partial government shutdown over the dispute. In the throes of the government shutdown, on January 6, 2019, President Trump, in a letter to a U.S. Senate committee, requested $5.7 billion for the construction of over 200 miles of border fencing. Congress and the President reached an agreement to end the shutdown, which included funding for border security, but that budget “appropriated only $1.375 billion of the $5.7 billion the President had sought in border barrier funding and specified that the $1.375 billion was ‘for the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector.’”

While he signed the legislation into law even without the full funding he had sought for the border wall, President Trump also issued a proclamation pursuant to the National Emergencies Act, declaring a national emergency along the southern border. Due to this emergency, he asserted he would reallocate funds from other sources within the federal budget to pay for the proposed expansion of the border wall, including invoking authority under the National Emergencies Act to redirect funds for construction projects pursuant to a national emergency that “requires use of the armed forces.” Patrick M. Shanahan, then the Acting Secretary of Defense, would subsequently invoke Section 8005 of the Department of Defense Appropriations Act of 2019 and Section 1001 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 to “reprogram” additional funds towards border wall construction.

B. The Court Challenges

Following these actions, a range of plaintiffs filed a variety of suits, many raising the same or similar claims. Each of these actions is described in turn below.

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14. See Sierra Club II, 929 F.3d at 677 (describing failed legislative acts that would have increased funding for border security).
15. Id.
16. Id. at 678.
20. 10 U.S.C. § 2808(a) (2018); Sierra Club II, 929 F.3d at 679–90.
21. Sierra Club II, 929 F.3d at 679–90 (citations omitted).
1. *California v. Trump*

Soon after the President took action to divert funding for border wall construction, sixteen states filed suit to halt these efforts. The states alleged that the President’s diversion of funds would impact these states because they stood to lose funding from the federal government for critical projects. According to the complaint, if the Administration is permitted to go through with its plans, “Plaintiff States collectively stand to lose millions in federal funding that their national guard units receive for domestic drug interdiction and counterdrug activities, and millions of dollars received on an annual basis for law enforcement programs from the Treasury Forfeiture Fund, harming the public safety of Plaintiff States.” They also alleged that diversion of funds from construction projects in those states would harm the states’ economies, the states’ “proprietary interests by the diversion of funding from military construction projects for the States’ national guard units,” and the state’s natural resources. The states raised claims under the Appropriations Clause of the U.S. Constitution; the National Emergencies Act; Section 2808 of the Emergency Military Construction Authority; Section 284 of the Chapter 10 of the U.S. Code, which authorizes the Department of Defense to dispense funds for counterdrug activities; the law governing the use of the Department of the Treasury Forfeiture Fund; and the National Environmental Policy Act (NEPA). The plaintiffs argued that the Administration’s actions violated aspects of each of these statutory authorities and prohibitions on executive branch conduct. They also alleged that the Administration’s actions were “ultra vires”—beyond the scope of the authority possibly granted to the President through these statutes. This case has, for all

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23. Id. ¶¶ 3–5.

24. Id. ¶ 5.

25. Id.

26. Id.

27. Id. ¶¶ 5, 13–107 (detailing specific harm to each plaintiff state, including that “construction of a wall along California’s and New Mexico’s southern borders will cause irreparable environmental damage to those States’ natural resources,” id. ¶ 5).


34. Complaint for Declaratory & Injunctive Relief, supra note 22, ¶¶ 268–74.
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intents and purposes, been consolidated with Sierra Club v. Trump, and I will describe the procedural status of these cases together below, in Subpart I.B.3.

2. House of Representatives v. Mnuchin

In a case filed in the district court for the District of Columbia, the U.S. House of Representatives challenged the actions of the Trump Administration, undertaken by the Secretary of the Treasury and other government officials, under several theories: that the actions diverting funds to the border wall contravened the 2019 budget bill, the National Emergency Act, the Administrative Procedure Act,35 and the Appropriations Clause of the U.S. Constitution.36 The Administration argued that the President’s actions were correct on the merits, but also that one house of Congress did not have standing to challenge such actions. In June of 2019, the district court dismissed the House’s challenge on standing grounds, holding that “[i]n the 230 years since the Constitution was ratified, the political branches have entered into many rancorous fights over budget and spending priorities. . . . Given these clashes, the paucity of lawsuits by Congress against the Executive would be remarkable if an alleged injury to the Appropriations power conferred Article III standing upon the legislature.”37

Despite the protest that there is a “paucity” of such cases in which legislative standing has been recognized, the court identified two relatively recent Supreme Court precedents that address the issue of legislative standing. Citing Raines v. Byrd,38 and Arizona State Legislature v. Arizona Independent Redistricting Commission,39 the district court summarized these holdings as recognizing that “[o]n one end, individual legislators lack standing to allege a generalized harm to Congress’s Article I power. On the other end, both chambers of a state legislature do have standing to challenge a nullification of their legislative authority brought about through referendum.”40 I will discuss these and other precedents in Part II below. As this Article was being finalized, the D.C. Circuit—in a highly unusual move—granted a hearing of the matter en banc prior to a panel of that court having reached a decision on the House of Representatives’s appeal, and the court directed the parties to explicitly address Article III standing questions.41

37. Id. at 16.
3. **Sierra Club v. Trump**

As the Ninth Circuit explained, the plaintiffs in Sierra Club “are two nonprofit organizations that sued in the Northern District of California on behalf of themselves and their members.” 42 The Sierra Club was described by the court as an organization “dedicated to enjoyment of the outdoors and environmental protection,” 43 that “engages in advocacy and public education on issues such as habitat destruction, land use, and the human and environmental impact of construction projects, including the proposed construction of the border barrier.” 44 The second plaintiff is the Southern Border Communities Coalition, which is part of a larger alliance that “brings together organizations from California, Arizona, New Mexico, and Texas to promote policies aimed at improving the quality of life in border communities, including border enforcement and immigration reform policies.” 45 Filing their action in mid-February 2019, soon after the state plaintiffs commenced the action described above, these plaintiffs similarly alleged that President Trump and several cabinet secretaries had “exceeded the scope of their constitutional and statutory authority by spending money in excess of what Congress allocated for border security; they also alleged that Defendants’ actions violated separation of powers principles as well as the Appropriations Clause and Presentment Clause of the Constitution, and that Defendants failed to comply with the National Environmental Policy Act [NEPA].” 46 The plaintiffs further alleged that the defendants were acting without legislative authority when they diverted existing funding to the border wall. 47 According to the plaintiffs’ complaint, the construction would affect their members’ ability to enjoy the natural habitat along the border. As a result, each organization had diverted their own resources to prevent funding from being allocated to the border wall in the 2019 budget legislation. 48 Plaintiffs moved in the district court for a preliminary injunction to prevent the reallocation of funds from designated budget lines to the border wall funding. On May 24, 2019, the court afforded the plaintiffs partial relief, granting the motion in part but also denying it in part. 49 The trial court found the plaintiffs had standing 50 and granted the

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42. Sierra Club v. Trump (Sierra Club II), 929 F.3d 670, 682 (9th Cir. 2019).
43. Id.
44. Id.
45. Id. at 682–83.
46. Id. (citation omitted).
47. Id.
48. Id. at 683.
50. Id. at 907–08.
injunction under Section 8005.51 Because it found that the Department of Defense had not yet issued a plan under its Section 2808 authority,52 the court did not rule on that claim. It also denied plaintiffs relief under NEPA.53 The defendants proceeded to the Ninth Circuit Court of Appeals to seek a stay of the lower court’s order, which was ultimately denied.54 Soon thereafter, the Supreme Court was asked to issue its own stay of the district court’s order, and it did so, finding, as stated above, that the “Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting [DoD] Secretary’s compliance with Section 8005.”55 The matter is now before the Ninth Circuit, which is considering several questions, including whether to issue a permanent injunction and whether to grant summary judgment.

4. **El Paso County v. Trump**

Months after the Supreme Court issued its stay in the Sierra Club case, El Paso County and the Border Network for Human Rights (BNHR) filed suit against the President and several other governmental defendants arguing that the Presidential Proclamation “exceeded the President’s authority under the National Emergency Act (NEA).”56 They also argued that “the NEA is unconstitutional if it authorizes the President’s Proclamation because it runs afoul of the nondelegation doctrine and the Take Care Clause of the Constitution.”57 The plaintiffs further alleged that the defendants’ “use of the funds to build a border wall violates the [Consolidated Appropriations Act], the Appropriations Clause of the Constitution, and the Administrative Procedure Act (‘APA’).”58 The district court for the Western District of Texas found that El Paso County had standing to sue “because they are the ‘object’ of the border wall construction, and they have suffered concrete reputational and economic injury” as a result of the President’s declaration and the unwelcome publicity the Declaration brought to the county, depressing tourism.59 As for BNHR, the district court found that it, too, had standing because it has had to expend tens of thousands of dollars to address the fallout from the President’s

51. *Id.* at 927–28.
52. *Id.* at 911–25.
53. *Id.* at 922–23.
57. *Id.*
58. *Id.*
59. *Id.* at 847. For a discussion of the question of when a party is the object of proposed action and the relationship of that question to standing, see Subpart II.E.
Declaration, including counseling its members and organizing the community to oppose construction of the wall. After granting the plaintiffs’ motion for summary judgment, roughly two months later the court issued a permanent injunction preventing the defendants from “using § 2808 funds beyond the $1.375 billion in the 2019 Consolidated Appropriations Act for border wall construction.”

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Each of these cases offers a view into different components of the standing inquiry and helps to highlight the ways in which standing law may be evolving. The following Part discusses these components, explores how courts may address them, and begins to develop an understanding of what the future may hold for the still-turbulent doctrine of standing.

II. THE QUESTION OF STANDING AT THE BORDER

The various pending cases that challenge the Trump Administration’s actions around border wall funding have surfaced several key issues in the standing debate. Below, I explore the standing of state plaintiffs, local governments, and associations; the evolution of the zone-of-interests test; and the standing of the House of Representatives. The questions surrounding the standing of these entities and the evolution of the zone-of-interests test are the most compelling and important questions that this litigation raises, apart from the merits, of course.

A. The Traditional Formula

Identified as an “irreducible constitutional minimum” of any lawsuit, standing doctrine has emerged as an expression of the “cases-and-controversies” requirement of Article III of the U.S. Constitution. Contemporary jurisprudence relies on the formula laid out in the Court’s 1992 decision in Lujan v. Defenders of Wildlife. Consolidating several decades of precedent, the

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62. See, e.g., Ass’n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) (identifying standing as reflecting the restriction of the federal judicial authority to “cases” and “controversies”).
63. Id. at 555; see also generally Gene R. Nichol, The Impossibility of Lujan’s Project, 11 DUKE ENVT. L. & POL’Y F. 193 (2001) (describing and criticizing the holding in Lujan); Sunstein, supra note 4 (same).
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Court’s majority opinion, authored by Justice Scalia, identified the three core elements of the standing inquiry. First, a plaintiff must suffer an “injury in fact,” often described as “an invasion of a legally protected interest” that is both “concrete and particularized,” and “actual or imminent” rather than “conjectural” or “hypothetical.” Second, there “must be a causal connection between the injury and the conduct complained of”—that is, the injury must be traceable to the defendant’s actions, not those of some third party “not before the court.” Third, it must be “likely” that the injury can be “redressed by a favorable decision” of the court.

In Lujan, the requirement that litigants must press their own interests, and not merely those of concerned bystanders, was reflected in the Court’s holding that the plaintiff environmental group did not have standing, because they were unable to identify individual members who had concrete plans to visit the international site at issue—a site which plaintiffs argued would be impacted by federal funding, thus necessitating extraterritorial application of the Endangered Species Act. The Lujan Court recognized that although “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing,” the “injury-in-fact” test required “more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.” The Court scrutinized the standing allegations and found them wanting because they “plainly contain[ed] no facts . . . showing how damage to the species w[ould] produce ‘imminent’ injury to” the members: Indeed, as the Court would hold, “the affiants’ profession of an ‘inten[t]’ to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough” to establish standing. Rather, “[s]uch ‘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.”

66. Id. at 560 (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
68. Id. at 561 (quoting Simon, 426 U.S. at 38, 43).
69. See id. at 585–88 (Stevens, J., concurring) (discussing the issue of the extraterritorial reach of the ESA).
70. Id. at 562–63 (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).
71. Id. at 563 (citing Morton, 405 U.S. at 734–35).
72. Id. at 564.
73. Id.
74. Id. (footnote omitted) (citation omitted); see Erick D. Rigby, Think Locally, Act Globally: The Presumption Against Extraterritorial Application of American Statutes and § 7(a)(2) of the


Courts have also identified what have long been described as “prudential” limits that can sometimes inhibit a party’s ability to establish standing, including that a plaintiff must assert his or her “own legal rights and interests.” In addition, courts have “refrained from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches.” Lastly, while there is some disagreement over whether this final aspect of standing should be considered one of the “prudential” aspects of the standing inquiry, more central to the standing analysis, or completely separate from it, the plaintiff’s complaint must “fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’”

One of the purposes of the standing requirement is that issues that come before the court are “presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” Furthermore, it “reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.” Instead, the standing requirement reflects the rejection of the notion that the federal courts should serve as “no more than a vehicle for the vindication of the value interests of concerned bystanders” and as “publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding.”

As the following discussion shows, however, standing is not easily reduced to a simple formula and how the courts rule can depend on many factors, not just whether there is some particularized injury. Indeed, these issues can often also hinge on the nature of the claims as well as the role of the parties in the litigation. As stated previously, the border wall litigation provides an especially useful

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75. Lujan, 504 U.S. at 560.
78. Id. (footnote omitted) (quoting Ass’n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)). For further discussion of the zone-of-interests test, see Subpart II.E.
79. Flast v. Cohen, 392 U.S. 83, 95 (1968); see also Fletcher, supra note 4, at 222 (noting that the stated purpose of standing doctrine is to ensure that parties are truly adverse).
82. Valley Forge Christian Coll., 454 U.S. at 473. But see Fletcher, supra note 4, at 247–50 (questioning the value of standing doctrine to serve these ends).
83. See, e.g., Fallon, supra note 4, at 1071 (describing standing as “a body of doctrine that aspires to trans-substantivity” but “fractures along substantive lines in important, identifiable categories of cases”).
opportunity to see the different contours of the standing doctrine in high relief. I explore just some of these questions throughout the remainder of this Part, using the border wall litigation to surface a range of the somewhat unsettled, and, at times, unsettling, issues surrounding standing doctrine.

B. State Plaintiff Standing

The various border wall lawsuits, especially if they are considered as part of a single effort, can be seen as an example of public law litigation. States have long found themselves as prominent litigants in public law litigation. States serve as litigants in many different contexts, and their presence in a lawsuit may just make that suit “public” in character. Nevertheless, a state may bring an action as an entity that participates in the market economy, like any other entity, or may seek to vindicate what might be considered third-party rights. States have historically sued in their parens patriae authority for over a century, and that power can be traced to the English common law. These functions were ultimately assumed by the states after the formation of the United States. The authority has shifted to reach beyond the power to simply stand in for those less able to represent themselves, as it was originally conceived, and has been extended to grant authority to represent all of a state’s citizens. It has also been recognized as protecting so-called “quasi-sovereign” interests: For example, in Georgia v. Tennessee Copper Co., the Supreme Court permitted the state of Georgia to bring suit over an “injury to it in its capacity of quasi-sovereign” and “[i]n 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." As such, a state as litigant “has the last word as

86. See Louisiana v. Texas, 176 U.S. 1 (1900).
87. See Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257 (1972) (describing the tradition of the parens patriae power deriving from the English common law, where the king had the “power as guardian of persons under legal disabilities to act for themselves”).
88. Id.
91. Id.
to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”92 What is more, as a “representative of the public,” the Court has found that a state litigant could challenge a wrong that “limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States.”93 In such instances, these are “matters of grave public concern” in which a state litigant “has an interest apart from that of particular individuals who may be affected.”94 That interest is not “remote,” but rather, “immediate.”95 To the extent the Court has drawn distinctions between parens patriae interests (arguably third-party interests), and those the state might assert as a market participant, like a landowner (a first-party interest), the Court has at times considered the parens patriae interests as more important. For example, the Court has treated the state-as-landowner-litigant position as a mere “makeweight” argument: added to buttress other, third-party claims, and perhaps, as a result, unnecessary.96

In Alfred L. Snapp & Son v. Puerto Rico,97 the Court described three types of harms that a state can typically allege: (1) harm to proprietary interests;98 (2) harm to its “sovereign interests,” including “the exercise of sovereign power over individuals and entities within the relevant jurisdiction, [which] involves the power to create and enforce a legal code, both civil and criminal”;99 and (3) harm to international reputation and authority, including “the demand for recognition from other sovereigns—most frequently . . . [involving] the maintenance and recognition of borders.”100

While the parens patriae authority is broad, it also has limits. The most important of these limitations was articulated in the consolidated cases Commonwealth v. Mellon and Frothingham v. Mellon.101 In those cases, the Court found that “a State, as parens patriae,” may not “institute judicial proceedings to

92. Id.
94. Id.
95. Id.
96. Tenn. Copper Co., 206 U.S. at 237.
98. See, e.g., Pa. R.R. Co., 324 U.S. at 447–52 (recognizing the right of a state to bring parens patriae action to challenge harms to quasisovereign interests in the health and welfare of the general economy and citizens of the state, and noting that harms to the state in its proprietary interest, though present and cognizable, were a mere “makeweight”). But cf. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262–66 (1972) (holding that the state of Hawaii could only sue to vindicate its own proprietary interests in an antitrust action).
100. Id.
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protect citizens of the United States from the operation of the statutes thereof.”102 In such situations, “it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.”103 There are important exceptions to this limitation, however, and the Supreme Court’s most recent effort to address this issue through its landmark holding in Massachusetts v. EPA identified such exceptions.

In Massachusetts v. EPA, the Court was asked to review a challenge to federal government inaction on greenhouse gas emissions brought by the Commonwealth of Massachusetts, other states, municipalities, and nonprofit organizations.104 The state plaintiffs, including Massachusetts, asserted parens patriae authority to bring the action; Massachusetts also asserted it was a landowner holding title to “a substantial portion of the state’s coastal property” that was under threat from climate change.105 As a result, the Court found Massachusetts had “alleged a particularized injury in its capacity as a landowner.”106 At the same time, the Court’s majority noted that state litigants are entitled to “special solicitude” in the standing analysis,107 and that a state can have an “independent interest ‘in all the earth and air within its domain.’”108 Allegations of harm to such interests would “support[] federal jurisdiction.”109 The fact that the Commonwealth owned “a great deal” of affected coastline110 “only reinforce[d] the conclusion that [the Commonwealth’s] stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.”111 The Court would ultimately find it “clear that petitioners’ submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial

102. Id.
103. Id. (emphasis added) (citation omitted).
105. Id. at 522.
106. Id. The Court also found that the plaintiffs met the causation and redressability components of the standing inquiry. Id. at 526. For an argument that courts should relax the standing requirements generally for state litigants suing the federal government to “protect the health, welfare, or natural resources of their citizens,” see Bradford Mank, Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States, 49 WM. & MARY L. REV. 1701, 1775 (2008).
107. Massachusetts v. EPA, 549 U.S. at 520.
109. Massachusetts v. EPA, 549 U.S. at 519 (alteration in original).
110. Id.
111. Id.
process. The Court did not, however, specify whether it was granting standing to the plaintiffs because of the state litigant’s special status or its more pedestrian status as a landowner.

In addition, the Court addressed the question of whether the Commonwealth and the other litigants could sue the federal government. Invoking its prior decision in *Georgia v. Pennsylvania R.R. Co.*, the Court drew distinctions between “allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).” But this brings us back to the previous question: What interests were at stake, the quasisovereign interests or the proprietary interests? By stating that the Commonwealth could sue the federal government to vindicate its own rights under federal law, was the Court privileging proprietary, first-party interests? It certainly suggests that the assertion of propriety interests against the federal government might have been at the center of the Court’s decision to permit the litigants to evade the bar on states suing to vindicate the interests of their citizens against the federal government.

As this rather robust body of case law suggests, states are in a strong position to establish their standing to sue when they vindicate not just their parens patriae authority but also their own proprietary interests. When suing the federal government, the traditional bar against the use of parens patriae authority on behalf of a state’s citizens to vindicate federal rights would seem to be relaxed, at least somewhat, when the state is seeking to vindicate its own interests as opposed to those that might be more correctly characterized as third-party interests. As we will see in the following discussions about the other public litigant and the private litigants in the border wall litigation, we can often categorize the harms asserted by those litigants as either first-party or third-party harms. This is another fault line in standing doctrine, and I will discuss it further in Subpart II.E below.

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112. *Id.* at 521.
116. As Seth Davis has argued, states alleging proprietary interests is the “new public standing.” *Davis*, supra note 108, at 1236.
117. For a further discussion of this question, see Brescia, *supra* note 113, at 407–09.
118. *But see Seth Davis, The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2102 (2019) (arguing that states resorting to the vindication of merely proprietary interests “raises separation of powers concerns that the federal courts will become embroiled in resolving political disputes that are not amenable to judicial resolution, and, in the course of doing so, will undermine their legitimacy” (footnote omitted)).
C. Local Government Standing

The Supreme Court has long recognized the rights of local governments themselves to seek redress of the cognizable harms they suffer as entities. In *Gladstone Realtors v. Village of Bellwood*, a local government alleged that real estate brokers were violating the Fair Housing Act (FHA) by improperly steering prospective white and black homeowners to different neighborhoods within the jurisdiction. This, it was alleged, resulted in the creation of segregated neighborhoods in the city, which, in turn, resulted in a reduction in property values. This reduction in property values harmed the local government because it would ultimately lead to a reduction in the taxes the municipality could collect. The Court recognized these harms as real and cognizable: "A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services."

Recently, in a case alleging practices by several banks that violated the Fair Housing Act, the Supreme Court reiterated and reaffirmed that a local government could suffer cognizable harm by such practices and have standing to challenge them. In *Bank of America v. City of Miami*, the Court described, approvingly, the holding in *Gladstone Realty*, noting that reduction in property values as a result of racial steering could serve as a cognizable injury-in-fact upon which the plaintiff-municipality had standing to sue.

Thus, the Court has, for over forty years, recognized that local governments can have standing when they suffer direct injuries from alleged violations of a statute like the FHA that has broad standing parameters. That El Paso is a county suing for the alleged injuries it has suffered and continues to suffer as a result of the actions of the Trump Administration does not seem to pose a barrier to this type of standing, since courts have routinely followed *Gladstone Realty* in their grant of standing to county governments.

121. Gladstone Realtors, 441 U.S. at 109–11.
122. Id. at 110–11 (footnote omitted) (citations omitted).
123. 137 S. Ct. 1296 (2017).
124. Id. at 1304–05 (citing Gladstone Realtors, 441 U.S. at 95).
125. See, e.g., Cook County v. McAleenan, 417 F. Supp. 3d 1008, 1030–31 (N.D. Ill. 2019) (holding that county had standing because its injuries were at least as concrete, imminent, and traceable as those of the village government in *Gladstone*); County of Cook v. HSBC N. Am. Holdings, 136 F. Supp. 3d 952 (N.D. Ill. 2015) (holding that the county had standing under *Gladstone* because it adequately pleaded injury in fact, even if those injuries were "general" economic harms); County of Cook v. Wells Fargo & Co., 115 F. Supp. 3d 909, 913 (N.D. Ill. 2015) (holding
D. Associational Standing

The Court in *Lujan* rejected the claim by the plaintiff organization that its members would be affected by the challenged governmental action; but that, standing alone, was not the reason the effort to establish standing failed. In fact, the notion that a group might have standing to vindicate the rights of its members has long been recognized in the standing inquiry. As the Court found in *Hunt v. Washington State Apple Advertising Commission*, the organization was permitted to bring a suit on behalf of its members provided those members were, themselves, harmed by the challenged action. Thus, a group has standing when any one of its members can satisfy the standing requirement—in other words, when individual members can show a concrete injury-in-fact that is traceable to the challenged actions of the defendant and is redressable by the court. For the plaintiff-organization in *Lujan*, the fact that the group could not show the requisite injury to its individual members meant that the group did not have standing. Critically, the general notion of associational standing was not, itself, at issue. Instead, the unchallenged standard of associational standing simply was not met by the plaintiff organization. This type of standing can certainly be seen as a version of “third-party” standing that courts might otherwise view suspiciously. Nevertheless, it has long been recognized by the courts, and in *Lujan* it was not seriously in doubt.

At the same time, courts have also recognized that a group can establish standing when the group itself suffers direct harm. For example, in *Havens Realty Corp. v. Coleman*, the Court found that an association’s harm to its own mission was a cognizable harm for the purpose of establishing the group’s standing. Indeed, organizations can establish standing to challenge actions that create a drain on the organization’s resources when they have to dedicate such resources to addressing, combatting, or dealing with the fallout from the defendant’s actions.

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that, under *Gladstone*, the allegations in the county’s complaint plausibly alleged cognizable injury to county that was fairly traceable to lender’s actions and thus, the county had sufficient standing to sue). *But c.f.* Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245, 264 (D.N.J. 2000) (holding that the county lacked constitutional standing because the County’s theory of causation involved a number of links in the causal chain for which the County could not establish proximate cause); Roane County v. Jacobs Eng’g Grp., Inc., No. 3:19-cv-206-TAV-HBG, 2019 WL 7374625, at *3–4 (E.D. Tenn. Dec. 19, 2019) (holding that the County and two cities could not establish standing to file lawsuit on behalf of their citizens’ individual and collective interests because under *Gladstone*, a municipality does not have standing to seek relief for injuries other than its own).

128. *Id.* at 379.
Thus, we see two types of harms that organizations can allege to establish their standing to sue: “indirect” harm through the harm suffered by their individual members and “direct” harm arising from the acts of a defendant that make the organization’s task of meeting its mission harder.

The plaintiffs in Sierra Club v. Trump have alleged both of these types of organizational harms: those that befall their members who frequent the areas affected by the border wall construction, and harm to the organizations themselves because the construction will result in a drain on organizational resources.129 Similarly, in the case brought by El Paso County and the Border Network for Human Rights, the district court found that because the organizational plaintiff had to divert its resources toward counteracting the ill-effects of the proposed border wall, it had articulated a cognizable injury sufficient to confer standing.130 Thus, given the allegations of the organizational plaintiffs in the border wall litigation, these plaintiffs appear to have alleged the types of harms that have been recognized as sufficient to confer standing.

E. The Zone-of-Interests Test

The injuries alleged by the various plaintiffs in the border litigation appear consistent with the types of injuries courts have recognized in the past as sufficient to establish standing. But the core issue that remains—which defendants have focused on in some of these cases—is whether the plaintiffs are within the so-called “zone of interests” of the statutory or constitutional provisions upon which they base their challenge. There has been some dispute recently as to whether the zone-of-interests question is correctly identified as a “prudential” aspect of the standing inquiry or whether courts should consider it as part of some separate inquiry: one that is not merely prudential, but discretionary.

The relatively recent decision from the Supreme Court on this question, authored by Justice Scalia, seems to consider the zone-of-interests analysis as something apart from the merely prudential considerations that arise in the standing inquiry. Indeed, in Lexmark,131 Justice Scalia wrote: “Whether a plaintiff comes within ‘the ‘zone of interests’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”132 He continued on to approvingly quote a decision of the D.C. Circuit: The term “‘prudential standing’

129. See Complaint for Declaratory & Injunctive Relief, supra note 22, ¶¶ 9–19.
132. Id. at 127 (footnote omitted) (citations omitted).
is a misnomer” with respect to the zone-of-interests test, which asks whether a particular type of plaintiff has a “right to sue” under a particular substantive statute.133

Regardless of whether it is core to the standing analysis, a prudential aspect of the inquiry, or a wholly separate question the court must answer when deciding whether a particular plaintiff can raise a particular claim, courts have long made clear that plaintiffs must establish that they fall within the zone of interests of the statute or constitutional right at the center of their claims. The Court’s first articulation of the zone-of-interests test appears in its decision in Association of Data Processing Service Organizations v. Camp,134 which has long been considered a decision about standing.135 There, the Court found that the plaintiffs could challenge a decision by the U.S. Comptroller of the Currency that allowed banks to compete in the plaintiffs’ market, on the basis that this decision caused them a cognizable injury.136 Although the data processors themselves were not the object of the challenged action, they were still harmed by it—even though this might have been described as a “competitor lawsuit,” which the Court had rejected on prior occasions.137 In reaching its conclusion, the Court distinguished its prior decision in Tennessee Electric Power Co. v. TVA, in which the Court found that one could not establish a cause of action “unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”138 In Data Processing, in contrast, the Court found that the standing inquiry asks “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”139 Even if the plaintiff was not the direct object of the statute or constitutional provision in question, the Court concluded, “[c]ertainly he who is

133. Id. (quoting Ass’n of Battery Recyclers, Inc., v. EPA, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring)).
135. See, e.g., Sunstein, supra note 4, at 185–86 (describing Data Processing and its role in the evolution of standing jurisprudence).
138. Id. at 137–38.
139. Data Processing, 397 U.S. at 153.
'likely to be financially' injured, may be a reliable private attorney general to litigate the issues of the public interest in the present case.”

Although the Court found that the plaintiffs in *Data Processing* fell within the zone of interests of the challenged action even though they were not directly affected by that action, the easier case to make when it comes to standing is when the plaintiff is, in fact, directly affected by the legislation or agency action. As then-law professor Antonin Scalia wrote in an influential law review article: "[W]hen an individual who is the very object of a law’s requirement or prohibition seeks to challenge it, he always has standing.” He would describe this as a “classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a ‘generalized’ one.” Then-professor Scalia also called this a “classic form of court challenge,” which he would contrast with the “increasingly frequent administrative law cases in which the plaintiff is complaining of an agency’s unlawful failure to impose a requirement or prohibition upon someone else.”

In many ways, when a party is the object of a challenged action, it can be said that he or she is a “first party” to the lawsuit. When the party is not that object, it can be said that he or she is a “third party” to the claim or claims. In many ways, this first-party/third-party distinction is embodied in the zone-of-interests test itself. At the same time, as Court made clear in *Data Processing*, one must only appear as “arguably” within the zone of interests of the challenged action; the plaintiffs in that case certainly were, even though they were not directly affected by the action because they were not the direct objects of the decision to allow banks to compete with them. The agency action directly affected only the banks themselves when it permitted them to compete with the plaintiffs. The plaintiffs were indirectly affected, but they were not written into the challenged agency action, so to speak. Nevertheless, they were found to be within the zone of interests affected by that action and granted standing to challenge it. Even with this first-party/third-party distinction, many of the plaintiffs in the border litigation—whether states that have had their funding reduced in order to pay for the wall, or El Paso County targeted as a wall construction site—appear to be directly affected by the challenged action and thus we need not assess whether they

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142. *Id.*

143. *Id.*

144. *Id.*
have sufficient indirect effects from such action. As a result, they appear to fall within the zone of interests of the challenged actions.

Another critical question that has emerged with respect to the zone-of-interests test is whether the test is still considered an element of the standing inquiry, and whether it can be considered merely “prudential.” To put it another way, is application of the test left to a court’s discretion? The Court’s decision in *Lexmark* certainly would suggest that Justice Scalia, writing for the majority, sought to make the requirement mandatory rather than “prudential”—such that a court may not decide, based on its own discretion, whether to hear or reject cases as that court deems appropriate. Yet the Court’s more recent decision in *City of Miami*, described below, places the zone-of-interests test squarely within the standing inquiry and also considers it a component of the prudential branch of that analysis. Although it cites to *Lexmark*, and states that to call the zone-of-interests test “prudential” was “misleading,”145 the Court still went on to conduct a zone-of-interests analysis within the question of whether the plaintiffs had standing.146

In *City of Miami*, the Court analyzed whether the municipal plaintiff could sue under the broad provisions of the FHA, which protected any “aggrieved person.” Consistent with a long line of precedent, the Court read this as conferring standing to the full extent of Article III, but still situated the analysis within the standing inquiry, when it found as follows:

> Here, we conclude that the City’s claims of financial injury in their amended complaints—specifically, lost tax revenue and extra municipal expenses—satisfy the “cause-of-action” (or “prudential standing”) requirement. To use the language of *Data Processing*, the City’s claims of injury it suffered as a result of the statutory violations are, at the least, “arguably within the zone of interests” that the FHA protects.147

The opinion in *City of Miami* is not the only piece of evidence that suggests the so-called prudential limits on standing are still alive and well, to a degree, as a discretionary doctrine. In fact, in one case—*U.S. v. Windsor*148—it is possible the case might never have been heard without the vesting of such discretionary authority with judges. Just a year before *Lexmark*, the Court reached its landmark decision in *U.S. v. Windsor*, invalidating a portion of the Defense Against Marriage

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146. Id.
147. Id. at 1304 (quoting *Data Processing*, 397 U.S. at 153).
The Shifting Frontiers of Standing

Act (DOMA). There, the Court agreed to hear the case even though the Executive Branch had decided that it would not defend one aspect of the statute—the definitional component that defined marriage for its application in federal law. That provision meant that a surviving spouse in a same-sex couple could not assert survivor’s benefits under the federal estate tax. First, the Court found that, even though the Justice Department was no longer defending the statute, the fact that the Internal Revenue Service had not refunded the named plaintiff the taxes she had paid through the estate tax when her spouse had died was a formal injury sufficient to create standing. Essentially, the plaintiff was denied funds and the Treasury would have to reimburse her if the statute was found to be unconstitutional.

More importantly for the discussion here, the Court assessed the role of a group of members of the U.S. House of Representatives who sought to intervene to defend the statute. The key issue did not seem to be whether the House was itself injured, but rather, whether it would be a worthy advocate facing sufficient “adversity” on the issue such that the dispute would be a real one. Speaking of the Bipartisan Legislative Advocacy Group (BLAG), a group of members of the House who sought to intervene in the action, the Court found as follows: “BLAG’s sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.”

Apart from the question of the adverseness of the parties, the Windsor majority addressed the question of the prudential elements of the standing inquiry. Indeed, the Court drew a sharp distinction between what it called the Article III components of the standing inquiry and the prudential limits. It would point out that those who sought to exclude the House from litigating to defend the statute were arguing that once the executive decided it would not defend the action, the Court no longer had jurisdiction. But, for the Windsor majority, this “elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise.”

150. Windsor, 570 U.S. at 757–58.
151. Id. at 758–61.
152. Id. at 761; see Katherine A. Rymal, Comment, Litigious Legislators: House v. Burwell and the Justiciability of Congressional Suits Against the Executive Branch, 89 TEMPLE L. REV. 191, 211–14 (2016) (discussing standing of BLAG in Windsor).
153. Windsor, 570 U.S. at 761.
154. Id. at 756–60.
155. Id. at 756 (emphasis added) (citations omitted).
are ‘essentially matters of judicial self-governance.’ The Court has kept these two strands separate: ‘Article III standing . . . enforces the Constitution’s case-or-controversy requirement, and prudential standing . . . embodies “judicially self-imposed limits on the exercise of federal jurisdiction.”’\(^{156}\)

Furthermore, the majority, acting on what can only be considered prudential concerns when it determined that there were strong reasons to entertain the case, found as follows:

Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA’s sweep involving over 1,000 federal statutes and a myriad of federal regulations.\(^{157}\)

Thus, the question remains: Is the zone-of-interests test a standalone doctrine or still a component of standing, and a “prudential” one at that: one that courts can utilize or not as they see fit to authorize suits to proceed or halt litigation?\(^{158}\) Ironically, making the zone-of-interests test more of a mandatory requirement than one considered discretionary may give courts less flexibility to recognize litigants as having authority to sue when adjudication might preserve judicial resources and enable courts to uphold their core function.\(^{159}\) As the Court pronounced in *Marbury v. Madison* over two centuries ago: It “is emphatically the province and duty of the judicial department to say what the law is.”\(^{160}\) Whether courts will follow the relatively new—and less flexible—approach in *Lexmark* or the more generous, prudential approach favored by Justice Kennedy in *Windsor* remains to be seen. Regardless of which approach is favored in the border wall litigation, many of the plaintiffs in that litigation appear to be the “objects” of the legislation and executive acts being challenged—particularly the state

\(^{156}\) Id. at 757 (citations omitted); see T. Patrick Cordova, Note, The Duty to Defend and Federal Court Standing: Resolving a Collision Course, 73 N.Y.U. ANN. SURV. AM. L. 109, 131–32 (2017) (describing the application of prudential standing considerations in the Court’s holding in *Windsor*).

\(^{157}\) *Windsor*, 570 U.S. at 761.


\(^{159}\) For the argument that the Court’s holding in *Windsor* reveals that prudential standing is both flexible and “subject to ad hoc balancing,” see William James Goodling, Comment, Distinct Sources of Law and Distinct Doctrines: Federal Jurisdiction and Prudential Standing, 88 WASH. L. REV. 1153, 1181–82 (2013).

\(^{160}\) 5 U.S.137, 177 (1803).
governments that are suffering the direct loss of funds by virtue of their diversion
to funding the border wall. As such, they would fall within Justice Scalia’s “object
theory” of standing and fall squarely within the zone of interests to be protected
under the statutory and constitutional provisions in question in this litigation.
What remains, then, is the question of whether the legislative plaintiffs are
similarly situated, a question I address next.

F. The Standing of the House of Representatives

The district court’s decision in *House v. Mnuchin* appears to consider the
House’s efforts in challenging the Administration’s border wall funding along the
same lines as the Supreme Court considered the plaintiffs’ efforts in *Raines*, when
it held that a small number of legislators could not challenge a decision they lost
through the legislative process. This is contrasted with what the Supreme Court
characterized as the actions of both chambers of a legislature acting in concert to
undermine their legislative authority in the *Arizona State Legislature* case. The
district court in *House v. Mnuchin* found that the plaintiff-House is more like the
plaintiffs in *Raines* because only one chamber of Congress was bringing the action.
But the Supreme Court recognized the authority of one chamber of Congress to
defend legislation in the *Windsor* case. Moreover, both *Raines* and *Arizona State
Legislature* relied on a prior decision of the Supreme Court in *Coleman v. Miller*.161
There, the Supreme Court heard a challenge from a group of legislators from
Kansas: twenty members of the Kansas State Senate and three members of its
House of Representatives, although it is unclear why those three members were
made part of the case.162 Those plaintiffs were challenging the tie-breaking vote of
the state’s Lieutenant Governor when the legislature considered whether to
approve a proposed amendment to the U.S. Constitution regarding child labor.
The plaintiffs claimed the amendment failed in the state senate when the vote of
the senators was tied evenly, twenty-to-twenty. That tie, the legislators argued,
meant the proposed amendment was not formally approved by the senate and
could not, as a result, achieve the state’s approval pursuant to Article V of the U.S.
Constitution.163 Concluding that the legislators had standing—and doing so long
before the term was used regularly—the Court found as follows:

> We find the cases cited in support of the contention, that petitioners
> lack an adequate interest to invoke our jurisdiction to review, to be
> inapplicable. Here, the plaintiffs include twenty senators, whose votes

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162. *Id.* at 435–46. In *Coleman*, the Court described the plaintiffs as “these senators.” *Id.* at 438.
163. *Id.* at 435–37.
against ratification have been overridden and virtually held for naught although they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege.164

Such a “vote nullification” theory would appear to be precisely the type of injury the House of Representatives is alleging in its action against the Administration in the border wall litigation. The House is arguing that its budget legislation, passed by both houses and signed by the President, is being violated by the Administration in peremptory acts that violate both that statute itself and the Appropriations Clause of the Constitution.165 The House’s efforts to adopt legislation pursuant to the provisions of that Clause have been stymied by the President, nullifying appropriate legislative action itself passed pursuant to the Appropriations Clause. Whether the actions themselves were inappropriate on the merits is of no moment for the standing inquiry. Indeed, in both Coleman and Arizona State Legislature, the Supreme Court decided those cases on the merits, and found against the legislator-plaintiffs in both cases. But they entertained the suits nevertheless, the first under the Elections Clause of the U.S. Constitution and the second under the Amendment Article.166 In Raines, the legislators did not have standing because they were seeking to overturn a vote carried out along proper constitutional procedures that they lost. In House v. Mnuchin, by contrast, the House is merely seeking to enforce its proper legislative function, making it more similar to the Court’s holding in Arizona State Legislature. To find otherwise would mean this president and future executives could simply ignore the budgetary decisions made pursuant to the requirements of the Constitution.

In Coleman and Arizona State Legislature the Court had to determine the appropriate force to give to legislative acts under provisions of the U.S. Constitution. Moreover, the House in the border wall funding litigation appears to ask nothing more than what the BLAG purported to seek in Windsor; thus, I would submit, the House has alleged cognizable harms sufficient to establish standing. As the Court found in Windsor, “when Congress has passed a statute

164. Id. at 438 (footnote omitted).
166. Id. art. V.
and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’s enactment solely on its own initiative and without any determination from the Court.” 167

Indeed, any review of the House’s efforts in the border wall funding litigation would seem to mirror the efforts by the BLAG in defending DOMA. The Court would be hard pressed to see this litigation differently.

III. STANDING’S FUTURE

The border wall funding litigation offers a lens through which to view the cutting-edge issues in standing doctrine. The first question several of these cases present is whether plaintiffs are able to establish that they meet the Lujan factors, showing they have suffered a sufficient injury-in-fact that is traceable to the actions of the defendant and subject to the judicial remedies. With nearly three decades of jurisprudence since Lujan, litigants seem more than capable of alleging the harms they must articulate to satisfy this test. This is true even when parties allege harms that are more formalistic, like the harms a government party might face to its proprietary interests, as if that party were no more important in our constitutional structure than any other market actor. Still, there are questions about whether legislative litigants can establish cognizable injuries by acts or omissions of the executive branch that undermine, or refuse to defend, duly enacted legislation. From the majority opinion in Windsor, we can see that such an interest and injury would seem not just cognizable, but also demonstrative of the legislature falling within the zone of interests of the relevant provisions. Another question that should merit attention is whether the litigants in these actions are first-party or third-party litigants. That is, whether they are the objects of the challenged actions or merely pursuing the interests of others. In each border wall funding case, with the exception of those narrow instances when a group is suing on behalf of its individual members, the plaintiffs are all the objects of the challenged actions, and thus are so-called first-party litigants.

Related to that issue, and another standing dispute the border wall funding litigation has raised, are several questions that surround the zone-of-interests inquiry. First, is this inquiry still a part of the standing question? Second, is this inquiry merely “prudential” and subject to the court’s discretion? That is, can a court hear a case regardless of whether the plaintiff falls within the zone of interests of the challenged statute or constitutional provision? As to the first question, the Court’s decision in Lexmark has been read by some as severing

the zone-of-interests test from the standing inquiry. But in decisions issued both before *Lexmark*, like *Windsor*, and after, like *City of Miami*, the Court seems committed to viewing the zone-of-interests test as both an essential part of the standing inquiry as well as discretionary; in other words, as part of the prudential component of standing doctrine. While this area of the law is likely the one most ripe for evolution, with the Court sheering this analysis away from the standing inquiry and making it mandatory rather than prudential, the ramifications of doing so are twofold. First, it would limit a court’s ability to hear cases that might not otherwise come before the court when entertaining such actions could vindicate important interests and preserve judicial resources. And second, it would upset years of precedent in which courts utilized such discretion to hear cases for which “prudence” might suggest courts refrain from doing so, which would mean some disputes might otherwise be beyond a court’s reach.

For example, in fairly recent litigation over President Obama’s decision regarding the Deferred Action for Parental Arrivals (DAPA) program, the state of Texas and other state litigants would seem to fall well outside the zone of interests of the DAPA program; but, as an equally divided court would find, the injury Texas would face by, at some point, having to issue state driver’s licenses to otherwise undocumented adults at a cost of roughly $130 per applicant raised a cognizable injury and one that apparently fell within the zone of interests. Courts might be hamstrung from entertaining suits challenging executive action in the future if they do not have the flexibility and the authority to consider broad interests at stake as falling even arguably within the zone of interests to be protected by statutory or constitutional provisions.

Yet what commentators have long-feared is that the standing requirement, particularly as it was articulated in the *Lujan* decision, is subject to a degree of formalism. This formalism would play out such that if litigants can craft some direct, monetary harm from the challenged action, even if insignificant, they can establish standing, while cases that present more important issues, like protections embedded in the Establishment Clause, for example, might otherwise escape scrutiny. What we may be seeing as the border wall litigation continues to unfold is that lawyers and litigants have become quite adept at establishing the

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169. See, e.g., Sunstein, *supra* note 4, at 202–06 (discussing the formalism of the Court’s holding in *Lujan* with respect to the injury-in-fact question there).

170. See, e.g., Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2022 (2019) (asserting that “[w]hether used to bolster a sovereignty or *parens patriae* claim, or as a separate proprietary or individual basis for standing, states have little trouble alleging such concrete injuries” (footnote omitted)).
formalistic requirements of standing. Does this mean that other aspects of the standing inquiry must come to the fore, and courts will look elsewhere to limit litigant access to the courts, as they have done in so many other areas in recent years?171

Of course, we might also learn something that is often lurking near the surface of the standing inquiry. Perhaps what we will learn from the decisions in the border wall funding litigation is what some have feared all along: that standing is in the eye of the beholder,172 and courts will hear those cases that enable them to pursue their own political objectives and reject those that might, if heard, place the actions of their political allies under judicial scrutiny.173 Such an outcome may be difficult to accept, but that may be how these cases unfold. Based upon longstanding judicial precedent, however, there do not seem to be any serious standing barriers to prevent the whole raft of cases in the border wall funding dispute from being heard on the merits. This seems to be true even if one were to question whether some of the litigants fall within the zone of interests of the provisions under which they have filed suit, and even if courts were to ultimately find that the zone-of-interests test is no longer a part of the standing inquiry and is mandatory and not “prudential.”

CONCLUSION

As I hope this Article has shown, the varied border wall funding litigation brought by a range of plaintiffs—public and private—both helps to shine some light on and provides a lens through which to view the current state of standing doctrine. It also helps us to foresee where the doctrine might go. Public law litigation brought by states, local governments, private institutions, and even


172. See Meredith M. Render, Fiduciary Injury and Citizen Enforcement of the Emoluments Clause, 95 Notre Dame L. Rev. 953, 996 (2020) (describing inconsistencies in standing holdings with respect to cases brought against President Trump under the Emoluments Clause of the U.S. Constitution as rendering them “vulnerable to the longstanding criticism” of standing jurisprudence that standing “lies in the eye of the beholder”).

173. See, e.g., Pierce, supra note 4, at 1758 (describing the malleability of the standing doctrine that enables judges to use it to serve their ideological purposes); Christian B. Sundquist, The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III, 1 Colum. J. Race & L. 119, 121 (2011) (arguing that the standing doctrine’s incoherence can be seen as reflecting “an unstated desire to protect racial and class privilege”).
houses of the U.S. Congress is likely here to stay as national, state and local governments remain polarized and divided on ideology and policy. The courts, for their part, will continue to serve as a critical institutional player in the resolution of these disputes. Standing doctrine can certainly serve as a tool for ensuring the courts are not used in inappropriate ways. But when litigants properly invoke the courts’ jurisdiction, courts should not hesitate to assume their proper Article III role. What that role is will remain the subject of debate as long as we continue to have a republic. In fact, ensuring the courts continue to assume their critical role in adjudicating these disputes may just help preserve our ability to sustain one.