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## TRIANGULATING STANDING

JAMES E. PFANDER\*

With apologies to Professor Tribe,<sup>1</sup> this brief paper explains how one might use the triangle (and other geometric shapes) to clarify some confusing features of standing doctrine for visual learners.<sup>2</sup> While no one can pretend to offer a simple account of so vexing a corner of the jurisdictional world, I have found that a simple triangle (or two) can help students better understand the issues in such familiar cases as *Lujan v. Defenders of Wildlife*,<sup>3</sup> *Allen v. Wright*,<sup>4</sup> *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>5</sup> *Regents of the University of California v. Bakke*,<sup>6</sup> and *Massachusetts v. EPA*.<sup>7</sup> As standing mavens know, the cases generally require the plaintiff to identify an injury in fact, and a causal chain that connects that injury to the wrongful conduct of the defendant such that a judicial remedy directed at the misconduct will redress the injury.

My first (and simplest) triangle depicts the relationship between three familiar parties in standing litigation: a federal government agency (call it the Environmental Protection Agency or EPA), the firms that the agency regulates (the regulated party or RP), and the public citizens who presumably agitated for the adoption of federal standards and will benefit from successful regulation (call these folks the “public interest,” or PI). Diagram 1 depicts the situation as follows:

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\* Professor of Law, Northwestern University School of Law. © 2009 James Pfander.

1. See Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

2. For general overviews of standing doctrine, see ERWIN CHERMERINSKY, FEDERAL JURISDICTION 57–116 (5th ed. 2007); JAMES E. PFANDER, PRINCIPLES OF FEDERAL JURISDICTION 30–40 (2006). For an overview of learning styles and the importance of teaching to all styles of learners, see Eric A. DeGroff & Kathleen A. McKee, *Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles*, 2006 BYU EDUC. & L.J. 499; M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139 (2001).

3. 504 U.S. 555 (1992).

4. 468 U.S. 737 (1984).

5. 426 U.S. 26 (1976).

6. 438 U.S. 265 (1978).

7. 549 U.S. 497 (2007).

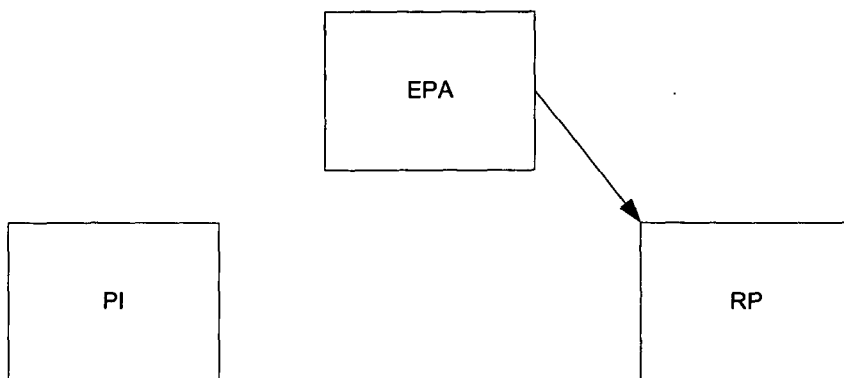


DIAGRAM 1

The first leg of the triangle depicts a first attempt at regulatory control: the adoption of regulatory standards by the EPA, perhaps reducing the amount of emissions a smokestack industry can release into the atmosphere. Once those standards have been adopted, the EPA can presumably bring an action to enforce them; if authorized to do so by Congress, it has standing to sue RP for a violation of federal standards (just as the Department of Justice can typically bring suit to enforce federal standards against those who violate them).

As noted, the first leg of the triangle does not usually raise standing questions. But take a moment to consider that conclusion. Has the EPA suffered any injury in fact as a result of RP's release of pollutants into the atmosphere? Perhaps not; indeed, the interests of the agency and the individuals who set policy, including the agency's head, the scientists, and lawyers, seem to resemble those of the public at large. Crucially then, the power of EPA to sue on what might otherwise look like a generalized grievance depends on statutory language that confers authority on EPA to enforce the standards it establishes. That, essentially, was the insight of Professor Hartnett; Hartnett argued that the right of the government to bring criminal prosecutions depends not on any injury in fact to the government, but on the customary and statutory power of law enforcement officials to initiate criminal proceedings.<sup>8</sup> Hartnett's broader point: that attorneys general, both public and private, act on behalf of the public at large rather than to remedy an injury in fact to their own legally cognizable interests, and we tend to regard statutory authorization as sufficient to enable them to do so.<sup>9</sup>

Just as the EPA has standing to sue RP for violating federal standards (assuming the agency's organic statute authorizes such suits), so too can RP

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8. Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251 (1999).

9. *Id.* at 2258.

sue the EPA. Suppose RP contends that the agency has exceeded its authority or has set standards that exceed those Congress authorized the agency to impose. Either sort of claim has long supported an action by a regulated entity against the agency in charge. One can perhaps best depict this reality by drawing an arrow from RP to EPA, as in Diagram 2 below.

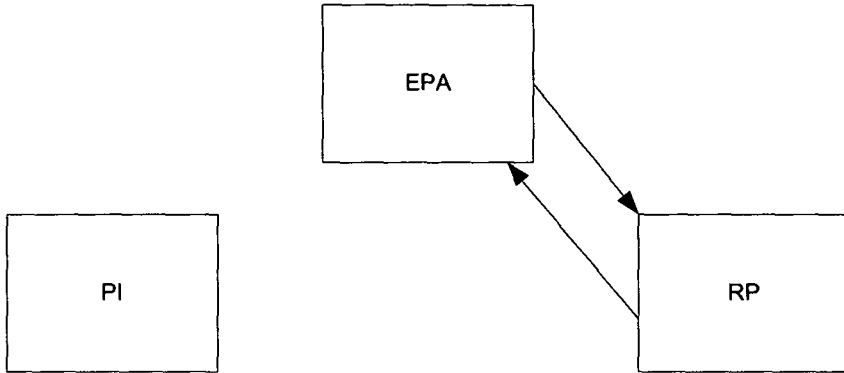


DIAGRAM 2

Standing thus operates as something of a two-way street; EPA has standing to sue RP, and RP can return the favor.

A somewhat more complicated set of questions arises when one considers the possibility that citizens might bring suit against RP directly for violation of federal standards. At common law, of course, individuals could sue to abate a nuisance, although the action was available only to those who lived in the neighborhood. One of the reasons Congress chose to create the EPA was its dissatisfaction with the existing tools of environmental regulation;<sup>10</sup> imagine the citizens of New England, for example, seeking relief on a nuisance theory from Midwestern firms whose emissions contribute to acid rain. Still, individuals can suffer relatively concrete harms as a result of violations of the EPA's standards. In *Friends of the Earth v. Laidlaw Environmental Services*,<sup>11</sup> for example, the plaintiffs alleged with some plausibility that they were less likely to use a particular waterway for swimming and fishing after learning that the firm had been exceeding the terms of its pollution permit.

The right of citizens to bring suit in such a situation depends both on the terms of the agency's organic statute and on standing doctrine. Congress might, of course, consolidate all enforcement authority in government agencies (as in the case of criminal prosecutions) and deny private individuals any right to sue.<sup>12</sup> If that occurred, then individuals would have to petition the agency to

10. See S. REP. NO. 91-296, at 4 (1969) (indicating that Congress created the EPA to address perceived problems in the enforcement of environmental law).

11. 528 U.S. 167 (2000).

12. See Hartnett, *supra* note 8, at 2246-51 (discussing criminal prosecutions in this context).

persuade it to pursue the claim (in the same way that citizens report crimes to the local prosecutor). Alternatively, Congress might provide that citizens may sue to enforce the standards set forth in federal law. Diagram 3 depicts such litigation:

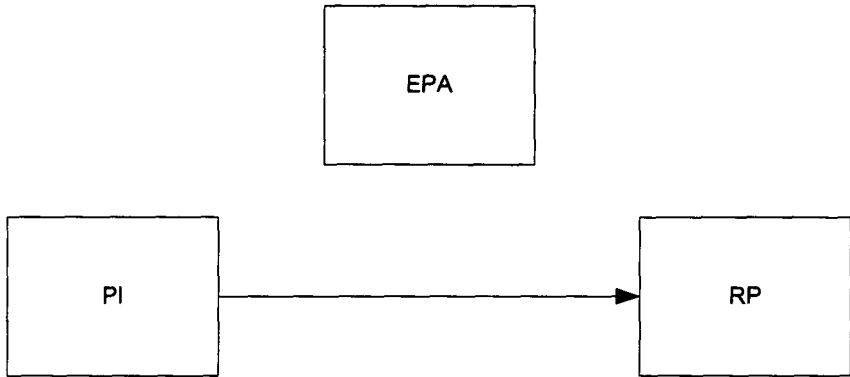


DIAGRAM 3

To bring such a suit, citizens must still satisfy the standing doctrine. So, for example, an employee may sue her firm for a violation of fair labor standards; she would surely have a concrete financial stake in the litigation. For environmental suits, however, the concrete stake may prove more elusive. Remember that to establish citizen standing in such a situation, the citizen must show injury, causation, and redressability. In *Laidlaw Environmental Services*, those elements were deemed satisfied by the plaintiff's stake in a clean river<sup>13</sup> and in the prospect that the imposition of a fine would deter future unlawful discharges.<sup>14</sup>

Many of the most difficult standing issues arise not from direct litigation between the agency and the RP or between the citizen and the RP. Rather, the difficulty arises when citizens sue the agency to compel it to get tough on the RP. Diagram 4 depicts that sort of litigation as follows:

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13. See *Friends of the Earth, Inc. v. Laidlaw Envntl. Servs.*, 528 U.S. 167, 183–85 (2000).

14. *Id.* at 187.

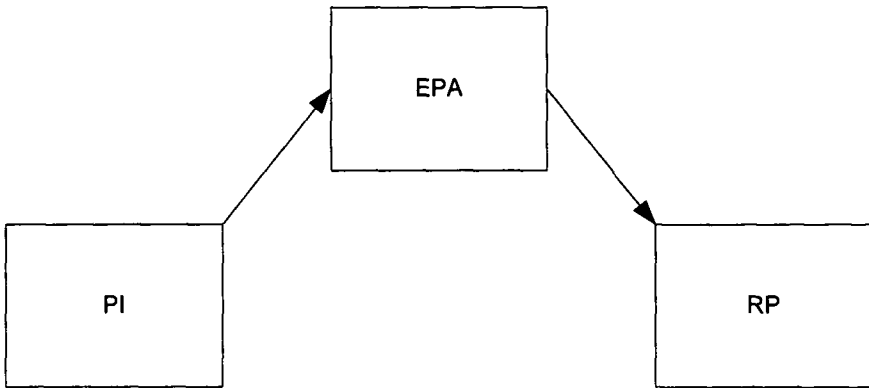


DIAGRAM 4

Here, the citizens seek to compel the agency to apply a more rigorous standard to the industry, or to enforce the law against a particular firm. We might call these sorts of claims “derivative” to reflect the fact that they seek to change the behavior of the regulated industry or firm by acting through the regulatory agency. Such suits have sometimes been called “agency-forcing litigation.”<sup>15</sup>

A number of famous standing cases involve this sort of derivative, or agency-forcing, model of litigation.<sup>16</sup> In *Allen v. Wright*,<sup>17</sup> for example, the parents of African-American school children brought suit against the Internal Revenue Service to compel it to more vigorously enforce the prohibition against granting tax-exempt status to private schools that maintained racially discriminatory admissions policies. The plaintiffs invoked their interest in an integrated public school system; white parents in the South were pulling their children out of the integrating public schools to attend what some called “white flight academies.” On the plaintiffs’ view, denial of exemption would alter the behavior of the schools and the parents who enrolled their children in the academies; as the loss of a tax subsidy made tuition more expensive (with the

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15. For an account, see John D. Graham, *The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act*, 1985 DUKE L.J. 100.

16. Diagram 4 also captures the core of the Court’s analysis in such cases as *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). In *Linda R.S.*, the plaintiff sought to compel the state to bring child support prosecutions against the fathers of both legitimate and illegitimate children on an even-handed basis. 410 U.S. at 615–16. But the Court found that prosecution would not assure the payment of child support to the plaintiff and denied her standing. *Id.* at 618–19. In *Simon*, the plaintiffs sought to challenge the IRS decision to drop its requirement that hospitals provide indigent care to maintain their status as non-profits under the tax code. 426 U.S. at 28. Again, the Court found that the plaintiffs lacked standing. *Id.* at 37. The Court said the plaintiffs might need low-cost medical care, but they could not show that denial of non-profit tax status would affect their ability to secure such care. *Id.* at 42–43. In both cases, in short, the plaintiffs brought derivative or agency-forcing claims.

17. 468 U.S. 737 (1984).

elimination of advantageous tax treatment for charitable contributions), some white parents on the margin might decide to keep their children in the public school system.

The Supreme Court found that the plaintiffs lacked standing. As the Court explained, the plaintiffs satisfied the first prong of the standing inquiry by alleging a deprivation of their constitutional right to an integrated public school education.<sup>18</sup> But the plaintiffs could not show causation and redressability; the Court doubted that a change in the school's tax exemption would influence the decisions of white parents about where to enroll their children.<sup>19</sup> Of course, the plaintiffs also contended that they were offended by the provision of any government support to the private academies. Here, the plaintiffs argued that tax-exempt status conferred government largesse on racially discriminatory institutions, thereby causing stigmatic injury to African-Americans. But this proposed injury was dismissed by the Court as a generalized grievance, unrelated to any injury the plaintiffs had suffered. As the Court noted, third parties generally have no cognizable interest in the amount another taxpayer pays to the IRS.

A variant of Diagram 4 nicely captures the problem in *Lujan v. Defenders of Wildlife*.<sup>20</sup> There, the public interest group Defenders of Wildlife brought suit to compel federal agencies to consult with one another about the environmental impact of certain overseas development projects. Defenders of Wildlife sued the Department of the Interior, which had recently concluded that no duty of consultation about environmental impact attached to projects that the United States was helping to fund overseas. Defenders invoked the citizen suit provisions of the Endangered Species Act, arguing that its members had studied the habitat of both the Asian elephant and the Nile crocodile, two species that appeared to be threatened by the proposed developments. If the development projects were approved without consultation, the projects might produce an avoidable impact on habitat. We can depict the litigation as in Diagram 5:

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18. *See id.* at 756.

19. *Id.* at 758–59.

20. 504 U.S. 555 (1992).

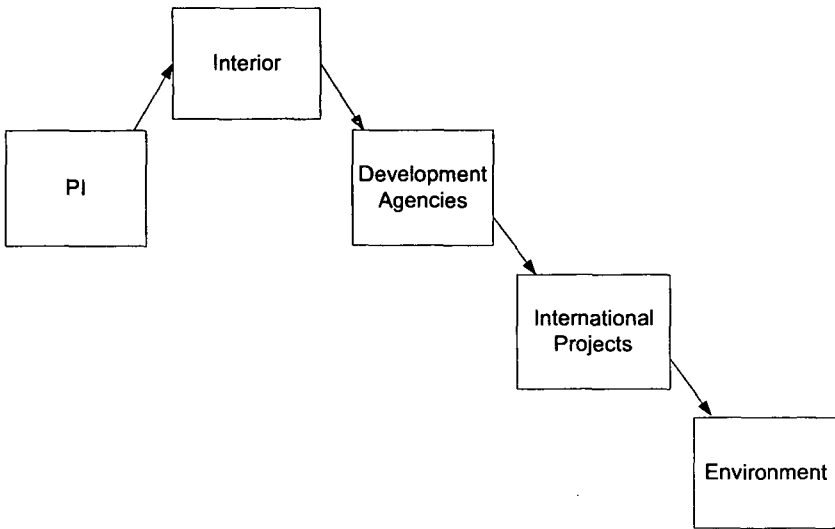


DIAGRAM 5

Diagram 5 seeks to convey the notion that the litigation was doubly derivative. It rested on the view that required consultations between the Department of Interior and the overseas development agencies would lead to consideration of the environmental impact of the projects, and that such consideration, in turn, would alter the impact of the projects on the species in question. The Court concluded that the plaintiffs had failed to show the requisite injury by connecting themselves more closely to the study of the animals in the wild. In addition, a plurality found this chain of inferences too speculative to support standing, and it also rejected the notion that the citizen suit provision could provide decisive support for standing when the requisite injury and redressability prongs of the analysis were otherwise difficult to establish. In the end, the Court refused to give effect to the ESA's citizen-suit provision on Article III grounds.

The Court has backed away from the broadest implications of the *Lujan* decision in subsequent cases. In *Federal Election Commission v. Akins*,<sup>21</sup> the Court confronted an attempt on the part of a group of voters to compel the Federal Election Commission (FEC) to regulate the American Israel Public Affairs Committee (AIPAC) as a "political committee" within the meaning of federal election law.<sup>22</sup> The voters sought information that AIPAC would have to disclose (lists of donors, contributions, and expenditures) if it were so regulated by the FEC. The FEC opposed regulation, and argued that the voters lacked standing. In analyzing the issue, the Court found that the plaintiffs had satisfied the injury requirement by showing that a decision to regulate would

21. 524 U.S. 11 (1998).

22. *See id.* at 13–14.

produce information valuable to their roles as informed citizens and voters. As for causation and redressability, the Court found that a decision in the voters' favor could lead the FEC to reconsider its regulatory stance. Although the Court acknowledged that the FEC would retain discretion to decline to regulate AIPAC even if the plaintiffs succeeded on the statutory issue, such retained discretion did not foreclose a finding of redressability. Thus, the Court defined success not in terms of immediate disclosure of information but in terms of altering the internal agency processes in ways that might produce a different regulatory outcome down the road.<sup>23</sup> It's fair to say that this focus on the pragmatic operation of internal agency processes, rather than real-world effects, represents an important shift away from the approach in *Lujan*.

Professor Sunstein has made much of the manner in which the Court frames the injury in criticizing its standing doctrine.<sup>24</sup> Sunstein notes, for example, that in *Regents of the University of California v. Bakke*,<sup>25</sup> Alan Bakke could not necessarily establish that he would have been admitted to medical school but for the University's decision to set aside a block of positions for minority applicants.<sup>26</sup> The Court overcame that problem by concluding that Bakke had suffered an injury to his right to compete in an admissions process untainted by racial discrimination. Sunstein suggests that other plaintiffs might work around standing problems by similarly re-characterizing their claims in terms that emphasize injuries to fair process values.<sup>27</sup> Thus, in *Allen v. Wright*, perhaps the plaintiffs could have avoided dismissal by characterizing their injuries as the loss of an opportunity to participate in the desegregation of school systems unaffected by the distorting effect of unlawful tax deductions.

But as the diagram below suggests, *Allen v. Wright* and *Regents of the University of California v. Bakke* differ fundamentally in terms of the nature of the litigation. In *Allen*, the plaintiffs were engaged in agency-forcing litigation as depicted in Diagram 4. In *Bakke*, by contrast, the plaintiff sued the University directly, challenging its program of racial set-asides. Diagram 6 depicts that situation.

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23. *See id.* at 19–26.

24. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1464–69 (1988).

25. 438 U.S. 265 (1978).

26. Sunstein, *supra* note 24, at 1465.

27. *Id.* at 1465–66.

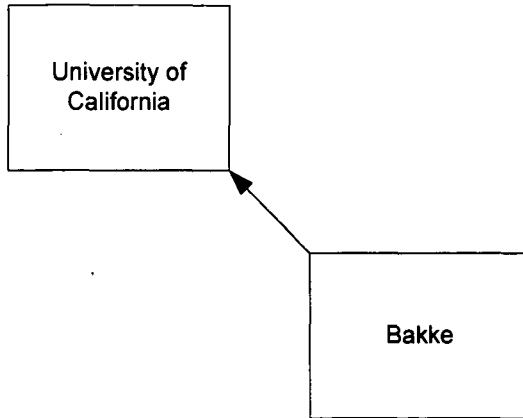


DIAGRAM 6

One can thus distinguish *Allen* and *Bakke* in terms of whether the plaintiff was suing the wrongdoer directly (*Bakke*) or was suing an agency to compel it to regulate a third party more stringently (*Allen*). Careful framing of the nature of the injury, as Professor Sunstein suggests, may help more in the context of direct litigation (*Bakke*) than in derivative litigation (*Allen*).

One final wrinkle informs standing analysis: whether or not, in a case that one might otherwise characterize as a generalized grievance, Congress has provided the plaintiff with an explicit right to sue. No such right had been provided in either *Allen* or *Bakke*; the decision about whether to recognize standing was one the Court had to make without the benefit of congressional guidance. By contrast, Congress had included citizen suit provisions in the statutes involved in both *Lujan*<sup>28</sup> and *Akins*.<sup>29</sup> Thus, the striking feature of the *Lujan* decision was its decision to ignore citizen suit provisions in concluding that the plaintiffs could not establish the minimum elements of Article III standing.

Beneath the surface of these cases lies a debate over the proper role of agencies in a Constitution that imagines only three branches of government: Congress, the Executive, and the judiciary. Diagram 7 depicts the debate over the control of federal agencies:

28. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–72 (1992).

29. See *FEC v. Akins*, 524 U.S. 11, 19 (1998).

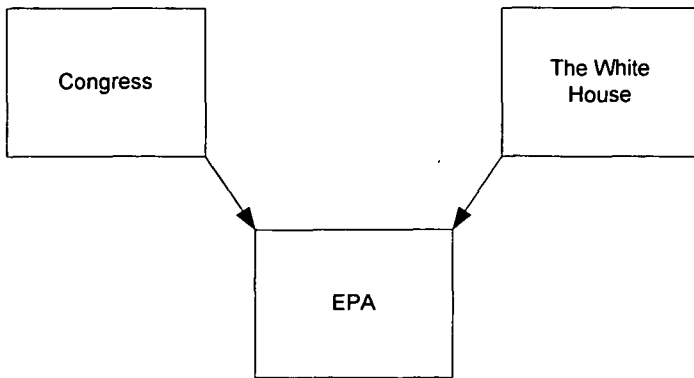


DIAGRAM 7

As Diagram 7 suggests, both Congress and the Executive Branch play important roles in overseeing the administration of agency policy. Congress controls the purse strings<sup>30</sup> and can redefine the agency mission through amendments to the organic statute.<sup>31</sup> Budget hearings and hearings into the proposed confirmation of agency officials can provide a forum in which Congress can either nudge or compel agencies to act in line with congressional preferences. Similarly, the Executive Branch and White House have a good deal of oversight: the President appoints the top officials of agencies, subject to the advice and consent of the Senate,<sup>32</sup> and can in many cases direct the operation of the agency or department if he chooses to do so.

Agency capture issues may help to explain why Congress includes citizen suit provisions in the laws that create new agencies. With standing to sue the agency if it goes too far, regulated industries have an obvious place at the table when the agency officials sit down to fashion, say, environmental standards. Who complains if the agency regulates too laxly? In theory, the task of avoiding lax regulations falls to the agency itself, but Congress may worry that agency officials have gotten too cozy with the firms they regulate.<sup>33</sup> Public interest groups may counter the tendency toward agency capture by overseeing the regulatory process.<sup>34</sup> In this way, the decision of Congress to include

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30. U.S. CONST. art. I, § 7, cl. 1.

31. See Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 918 (2008) (discussing how amendments were made to the FDA's organic statute "to make clear" what Congress wanted).

32. U.S. CONST. art. II, § 2, cl. 2.

33. The Bush-era scandal in the Interior Department provides a defining, if perhaps not representative, example of agency officials getting too cozy with regulated industry. See Charlie Savage, *Sex, Drug Use, and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 11, 2008, at A1.

34. See Mark Seidenfeld & Janna Satz Nugent, "The Friendship of the People": Citizen Participation in Environmental Enforcement, 73 GEO. WASH. L. REV. 269, 302 (2005).

citizen suit provisions in the statute can be seen as a way of assuring interest groups a place at the regulatory table.<sup>35</sup> Interest groups can sound the alarm, and invite more pointed congressional oversight, if regulations grow too lax.

Although the Court has generally upheld the power of Congress to confer a degree of independence on federal agencies, some scholars have argued that such independence violates the Constitution's insistence on a unitary Executive. Out of the unitary-executive debate has come a suggestion that Article III standing doctrine must take account of the separation of powers and the role of the Executive Branch under Article II.<sup>36</sup> On this view, only the Executive Branch can determine how vigorously or laxly to enforce particular federal laws.<sup>37</sup> The Court has traced this executive power of enforcement discretion to the Take Care Clause, the provision in Article II that directs the President to take care that the laws be faithfully executed.<sup>38</sup> Thus, in *Allen v. Wright*, the Court invoked the Take Care Clause in questioning whether citizens can be permitted through litigation to seek a re-structuring of the apparatus the Executive Branch uses to fulfill its enforcement obligations.<sup>39</sup> Similarly, in *Lujan*, Justice Scalia highlighted the Take Care Clause as part of his argument that Congress lacks power to invest private citizens with the authority to assume the President's law enforcement obligations.<sup>40</sup> Diagram 8 depicts this strong vision of executive primacy as follows:

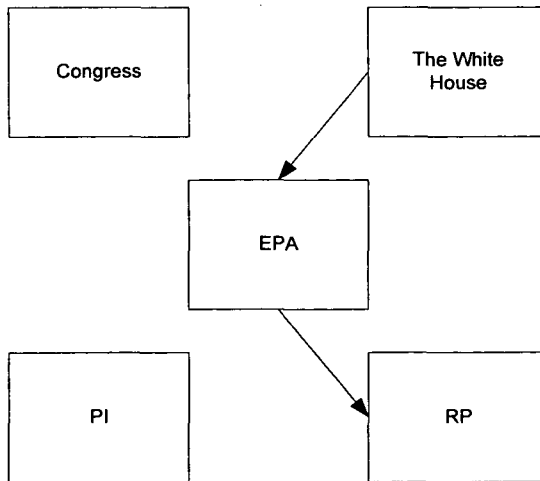


DIAGRAM 8

35. *Id.*

36. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 211–12 (1992).

37. See *id.* at 212.

38. *Id.*

39. 468 U.S. 737, 761 (1984).

40. 504 U.S. 555, 577 (1991).

Although this is not the place finally to resolve the debate over the Take Care Clause and executive primacy in the enforcement of the law, it may not be amiss to point out that Congress has long used its legislative power to broaden or narrow the scope of executive discretion.<sup>41</sup> When Congress narrows executive discretion and creates rights, those who believe that they enjoy such rights can make a fairly strong argument that the federal courts should be open to hear their claims.<sup>42</sup>

How then to make sense of the Court's most recent derivative standing decision, *Massachusetts v. Environmental Protection Agency*?<sup>43</sup> Diagram 9 below attempts to do so:

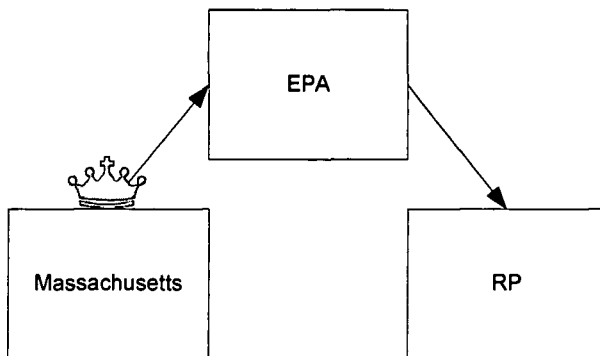


DIAGRAM 9

The state of Massachusetts brought suit to compel the Environmental Protection Agency to regulate the greenhouse gas emissions that contribute to global warming. In finding that the state had standing to bring the action, the Court placed special emphasis on two factors: (1) that Congress had included states among those who could bring suit to protect procedural interests, and (2) that the state had important sovereign interests to protect (such as the coastal areas that rising sea levels would inundate). In response to the argument that EPA's regulations might have little discernible impact on the Massachusetts shoreline, the Court noted that the state's quasi-sovereign status entitled it to special solicitude in standing analysis. Thus, while the Court continued to require a showing of causation and redressability, the standards it applied were somewhat relaxed. Perhaps the addition of a small crown to the depiction of the state—a crown that represents its status as a sovereign—would help to

41. See Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 789 (1984) ("Congress can confer more or less policymaking authority on the Executive by legislating at a high level of generality or by enacting detailed legislation that leaves very little discretion to the Executive.").

42. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

43. 549 U.S. 497 (2007).

clarify why this particular form of agency-forcing litigation was permitted to proceed.

#### CONCLUSION

Standing doctrine often reflects the Court's effort to balance the respective roles of regulatory agencies, the parties they regulate, and the many different publics they seek to serve. I have found students can keep these complex relationships better in mind if they see them depicted graphically on the blackboard or in a slide presentation. By triangulating standing, professors can provide visual learners with a stronger grasp of this confusing chapter of jurisdictional law.