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Standing on Hot Air: *American Electric Power* and the Bankruptcy of Standing Doctrine

Article III standing has three seemingly simple components: (1) the plaintiffs must suffer an actual injury, (2) the injury must be caused by the defendant, and (3) the courts must be able to provide a remedy for that injury.¹ In *American Electric Power Co. v. Connecticut (AEP)*,² the Justices deadlocked over the application of the test to a common law action for nuisance. As *AEP* illustrates, the apparent simplicity of the test is misleading.

The claims were brought against utilities by states complaining that carbon emissions from power plants were contributing to harm from climate change. The Court devoted only a few cryptic sentences to the issue of standing. Four Justices found standing based on *Massachusetts v. EPA*,³ the Court's path-breaking opinion on climate change, while four others rejected standing, either "adhering to a dissenting opinion in *Massachusetts* or regarding that decision as

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1. For an overview of this doctrine and its application in environmental cases, see Daniel A. Farber, *A Place-Based Theory of Standing*, 55 *UCLA L. REV.* 1505 (2008).
 2. 131 S. Ct. 2527 (2011).
 3. 549 U.S. 497 (2007). It is likely that Justice Sotomayor would join this group, placing in doubt the D.C. Circuit's view that *Massachusetts v. EPA* is limited to its "unique" facts. See *Ctr. for Biological Diversity v. Dep't of the Interior*, 563 F.3d 466, 475-77 (D.C. Cir. 2009). Then-Judge Sotomayor's opinion in *Riverkeeper, Inc. v. EPA* indicates sympathy with environmental concerns. See 475 F.3d 83, 99-100 (2d Cir. 2007), *rev'd sub nom.* *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009). Moreover, she voted with the liberals to find standing in *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), and to reject Justice Scalia's argument against standing in *Salazar v. Buono*, 130 S. Ct. 1803, 1830 n.2 (2010).

distinguishable.”⁴ As a result, the lower court’s finding of standing was affirmed by an equally divided Court.

This disposition may leave the reasoning of the Justices mysterious, but *AEP* is a powerful illustration of the deep flaws in current doctrine: first, its incoherent application; second, its injection of merits issues into a supposedly jurisdictional determination; third, its manipulability in the hands of creative, well-resourced lawyers; and fourth, its resulting failure to advance any intelligible vision of the proper role of the federal judiciary.

The unpredictability and ideological nature of standing law seems inherent in the three-part test, whose terms seem to serve as a kind of Rorschach inkblot allowing each Justice to project her own worldview onto each case.⁵ The Court has never defined what constitutes an “injury” for purposes of standing, leaving it to each Justice to decide what kinds of grievances should be considered cognizable injuries. The second element is a mirror in which the judge can perceive her own preferences—when an injury is “fairly traceable” is simply a question of what a judge regards as fair. The third element replicates the problems of the first one, since the Court must decide whether the benefits sought by the plaintiff through the remedy should count for constitutional purposes.⁶ One need only look at *Massachusetts*, where the conservatives were certain that the case failed all three prongs of the test whereas the liberals were equally certain that it passed the hurdles. From what can be gleaned from the Court’s cryptic comment in *AEP*, the dissenters in *Massachusetts* held their ground in *AEP*.

Moreover, the standing determination is supposed to be jurisdictional but can often require the Court to decide elements of a case’s merits. *AEP* is the perfect illustration. The governmental plaintiffs alleged harm to public lands, infrastructure, and health, while the plaintiff trusts alleged harm to the lands under their protection.⁷ The heart of the plaintiffs’ claim was that the defendants’ carbon-dioxide emissions created a “substantial and unreasonable

4. 131 S. Ct. at 2535. Some of the defendants also raised a non-Article III argument: “In addition to renewing the political question argument made below, the petitioners now assert an additional threshold obstacle: They seek dismissal because of a ‘prudential’ bar to the adjudication of generalized grievances, purportedly distinct from Article III’s bar.” *Id.* at 2535 n.6. Apparently, at least four Justices rejected this argument.

5. As early as 1988, now-Judge Fletcher referred in this journal to “the apparent lawlessness of many standing cases when the wildly vacillating results in those cases are explained in the analytic terms made available by current doctrine.” William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 223 (1988).

6. One might think that plaintiffs themselves were best situated to decide whether a remedy would actually benefit them—otherwise, why bring a lawsuit?

7. 131 S. Ct. at 2533-34.

interference with public rights,' in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law."⁸ Thus, to prove liability, they would need to show a violation of rights under their protection (element 1 of standing) and show that the defendants' conduct "unreasonably interfered" with those rights (element 2 of standing). To justify a claim for relief, they would need to show that the relief would address the unreasonable interference (element 3 of standing). So, if the plaintiffs were successful on the merits, they would necessarily have standing; logically, for the court to reject their standing claim would amount to a determination that they would lose on the merits. Thus, the standing determination substantially overlapped with the merits of the case, although it was still possible for the plaintiffs to lose on the merits on other grounds.

The same jurisdiction/merits issue was present in *Massachusetts v. EPA* but in even more troublesome form. Under the Clean Air Act, it is up to the EPA to determine whether carbon emissions from vehicles endanger human health or welfare.⁹ But to find standing, the Court itself first had to determine that carbon emissions are harmful. Similarly, in order to get a court to order an agency to investigate whether a government action will cause a significant environmental harm in a National Environmental Policy Act (NEPA) case, an environmental group first has to prove that the action actually will cause significant environmental harm. None of this makes much sense.

The climate change cases illustrate another key problem with standing doctrine: the "injury" that forms the basis for Article III standing does not need to have any logical connection with the legal claim.¹⁰ That is, the plaintiff can challenge a defendant's actions under a constitutional or statutory provision if the action also happens to cause a different harm to the plaintiff satisfying the other prongs of the standing test.

For instance, in *AEP*, the plaintiffs complained about the defendants' carbon emissions. Coal and oil fired plants do not merely produce carbon dioxide; they produce a host of other pollutants, many of which are transported between states. Reducing CO₂ emissions would require a decrease in the consumption of fossil fuels, which would inevitably reduce co-pollutants as well. The EPA has found that power plants in the Midwest and Texas cause massive pollution harms in downwind states.¹¹ A successful remedy in *AEP*

8. *Id.* at 2534.

9. 42 U.S.C. § 7521(a)(1) (2006).

10. *Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59 (1978).

11. See Richard Schmalensee & Robert N. Stavins, *The EPA Transport Rule's Positive Net Benefits*, REG BLOG (Apr. 22, 2011), <http://www.law.upenn.edu/blogs/regblog/2011/04/>

would have forced utilities in these upwind states to further reduce their use of carbon fuels, thereby decreasing the harm of the co-pollutants to the downwind states. This byproduct of the climate litigation would be a sufficient injury-in-fact to give the plaintiffs standing to litigate the issue of climate change, even though the harm was caused by ordinary pollution rather than climate change.

Similarly, in *Massachusetts v. EPA*, reducing the carbon from vehicles necessarily means decreasing the amount of gasoline and diesel burned by those vehicles by improving fuel efficiency. All things being equal, using less fuel means less production of pollutants. Thus, plaintiffs suffering from urban air pollution due to vehicles would suffer an injury (harm from co-pollutants), traceable directly to EPA's failure to regulate carbon, and remediable by EPA carbon regulations. In short, even if injury from climate change was considered too indirect or delayed to give rise to standing, a determined plaintiff with the resources to obtain the necessary expert evidence could have established standing based on harm from co-pollutants in *AEP* and *Massachusetts v. EPA*.¹²

Many law review pages have been consumed with efforts to discern the purpose of standing doctrine.¹³ None of the efforts seem to have proved particularly persuasive to judges or to the scholarly community. More importantly, the doctrine as it is currently constituted seems incapable of serving *any* purpose—unless randomly hassling the plaintiffs in public interest cases can be considered a valid judicial goal.

While its accomplishments are unclear, standing doctrine carries substantial costs. It burdens litigants and takes up large amounts of judicial

the-epa-transport-rules-positive-net-benefits.html (explaining the harm caused by interstate transportation of SO₂ and NO_x pollutants).

12. There are several additional reasons why the plaintiff's resources make a difference. First, establishing standing may require expert evidence. Second, standing doctrine is esoteric and complex, requiring sophisticated lawyering. Third, organizations may need to expend resources to find individual members with suitable injuries, prepare appropriate testimony, and prepare them for possible depositions.
13. A Westlaw search of the Journals and Law Reviews database for such discussions produced 270 hits. WESTLAW, <http://www.westlaw.com> (follow "Journals and Law Reviews" hyperlink; then search for ("standing doctrine" /s (purpose function goal) & "article iii"). For a sample of scholarly viewpoints on this issue, see Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need To Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1071 (1994); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995).

time. Extraneous factors, rather than any intelligible goal, seem to drive outcomes. The manipulability of the doctrine makes outcomes turn all too often on the judge's ideology. The potential for end-runs by resourceful, well-lawyered plaintiffs means that the ability of a case to survive a standing challenge turns as much on the plaintiff's resources as on the inherent quality of the case. As *AEP* illustrates, judicial agonizing over standing can be a complete waste of time—regardless of the standing issue, the plaintiffs were going to lose on the merits anyway. Surely it is time for the Court to rethink this “exquisitely murky” doctrine¹⁴ and find some more sensible way to determine which cases are suitable for judicial resolution.

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14. Holly Doremus, *The Persistent Problem of Standing in Environmental Law*, 40 ENVTL. L. REP. 10,956, 10,957 (2010).