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THE CLAIMS AND LIMITS OF JUSTICE SCALIA'S TEXTUALISM: LESSONS FROM HIS STATUTORY STANDING DECISIONS

Michael P. Healy[†]

Two decisions written by Justice Scalia near the end of his life, Lexmark International Inc. v. Static Control Components, Inc., 572 U.S. 479 (2014), and Thompson v. North American Stainless, LP, 562 U.S. 170 (2011), reshaped the law of statutory standing and provide important insights into the claims and limits of textualism. These decisions have reshaped the law of statutory standing in three ways. They have changed the legal terminology; expanded the range of cases to which the zone-of-interests test applies; and changed the application of the zone-of-interests test when it applies to determine statutory standing. This Article discusses these changes and addresses how they relate to the textualist method of statutory interpretation. The current significance of textualism, which emerged after Justice Scalia became an Associate Justice of the United States Supreme Court, has led Justice Kagan, the appointee of President Barak Obama, to state that “we’re all textualists now.”¹

The first Part of the Article briefly describes the critical role that Justice Scalia played in the emergence of textualism as a central method for the interpretation of statutes. The Article then considers the rhetoric and legal craft employed by Justice Scalia to accomplish important changes in the law of statutory standing. These

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¹ Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:28 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/3U59-BKQZ>].

changes concern the respective roles that the legislature and the judiciary play in determining who may bring claims in federal court pursuant to the Administrative Procedure Act (APA) and other federal statutes. The second Part of the Article discusses how Justice Scalia quickly and decisively reshaped the nomenclature that the Court applies to this area of the law. By changing the legal terminology from prudential standing to statutory standing, Justice Scalia framed his claim that Congress had sole authority to define the parties who had a right to bring a claim in federal court when the party has Article III standing. Locating this authority in the legislature, rather than in the judiciary's exercise of its own prudential power, reinforced Justice Scalia's claim that his textualist method ensured legislative supremacy and limited opportunities for judicial activism.

*Despite this claim, Justice Scalia's other two changes to the law of statutory standing had the effect of constraining by judicial interpretation the scope of statutory standing relative to statutory text and legislative intent. First, Justice Scalia interpreted statutory text that was extremely broad in the legislative grant of statutory standing and intended to allow an action by any party aggrieved by a claimed government illegality to grant statutory standing only to a party who met the zone-of-interests test. Justice Douglas, writing for the Court in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), identified a wholly new test for what he called "prudential standing," a test that we know as the zone-of-interests test. Justice Douglas defined this test in order to expand the scope of statutory standing that Congress had provided when it enacted § 702 of the APA. Justice Scalia, writing for the Court in two decisions more than forty years later, pragmatically employed the ahistorical, court-contrived zone-of-interests test to limit the scope of statutory standing defined by Congress in clear statutory text that broadly provided for statutory standing. These decisions added to the legal error that Justice Douglas committed in *Data Processing*, this time in the service of reducing the scope of standing compared to what Congress had intended and provided in the clear language of the statute. Justice Scalia's decisions undermine the broader scope of statutory standing defined by Congress in particular statutes.*

The second change in statutory standing law was that Justice Scalia, having determined for the Court that the zone-of-interests test would determine whether a party had statutory standing, concluded that the zone-of-interests test, when applied outside the APA context, necessitated a showing that the claimed illegality proximately caused the injury to the person bringing the claim. This proximate cause requirement is not found in statutory text or in legislative history. Rather, Justice Scalia decided that Congress had to be understood to have imposed a proximate cause limit when the zone-of-interests test applies and, at least for now, when the claim is not brought under the APA.

This interpretive result is claimed to follow from the prescription of the legislature, rather than the prudent activism of the judiciary. Contrary to this claim of textualism, the decisions in these cases show that Justice Scalia was willing and able to be an activist judge when the text enacted by Congress did not align with his own views of good policy. The decisions in these cases show the limits of textualism and provide strong reason to doubt the claims that that the preeminent advocate of textualism made about the virtues of that interpretive method.

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INTRODUCTION

This Article describes and assesses Justice Antonin Scalia's decisions in *Lexmark International, Inc. v. Static Control Components, Inc.*,² and *Thompson v. North American Stainless, LP*.³ These decisions have reshaped the law of statutory standing in three ways. They have changed the legal terminology; they have expanded the range of cases to which the zone-of-interests test applies; and they have changed the application of the zone-of-interests test when it applies to determine statutory standing. This Article discusses these changes and addresses how they relate to the textualist method of statutory interpretation. The current significance of textualism, which emerged after Justice Scalia became an Associate Justice of the United States Supreme Court, has led Justice Kagan, the appointee of President Barak Obama, to state that, "we're all textualists now."⁴

The first Part of the Article briefly describes the critical role that Justice Scalia played in the emergence of textualism as a central method for the interpretation of statutes.⁵ This Part describes the rule of law and externality claims presented on behalf of textualism.⁶ It also discusses how textualism has cast doubt on some canons of construction⁷ and has rejected the other two conventional approaches to statutory interpretation, intentionalism and purposivism.⁸

The Article then considers the rhetoric and legal craft employed by Justice Scalia to accomplish important changes in the law of statutory standing. These changes concern the respective roles that the legislature and the judiciary play in determining who may bring claims in federal

² 572 U.S. 118 (2014).

³ 562 U.S. 170 (2011).

⁴ See Kagan, *supra* note 1.

⁵ See *infra* Part I.

⁶ See *infra* notes 20–28 and accompanying text.

⁷ See *infra* note 43 and accompanying text.

⁸ See *infra* notes 31–42 and accompanying text.

court pursuant to the Administrative Procedure Act (APA)⁹ and other federal statutes. The second Part of the Article discusses how Justice Scalia quickly and decisively reshaped the nomenclature that the Court applies to this area of the law. Justice Scalia maintained that the new terminology reflected a doctrinal focus on the legislature and the legislature's own determination of the parties authorized to bring an action in federal court claiming a statutory violation. Although the changed nomenclature appears to conform to the claims of textualism, the change should, instead, be seen as a disingenuous effort to present, as legislatively determined, standards for statutory standing that the Court itself has defined, without attending to either the statutory text or the intent of Congress.¹⁰

The third Part of the Article discusses how Justice Scalia's decisions for the Court have significantly expanded the scope of application of the zone-of-interests test. In order to provide context for understanding Justice Scalia's unlikely embrace of this modern test for APA standing, the Article provides the historical background of statutory standing before the APA and that statute's codification of that body of law. The Article then describes how Justice Douglas, writing for the Court in *Association of Data Processing Service Organizations, Inc. v. Camp*,¹¹ identified a wholly new test for what he called "prudential standing," a test that we know as the zone-of-interests test. Justice Douglas defined this test in order to *expand* the scope of statutory standing that Congress had provided when it enacted § 702 of the APA. This Part then discusses how Justice Scalia, writing for the Court in two decisions, pragmatically employed the ahistorical, court-contrived zone-of-interests test to *limit* the scope of statutory standing defined by Congress, by ignoring clear statutory text that broadly provided for statutory standing. These decisions added to the legal error that Justice Douglas committed in *Data Processing*, this time in the service of reducing the scope of standing compared to what Congress had intended and provided in the clear language of the statute. Justice Scalia's decisions undermine the broader scope of statutory standing defined by Congress in particular statutes. The broad application of the zone-of-interests test that Justice

⁹ Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551 *et seq.* (2006)).

¹⁰ See *infra* notes 74–81 and accompanying text.

¹¹ 397 U.S. 150 (1970).

Scalia has championed reflects neither the text of the relevant statutes nor the intent of the enacting legislatures.

The fourth Part of the Article considers how Justice Scalia, having defined the zone-of-interests test as the default test that determines statutory standing for all federal statutes, regardless of date of enactment, began the work of narrowing the scope of that test by finding a new limit to the parties who are arguably within the zone of interests. It begins by discussing how the Court's zone-of-interests test came to be applied as the Court moved to a textualist interpretive approach. The test had emerged when the Court was comfortable identifying interests arguably protected by a statute based on legislative intent, discernable through text and legislative history, and on statutory purpose. Indeed, the test appeared to limit standing only when legislative intent indicated to the Court that Congress had not intended to protect a particular interest. The textualist method, which rejects legislative intent as a basis for interpretation, had to rely on only inference and effect to determine arguably protected interests. The method therefore had the effect of expanding statutory standing using the zone-of-interests test. In this context, Justice Scalia determined that a new limit, a proximate cause requirement, had been enacted by Congress as part of an understanding of the background law. Justice Scalia accordingly found a legal limit to narrow the statutory standing defined by Congress, notwithstanding extremely broad statutory text and the absence of an indication that Congress did not intend to protect the interests presented by the plaintiffs.

This new proximate cause limit may allow the Court's conservative members to narrow the scope of statutory standing in cases when a textualist applying the traditional zone-of-interests test would likely be unable to limit statutory standing beyond the limits defined by Article III. In short, Justice Scalia sought to narrow the scope of statutory standing by defining new limits that he claimed Congress should be understood to have enacted in the absence of having previously enacted text sufficiently clear to overcome the Court's new presumptive meaning of text. This judicial activism contrasts starkly with the broad claims of the objectivism of the textualist method and the claim of the new nomenclature that the statutory standing doctrine does not include a prudential component and merely follows Congress's directions regarding the parties who may bring a statutory claim. Finally, the Court's rationale supporting this proximate cause limit also appears to

apply to the APA itself, so it may be only a matter of time before the proximate cause limit on the zone-of-interests test also applies in the APA context.

I. JUSTICE SCALIA AND THE CLAIMS OF TEXTUALISM

Beginning in the 1980s,¹² Justice Scalia emerged as the leading advocate of the textualist approach¹³ to the interpretation of statutes.¹⁴ For Justice Scalia, “The text is the law, and it is the text that must be observed.”¹⁵ This textualist interpretive approach has affected the American legal system to such a great extent that Justice Elena Kagan, appointed by Democratic President Barack Obama, has reportedly stated that everyone now engaged in statutory interpretation is a textualist.¹⁶

¹² See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 363 (1994) (“The rapid spread of textualism among the Justices no doubt owes something to Justice Scalia’s powers of persuasion. Since 1987, Justice Scalia has been conducting what amounts to a continuous seminar on the virtues of textualism and evils of legislative history.”).

¹³ See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 347 (2005) (“One of the leading approaches [to statutory interpretation], championed by Justices Scalia and Thomas on the Supreme Court and by Judge Easterbrook on the Seventh Circuit, goes by the name of ‘textualism.’”).

¹⁴ See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (“By emphasizing the centrality of the words of the statute, Justice Scalia brought about a massive and enduring change in American law.”); JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 49 (1st ed. 2010) (“Near the close of the twentieth century, a group of self-described ‘textualist’ judges—most prominently, Justice Antonin Scalia and Judge Frank Easterbrook—challenged many of the key assumptions defining traditional purposivism.”); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4 n.5 (2001) (“The Court’s leading textualists are Justices Scalia and Thomas.”) (citations omitted).

¹⁵ ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 22 (1997)

¹⁶ See Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017) (“Text matters. The text of a law is the law. As Justice Kagan recently stated, ‘we’re all textualists now.’”).

Justice Scalia is, of course, the legal figure who has been credited with shaping this change in the practice of statutory interpretation.¹⁷ Although disagreement continues about the degree to which courts remain willing to ground the interpretation of a statute in interpretive sources outside of the statute's text,¹⁸ modern American statutory interpretation is now greatly concerned with the words of the statute.¹⁹

¹⁷ See Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2054 (2017) ("No one had a more important impact on the modern theory and practice of statutory interpretation than did Justice Scalia."); Kavanaugh, *supra* note 16, at 1910 ("Statutory interpretation has improved dramatically over the last generation, thanks largely to Justice Scalia. Justice Scalia brought about a massive and enduring change in statutory interpretation."); Merrill, *supra* note 12 and accompanying parenthetical; WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 337 (1993) (characterizing Justice Scalia as "the most prominent textualist on the contemporary Supreme Court").

¹⁸ See Gluck, *supra* note 17, at 2057–58 ("Thanks to the great intellectual efforts of textualists, purposivists, and pragmatists over the past three decades, a basic equilibrium has emerged. All sides have significantly moderated and largely have converged on a middle-ground, text-focused position that, for most practitioners and judges (even if not for Justice Scalia himself), includes recourse to broader context, including, in disciplined fashion (again largely thanks to Justice Scalia), legislative materials.") (citations omitted). With specific regard to the use of legislative history, all Members of the Court, except Justice Scalia, joined an opinion in which Justice White, writing for the Court, stated:

As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (citations omitted).

¹⁹ See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT, & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 592 (5th ed. 2014) ("First, and foremost, the text is now, more than it was 30 years ago, the central inquiry at the Supreme Court level . . ."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 36 (2006) ("Textualism's adherents and nonadherents often opt to caricature and talk past one another, rather than to acknowledge just how thoroughly modern textualism has succeeded in dominating contemporary statutory interpretation. Although some scholars on both sides have noticed the shift in judicial attitudes discussed above, neither side of the debate has been eager to acknowledge just how much we have all become textualists.") (citations omitted); see also Merrill, *supra* note 12, at 355 ("By far the most important story from the Supreme Court on the

Justice Scalia's advocacy of textualism is grounded in several claimed values that he and other commentators have associated with the textualist approach. First, the claim is made that textualism is consistent with judicial neutrality and restraint.²⁰ By employing textualism, a court is simply finding the law that the *legislature* has defined in the text of the statute.²¹ The necessary limit on the use of legal sources outside of the text constrains courts from imposing their own view of good law onto the statutes enacted by Congress.²² Notwithstanding this claim of judicial neutrality and restraint, Justice Scalia had recognized that even a restrained court would have to ignore clear text in some unusual circumstances.²³

Related to the claim that textualism is neutral is the claim that the content of law can and should be understood by a reading of the statutory text with the words receiving their ordinary meaning.²⁴ This

statutory interpretation front these days is the emergence of the textualist method associated with Justice Scalia.”).

²⁰ See Scalia, *supra* note 15, at 23 (“A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably to contain all that it fairly means.”); Gluck, *supra* note 17, at 2071 (“Justice Scalia often insisted, as part of his formalist defense of textualism, that textualism’s rules are value-neutral.”) (footnote omitted); Kavanaugh, *supra* note 16, at 1909 (“What did Justice Scalia stand for as a judge? It’s not complicated, but it is profound. The judge’s job is to interpret the law, not to make the law or make policy. So read the words of the statute as written.”).

²¹ See MANNING & STEPHENSON, *supra* note 14, at 49 (“Modern textualists emphasize that judges must respect the *legislative compromise* embedded in the statutory text.”).

²² See Molot, *supra* note 19, at 26 (“[T]extualists believed that by emphasizing statutory text over statutory purposes, and by excluding legislative history in particular, they could narrow [judicial] leeway.”) (citation omitted); *id.* at 27 (“a judge who favors statutory purposes over statutory text risks not only confusing his own policy views with those of Congress, but also violating the Constitution by making federal law outside of the constitutionally prescribed lawmaking procedures.”) (citations omitted); *id.* at 26 (“Textualists were not content merely to accept the leeway inherent in interpretation, but rather sought to cabin it.”).

²³ See Kavanaugh, *supra* note 16, at 1910 (“When the text is clear, the Court says, follow the text *unless the text is absurd or unless the text is overridden by some clear statement canon* of interpretation. That is a neutral principle: It is not pro-business or pro-labor, pro-manufacturer or pro-environment, pro-plaintiff or pro-defendant. And Justice Scalia is largely to thank for that.”) (emphasis added). Justice Scalia’s view of the absurd result exception and clear statement rules will be discussed later in this article. See *infra* notes 42, 182 and accompanying text (absurd result rule); note 238 and accompanying text (clear statement rule).

²⁴ See *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (“Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so

formalist approach²⁵ to the content of statutory law has roots in the understanding of the United States as a nation of laws,²⁶ as well as in the legal realism of Oliver Wendell Holmes.²⁷ Textualists claim the interpretive approach ensures that statutory law is objective and external,²⁸ depriving a court of the opportunity to impose its own subjective understanding of the law by the subterfuge of interpretation.²⁹ For this reason, Justice Scalia expressed concerns about judges employing substantive canons to determine the interpretive result, notwithstanding the apparent meaning of the statute's text.³⁰

In addition to advocating the textualist approach to interpreting statutes, Justice Scalia rejected intentionalism and purposivism, the

determined.") (citation omitted)); SCALIA, *supra* note 15, at 22 ("The text is the law, and it is the text that must be observed.").

²⁵ See Gluck, *supra* note 17, at 2056 ("And yet the core of Justice Scalia's textualism, as he himself presented it, was supposed to be formalism.").

²⁶ See SCALIA, *supra* note 15, at 17 ("It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.").

²⁷ See Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

²⁸ *Id.* at 418–19 ("[W]e ask[] not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.").

²⁹ See Gluck, *supra* note 17, at 2064 ("[T]extualists, including Justice Scalia, lean heavily on textualism's purported formalism to argue textualism's normative superiority They also cling to formalism as the justification for why it is acceptable to forgo an interpretive approach that is more tethered to the way Congress actually operates and drafts; the idea being that congressional reality is impossible to decipher and so we trade off the value of that democratic connection to Congress in exchange for the 'rule of law' values and the benefits that a formalist regime brings.").

³⁰ See SCALIA, *supra* note 15, at 27–28 ("[P]resumptions and rules of construction that load the dice for or against a particular result increase the unpredictability, if not the arbitrariness of judicial decisions."); Gluck, *supra* note 17, at 2071 ("Justice Scalia's most important writing on statutory interpretation, his 1989 Tanner Lecture, expressed discomfort with the policy canons. He called them 'thumb on the scales' and 'dice-loading' rules. He was willing to use them nonetheless—likely because he had to, because text cannot answer every question."); ESKRIDGE ET. AL., *supra* note 19, at 746 ("[O]f the 27 majority opinions Justice Scalia authored construing federal workplace law statutes between 1986 and 2002, he invoked textual canons one-third of the time as part of his reasoning but never invoked substantive canons.").

other two conventional approaches to statutory interpretation. Chief Justice Rehnquist, the conservative jurist who served as Chief Justice for much of Justice Scalia's term on the Court,³¹ believed that a court's interpretation of a statute is determined by "the intent of Congress."³² Justice Stevens, a jurist generally viewed as a liberal, agreed with this intentionalist methodology.³³

Despite the appeal of intentionalism across the range of political ideology, Justice Scalia rejected the approach.³⁴ He believed that the intentionalist approach, which accepts that legislative history may properly inform the interpretation of statutes because that history provides evidence of congressional intent, violates rule of law principles³⁵ by authorizing courts to interpret statutes subjectively and determine the content of law based on their own policy preferences.³⁶

³¹ See Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v. Hart*, 35 STAN. J. INT'L L. 231, 232–35 (1999).

³² *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 253–54 (1979) (Rehnquist, J., dissenting) ("Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the words of the statute and, if they are unclear, then to the statute's legislative history."); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress.").

³³ *Griffin*, 458 U.S. at 578 (Stevens, J., dissenting) ("In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand."). Justice Brennan, another liberal Justice also supported an intentionalist approach to interpreting a statute. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting) ("[T]he judiciary[s] . . . proper role in construing statutes . . . is to interpret them so as to give effect to congressional intention.").

³⁴ See SCALIA, *supra* note 30 and accompanying parenthetical; Michael P. Healy, *Means and Ends in City of Arlington v. FCC: Ignoring the Lawyer's Craft to Reshape the Scope of Chevron Deference*, 76 U. PITT. L. REV. 391, 414 (2015) (discussing Justice Scalia's rejection of legislative intent as a basis for interpretation).

³⁵ *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 122 (2007) (Scalia, J., dissenting) ("The only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail. This case will live with *Church of the Holy Trinity* as an exemplar of judicial disregard of crystal-clear text. We must interpret the law as Congress has written it, not as we would wish it to be.").

³⁶ See SCALIA, *supra* note 15, at 18 ("[Y]our best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law.") (emphases in original); *id.* at 36

Justice Scalia also rejected intentionalism because he believed that the approach subverted the Constitution's bicameralism and presentment requirements.³⁷ Another of his critiques of intentionalism is that it gave an advantage to litigants who had the means to study and present legislative history to controvert the easier to determine, apparent meaning of the statute's text.³⁸

("In any major piece of legislation, the legislative history is extensive, and there is something for everybody."); *see also Zuni*, 550 U.S. at 118 (Scalia, J., dissenting) ("Why should we suppose that in matters more likely to arouse the judicial libido—voting rights, antidiscrimination laws, or environmental protection, to name only a few—a judge in the School of Textual Subversion would not find it convenient (yea, *righteous!*) to assume that Congress *must* have meant, not what it said, but what he knows to be best?"); *Conroy v. Aniskoff*, 507 U.S. 511, 518 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends. If I may pursue that metaphor: The legislative history of § 205 of the Soldiers' and Sailors' Civil Relief Act contains a variety of diverse personages, a selected few of whom—its 'friends'—the Court has introduced to us in support of its result. But there are many other faces in the crowd, most of which, I think, are set against today's result."); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 777 (1995) (Justices Scalia and Thomas are among those who "are so hostile [to legislative history] that any reference to legislative history in a majority opinion is virtually certain to draw a rebuke in a concurring or dissenting opinion").

³⁷ *Zuni*, 550 U.S. at 117 (2007) (Scalia, J., dissenting) ("Legislative history can never produce a 'pellucidly clear' picture of what a law was 'intended' to mean, for the simple reason that it is never voted upon—or ordinarily even seen or heard—by the 'intending' lawgiving entity, which consists of both Houses of Congress and the President (if he did not veto the bill). . . . [T]he system of judicial amendatory veto over texts duly adopted by Congress bears no resemblance to the system of lawmaking set forth in our Constitution.") (internal citations omitted).

³⁸ *Aniskoff*, 507 U.S. at 518–19 (Scalia, J., concurring) ("[T]he Court feels compelled to demonstrate that its holding is consonant with legislative history, including some dating back to 1917—a *full quarter century* before the provision at issue was enacted. That is not merely a waste of research time and ink; it is a false and disruptive lesson in the law. It says to the bar that even an 'unambiguous [and] unequivocal' statute can never be dispositive; that, presumably under penalty of malpractice liability, the oracles of legislative history, far into the dimmy past, must always be consulted. This undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers."); *Zuni*, 550 U.S. at 119 (Scalia, J., dissenting) ("I do not believe that what we are sure the Legislature *meant* to say can trump what it *did* say. Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated. I think it terribly unfair to expect that the two rural school districts that are petitioners here should have pored over some 30 years of regulatory history to divine Congress's 'real' objective (and with it the 'real' intent that a majority of Justices would find

Justice Scalia also rejected the purposivist approach to interpreting statutes. Warren Burger, who was serving as Chief Justice of the United States when Justice Scalia joined the Court, had written for the Court not long before Justice Scalia became a Justice that “[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.”³⁹ Consistent with the textualist approach,⁴⁰ Justice Scalia rejected the idea that the purpose of a statute could trump the meaning of its text.⁴¹

In addition to rejecting two accepted methods for interpreting statutes, textualists have challenged other traditional interpretive devices that had the effect of limiting the effect of statutory text. Textualists, for example, have expressed reservations about applying the absurd results rule, because it allows an activist court to ignore the plain meaning of the text when a judge decides that the meaning is an absurd result that Congress could not have intended.⁴² For similar reasons, Justice Scalia

honest and true). To be governed by legislated text rather than legislators’ intentions is what it means to be ‘a Government of laws, not of men.’”).

³⁹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

⁴⁰ See MANNING & STEPHENSON, *supra* note 14, at 49 (“textualists build on the premise of legislative supremacy to argue that judges must hew closely to the meaning of a clear statutory text even when the result contradicts the statute’s apparent purpose, however, derived.”).

⁴¹ See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991) (Scalia, J.) (“As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.”) (citation omitted).

⁴² See ESKRIDGE ET AL., *supra* note 19, at 585 (textualists believe that “the normative rule of law advantages of textualism would be compromised by a subjective, absurd-results exception: because ‘absurdity’ is in the mind of the beholder, the law would lose some degree of predictability and objectivity”). See generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). Judge Frank Easterbrook, a prominent textualist, has written that “[t]he dearth of modern ‘substantive absurdity’ decisions is readily understandable. Scholars as well as judges have recognized that a power to fix statutes substantively would give the Judicial Branch too much leeway to prefer its views about what makes for ‘good’ laws over those of the Legislative Branch.” *Jaskolski v. Daniels*, 427 F.3d 456, 462 (7th Cir. 2005) (Easterbrook, J.) (citations omitted).

Justice Scalia, however, did recognize the absurd result exception to the rule that the court define the law based on the meaning of the text. See *Green v. Bock Laundry Mach. Co.*,

was concerned about the use of substantive canons that would yield interpretive results that were inconsistent with the meaning of the statute's text.⁴³

Despite Justice Scalia's claims about the values of the textualist method, there is reason to have serious doubts that the approach, at least as applied by Justice Scalia, actually conforms to the formalist values of objectivity, externality, and rule of law.⁴⁴ In considering how Justice Scalia applied his interpretive approach to the law of statutory standing, important limits on his interpretive approach become evident.

II. SETTING THE TABLE WITH NEW NOMENCLATURE: FROM JUDICIAL PRUDENCE TO LEGISLATIVE DIRECTIVE

The modern era of statutory standing traces back to the Supreme Court's decision in *Association of Data Processing Service Organizations, Inc. v. Camp*.⁴⁵ There, companies providing data processing services claimed that the Comptroller of the Currency acted unlawfully when he permitted banks to provide data processing services to their customers. The Court considered the scope of standing available to claimants seeking review under the APA.⁴⁶ Justice Douglas, writing for a majority of the Court, believed that a party seeking to bring an action in federal court had to demonstrate standing beyond the requirements imposed by Article III. In Justice Douglas's view, non-Article III standing

490 U.S. 504, 527–30 (1989) (Scalia, J., concurring); *see also* ESKRIDGE ET AL., *supra* note 19, at 584–85 (noting that Justice Scalia accepted the absurd result exception to textualism).

⁴³ *See* SCALIA, *supra* note 15, at 28 (“To the honest textualist, all of these preferential rules and presumptions are a lot of trouble.”).

⁴⁴ *See* Gluck, *supra* note 17, at 2076 (“Justice Scalia created the field of modern statutory interpretation, but he, like the textualism he entrenched across the U.S. courts, was never really formalist. There are too many rules; the rules lack predictable means of application; they lack a clear legal status or even a defined source; and they are as activist as pragmatism and purposivism, albeit in a different way.”); *see also id.* at 2061 (“[S]tatutory interpretation, as Scalia himself developed it, now more closely resembles a multifactor test than a formalist regime. A field with more than one hundred potentially applicable doctrines, with no order ranking those doctrines, and no clear rule about when individual doctrines are triggered and in what order they are triggered, effectuates an intense methodological pluralism.”) (citation omitted).

⁴⁵ 397 U.S. 150 (1970).

⁴⁶ The Court's decision on the merits of this question is discussed *infra* Section III.A.

requirements were defined by a combination of limits determined by the judiciary and the legislature. The former were defined narrowly to reflect judicial restraint and the latter were defined generously by contemporary statutes:

Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court for its own governance, have involved a “rule of self-restraint.” *Barrows v. Jackson*, 346 U.S. 249, 255. Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise. *Muskrat v. United States*, 219 U.S. 346.

Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved “persons” is symptomatic of that trend.⁴⁷

Justice Brennan dissented from this view that the standing doctrine extended beyond the minimum requirements of Article III.⁴⁸ His position was that a plaintiff has standing once the party has met the requirements of Article III,⁴⁹ and that the only remaining question was whether Congress had provided for reviewability of the matter,⁵⁰ a question that necessitated a statutory determination whether Congress had authorized the claimant to bring the action.⁵¹

The Supreme Court returned to this question of non-Article III standing in an action brought under the APA in *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*.⁵² The Court

⁴⁷ *Data Processing*, 397 U.S. at 154.

⁴⁸ *See id.* at 167 (Brennan, J., dissenting). He was joined by Justice White in his dissent.

⁴⁹ *See id.* at 168.

⁵⁰ *See id.* at 169 (“Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency action. But the canvass is made, not to determine standing, but to determine an aspect of reviewability, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff.”).

⁵¹ *See id.* at 169 n.2 (“Reviewability has often been treated as if it involved a single issue: whether agency action is conclusive and beyond judicial challenge by anyone. In reality, however, reviewability is equally concerned with a second issue: whether the particular plaintiff then requesting review may have it. Both questions directly concern the extent to which persons harmed by agency action may challenge its legality.”) (citation omitted).

⁵² 498 U.S. 517 (1991).

adhered to the approach it had taken to standing in *Data Processing*: a claimant must demonstrate that it meets both the Article III test for injury in fact and the APA's zone-of-interests test.⁵³ When he explained the function of the zone-of-interests test in *Bennett v. Spear*,⁵⁴ Justice Scalia focused on the prudential limit explanation and the role of the judiciary in defining the limit:

In addition to the immutable requirements of Article III, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Like their constitutional counterparts, these judicially self-imposed limits on the exercise of federal jurisdiction, are founded in concern about the proper—and properly limited—role of the courts in a democratic society; but unlike their constitutional counterparts, they can be modified or abrogated by Congress. Numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.⁵⁵

Justice Scalia specifically referred to the requirement of “prudential standing” in his analysis.⁵⁶

When the Court later decided a prominent case addressing a plaintiff's standing to bring an action under the APA, the Court reiterated the use of the term “prudential standing” to describe the doctrinal question:

We have interpreted § 10(a) of the APA to impose a prudential standing requirement in addition to the requirement, imposed by Article III of the Constitution, that a plaintiff have suffered a sufficient injury in fact. For a plaintiff to have prudential standing under the APA, “the interest sought to be protected by the

⁵³ *Id.* at 523.

⁵⁴ 520 U.S. 154 (1997).

⁵⁵ *Id.* at 162 (quotations and citations omitted).

⁵⁶ *Id.* at 161, 163.

complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question.”⁵⁷

The Court used this terminology of prudential standing throughout the opinion.⁵⁸ Justice O'Connor, writing for the four dissenters in the case, also used the prudential standing terminology in her opinion, emphasizing that the doctrine is grounded in a need for judicial restraint even when construing the scope of standing defined by Congress:

Prudential standing principles “are ‘founded in concern about the proper—and properly limited—role of the courts in a democratic society.’” The zone-of-interests test is an integral part of the prudential standing inquiry, and we ought to apply the test in a way that gives it content. The analysis the Court undertakes today, in my view, leaves the zone-of-interests requirement a hollow one.⁵⁹

In the Roberts Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,⁶⁰ Justice Kagan, writing for an eight-Justice majority, again employed the prudential standing terminology in deciding whether the plaintiff met the APA's zone-of-interests test.⁶¹

Justice Scalia, however, brought this long- and well-accepted⁶² use of the prudential standing nomenclature to an end with his 2014 decision, *Lexmark International, Inc. v. Static Control Components, Inc.*⁶³ Justice Scalia, writing for a unanimous Court, specifically opined about the proper terminology to be used when considering whether a party meeting the irreducible minimum requirements of Article III

⁵⁷ Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998) (citations omitted).

⁵⁸ See, e.g., *id.* at 485, 486, 490.

⁵⁹ *Id.* at 518 (O'Connor, J., dissenting) (citations omitted).

⁶⁰ 567 U.S. 209 (2012).

⁶¹ See *id.* at 224–26.

⁶² The use of the “prudential standing” nomenclature was not limited to Supreme Court decisions. Legal scholarship also followed the Court's terminology. See, e.g., Eugene Kontorovich, *What Standing is Good For*, 93 VA. L. REV. 1663, 1670 (2007) (“Beyond this constitutional ‘core’ of standing are ‘prudential’ standing rules invented by the courts themselves. Congress can presumably override these ‘self-imposed limits.’”) (citation omitted).

⁶³ 572 U.S. 118 (2014).

standing⁶⁴ may bring a statutory claim in federal court. Justice Scalia began the Court's analysis of this issue "by clarifying the nature of the question at issue in this case,"⁶⁵ which "[t]he parties' briefs treat[ed] . . . as one of 'prudential standing.'"⁶⁶ The Court, notwithstanding its own continued use of the terminology, found "that label misleading."⁶⁷

Justice Scalia acknowledged that the parties had good reason to claim that the Court's cases had delineated a "prudential" branch of standing,⁶⁸ that incorporated "the zone of interests" limit on parties that were able to assert a claim in court.⁶⁹ He also acknowledged that limiting a party's ability to bring a claim for "prudential" reasons "is in some tension with" the Court's view that a federal court is obligated to adjudicate "cases within its jurisdiction."⁷⁰

Justice Scalia opined that, even though the Court had used the term "prudential standing" to describe the test for a plaintiff's ability to assert a statutory claim,⁷¹ the issue must properly be viewed as determined by statute, rather than a court's exercise of prudent restraint: "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."⁷²

The Court then held that the proper inquiry in determining whether a claimant who has Article III standing may bring a claim in federal court is entirely a question of (textualist) statutory construction:

⁶⁴ See *id.* at 125–26 ("Lexmark does not deny that Static Control's allegations of lost sales and damage to its business reputation give it standing under Article III to press its false-advertising claim, and we are satisfied that they do.").

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *id.* at 125–29.

⁷⁰ *Id.* at 125–26.

⁷¹ See *id.* at 127.

⁷² *Id.* (citations omitted); see *id.* ("As Judge Silberman of the D.C. Circuit recently observed, "'prudential standing' is a misnomer' as applied to the zone-of-interests analysis, which asks whether 'this particular class of persons ha[s] a right to sue under this substantive statute.'" (citation omitted).

[W]e ask whether [the claimant] has a cause of action under the statute. That question requires us to determine the meaning of the congressionally enacted provision creating a cause of action. In doing so, we apply traditional principles of statutory interpretation. We do not ask whether in our judgment Congress should have authorized Static Control's suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because "prudence" dictates.⁷³

To reiterate, the question of statutory standing is resolved by "determin[ing] the meaning of the congressionally enacted provision creating a cause of action."⁷⁴ Justice Scalia accordingly concluded that labeling this issue as one of "statutory standing" "is an improvement over the language of 'prudential standing,' since it correctly places the focus on the statute."⁷⁵ He also opined, however, that the statutory standing label "is misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional *power* to adjudicate the case."⁷⁶

In short, Justice Scalia used his majority opinion in *Lexmark International* as the occasion for rejecting a doctrine that had allowed courts to define limits on a potential plaintiff's ability to bring a statutory claim in federal court. Rather than permit the judiciary to define prudential limits on the right to sue, the Court's reshaped doctrine purports to focus the question of the right to sue on the limits, if any, defined by the legislature once the minimum requirements of Article III are met.⁷⁷ The Court maintained that the judiciary must

⁷³ *Id.* at 127–29 (citations omitted). *See also id.* at 128 ("[T]his case presents a straightforward question of statutory interpretation: Does the cause of action in § 1125(a) extend to plaintiffs like Static Control?").

⁷⁴ *Id.*

⁷⁵ *Id.* at 128 n.4. The statutory standing label is one that Justice Scalia had applied previously. *See Holmes v. Sec. Inv'r Protection Corp.*, 503 U.S. 258, 286 (1992) (Scalia, J., concurring) ("The ultimate question here is statutory standing . . .").

⁷⁶ *Lexmark Int'l*, 572 U.S. at 128 n.4 (citations and internal quotations omitted).

⁷⁷ *See* James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEGAL STUD. 85, 87 (2017) ("Justice Scalia worked to eliminate prudential

neither expand nor contract the cause of action that Congress has defined in “the congressionally enacted provision creating a cause of action.”⁷⁸ The change made by Justice Scalia is sensible in the light of his commitment to textualism.⁷⁹ His claim was that the judiciary is bound to accept and apply the scope of the cause of action defined by the statute, as long as the plaintiff has Article III standing.⁸⁰ As a textualist, his claim was that the judiciary may not subjectively (or prudentially) constrain the scope of standing defined by the legislature.⁸¹

As we will see in the rest of this Article, Justice Scalia’s new nomenclature set the table for important changes in the substantive law of statutory standing. The new nomenclature permitted Justice Scalia to explain these changes to be not the result of the activism of a prudently restrained judiciary, but rather the result of the legislature providing plain textual directives to the judiciary, which would simply implement those directives.⁸² As will be discussed, there is great irony in Justice Scalia’s claim that a party’s ability to sue will be determined objectively by Congress’s grant of the right to bring a claim, rather than by a court’s subjective judgment about the parties that may properly bring an action in federal court.

III. ESTABLISHING THE NEW STATUS QUO: THE EXPANDED AND ANACHRONISTIC SCOPE OF APPLICATION OF THE FLAWED AND CONSTRAINED APA ZONE-OF-INTERESTS TEST

Having described how Justice Scalia changed the terminology applicable to the question of the parties that may properly bring a statutory action in federal court once the minimum requirements of Article III standing are met, we turn to a consideration of how Justice Scalia reshaped the scope of application of the zone-of-interests test and

doctrines, preferring in the absence of perceived constitutional limits to define the right of individuals to sue by reference to the text of applicable legislation.”) (citation omitted).

⁷⁸ *Lexmark Int’l*, 572 U.S. at 128.

⁷⁹ See *supra* Part I.

⁸⁰ See *Lexmark Int’l*, 572 U.S. at 128–29.

⁸¹ See *supra* notes 63–76 and accompanying text.

⁸² See Pfander, *supra* note 77, at 99 (“*Lexmark* ends the doctrine of sub-constitutional prudential standing, transforming the inquiry into a merits-based assessment of the right to sue.”).

wrote the decision in which the Court held that the zone-of-interests test presumptively defines the scope of statutory standing under all federal statutes. This Part begins with a summary of the improbable source of the zone-of-interests test and how Justice Douglas created that test to expand the scope of statutory standing. The Article then discusses two decisions written by Justice Scalia in which the Court has defined the broad presumptive scope of application of the zone-of-interests test. In these decisions, Justice Scalia interpreted the statutes as providing statutory standing for parties that met the zone-of-interests test, notwithstanding statutory text that included an extremely broad grant of statutory standing and was enacted prior to the Court's initial definition of the zone-of-interests test.

A. *The Roots of Statutory Standing and the Improbable Source of the Zone-of-Interests Test*

The sources of the law of statutory standing extend back into the nineteenth century and involve common law, rather than statutory, controversies. In *Mayor of Georgetown v. Alexandria Canal Co.*, the Court held that several private party plaintiffs did not have a right to pursue a common law public nuisance claim because the plaintiffs did not allege a special injury.⁸³ The common law public nuisance claim, in the Court's view, could be asserted by a private party only when the private party is able to allege and then prove that the party suffered a special injury.⁸⁴

The Court opined that a plaintiff must demonstrate a legally protected right in order to bring a court action against a defendant. A defendant is not subject to a plaintiff's claim in court when the defendant has caused injury to the plaintiff but has not acted unlawfully, as well as when the defendant's unlawful conduct has injured the plaintiff but the plaintiff has no legal right that has been harmed.⁸⁵ Even assuming that the defendant's conduct was a public nuisance, a private party has a common law right to a judicial remedy only when the

⁸³ *Georgetown v. Alexander Canal Co.*, 37 U.S. 91 (1838).

⁸⁴ *See id.* at 99.

⁸⁵ *See id.* at 97.

private party suffered a special injury, that is, an injury different from the injury suffered by the public.⁸⁶ Even though *Alexandria Canal* is a common law case, the case is an early example of the principle that a party may bring a judicial action only when the law, in this case the common law, has recognized that the plaintiff has a legal interest that may be protected by a court. Although determining whether a party had a legal interest did not involve deciding whether the defendant had engaged in a public nuisance, the legal interest determination did necessitate a substantive decision whether the private plaintiff's injury was special under common law standards.

More than forty years after *Alexandria Canal*, the Court returned to the issue of a plaintiff's ability to bring a court action claiming common law liability in *New Orleans, Mobile & Texas Railway Co. v. Ellerman*.⁸⁷ Ellerman, the plaintiff in the action, held a contract with the City of New Orleans to operate a wharf.⁸⁸ Ellerman brought the action against the defendant railroad claiming the railroad was unlawfully permitting a wharf to be operated on land leased from New Orleans, and that this competing wharf was injuring Ellerman's business.⁸⁹ The claimed unlawfulness was the railroad's breach of contractual conditions on the use of the land that the railroad had leased.⁹⁰ The claim was therefore based on the common law, rather than a statute.⁹¹

The Court concluded that the plaintiff had no legal right to assert a common law claim:

The only injury of which [plaintiff] can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself

⁸⁶ See *id.* at 100.

⁸⁷ 105 U.S. 166 (1881).

⁸⁸ See *id.* at 168–69.

⁸⁹ See *id.* at 169–70.

⁹⁰ See *id.*

⁹¹ See *id.* at 173–74.

injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed.⁹²

The only American decision that the Court cited in support of this principle was *Alexandria Canal*.⁹³ The Court accordingly held that the plaintiff's action had to be dismissed.⁹⁴

Just over forty years after *Ellerman*, the Court began deciding the series of cases that defined the modern understanding of statutory standing in administrative law, the understanding that Congress codified when it enacted the APA. In *Edward Hines Yellow Pine Trustees v. United States*,⁹⁵ Justice Brandeis authored a brief opinion for a unanimous Court. Edward Hines brought an action claiming that the Interstate Commerce Commission (ICC) had acted illegally when it issued an order that cancelled penalty charges that had been imposed to prevent undue detention of railroad equipment during the emergency conditions resulting from World War I.⁹⁶ Edward Hines was a large manufacturer and claimed that the cancellation of penalty charges was causing competitive injury because those charges had the effect of "severe[ly] handicap[ing]" the plaintiff's "rivals in business."⁹⁷

Justice Brandeis concluded that the plaintiff could not maintain the action because the ICC order had not caused any legal injury to the plaintiff and the plaintiff failed to pursue an action to redress the only legal injury it might have claimed:

[P]laintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals

⁹² *Id.* at 174

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 263 U.S. 143 (1923).

⁹⁶ *See id.* at 144–46.

⁹⁷ *Id.* at 146–48.

in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Plaintiffs' right is limited to protection against unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection. The correctness of those findings cannot be assailed here; among other reasons, because the evidence on which they were made is not before the Court.⁹⁸

By focusing on whether the plaintiff had suffered injury to a legally-defined right, the Court's reasoning in this statutory case was the same as its reasoning in the common law cases. The Court did not present the analytic basis for its holding that the statute did not provide the plaintiff with a legal right. The Court merely stated its conclusion that plaintiff lacked a legal right and therefore the ability to "maintain this suit."⁹⁹

One year later, in the *Chicago Junction Case*,¹⁰⁰ Justice Brandeis again wrote the opinion for the Court and decided whether the plaintiff had a right to bring an action claiming a statutory violation by the ICC. The ICC had issued an order authorizing the New York Central Railroad to purchase the stock of the Chicago River & Indiana Railroad and to lease the Chicago Junction Railway.¹⁰¹ Plaintiffs opposed the issuance of this order before the ICC and then brought the action in court.¹⁰² The plaintiff railroads claimed that the ICC order injured them because the New York Central, as owner of the rail lines around Chicago, would treat the New York Central favorably and would allow unequal, reduced access to them as competitors of the New York Central.¹⁰³ The statute permitted the transfer of control of the railways

⁹⁸ *Id.* at 148 (citations omitted).

⁹⁹ *Id.*

¹⁰⁰ 264 U.S. 258 (1924).

¹⁰¹ *See id.* at 318.

¹⁰² *See id.*

¹⁰³ *See id.* at 320 ("The plaintiffs are no longer permitted to compete with the New York Central on equal terms. A large volume of traffic has been diverted from their lines to those of the New York Central.").

only if the ICC approved the transfer agreement based on the ICC's determination "that the acquisition 'will be in the public interest.'"¹⁰⁴

The Court distinguished *Edward Hines* as involving an injury that was simply "the incident of more effective competition."¹⁰⁵ The Court found that the plaintiffs' injury in *Chicago Junction* was, rather, "injury inflicted by denying to the plaintiffs equality of treatment. To such treatment, carriers are, under the Interstate Commerce Act, as fully entitled as any shipper."¹⁰⁶ The Court concluded that the Transportation Act of 1920 granted to the plaintiffs "a special [legal] interest in the proposal to transfer the control to [the New York Central]."¹⁰⁷

Justice Sutherland, joined by Justices McReynolds and Sanford, dissented on the grounds that the plaintiffs had suffered only irremediable competitive injury as a result of the ICC order. The plaintiffs lacked a legal interest in the order:

¹⁰⁴ *Id.* at 263.

¹⁰⁵ *Id.* at 267. Justice Brandeis had written the opinion for the unanimous Court in *Edward Hines*. See *supra* note 93.

¹⁰⁶ *Chi. Junction*, 264 U.S. at 267 (citation omitted).

¹⁰⁷ *Id.* The Court's brief analysis of the source of the plaintiffs' legal interest was the following:

It is true that, before Transportation Act 1920, the Interstate Commerce Act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making the purchase. And by reason of a provision then contained in section 3 of the Interstate Commerce Act the purchase might have enabled the New York Central to exclude all other carriers from use of the terminals. But Transportation Act 1920 repealed that provision in section 3, it made provision for securing joint use of terminals, and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company.

Id. (citations omitted). The Court also concluded that the plaintiffs could proceed with their court action because they had participated as parties before the agency. See *id.* at 268 ("No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein."). This rationale does not address the fact that a party may have the right to participate as a party in an agency proceeding, but may lack Article III standing to bring a claim in court. See *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72 (D.C. Cir. 1999).

A private injury, for which the law affords no remedy, cannot be converted into a remediable injury, merely because it results from an act of which the public might complain. In other words, the law will afford redress to a litigant only for injuries which invade his own legal rights; and since the injuries here complained of are not of that character, and do not result from the violation of any obligation owing to the complainants, it follows that they are without legal standing to sue.¹⁰⁸

Justice Sutherland concluded that the 1920 Railway Act required the ICC to consider only the public interest, rather than the private interests of competing railroads, when deciding whether to approve a railway purchase.¹⁰⁹ Only a public party could bring a judicial action to protect the public interest.¹¹⁰ He also decided that the statute required equality of treatment only in the distribution of access to railway lines operated by entities other than by the owner itself. The use of additional lines by the owner company would mean that fewer lines would be available to lines operated by companies other than the owner. The statutory requirement of equal treatment applied only to the use of lines by non-owner operated companies.¹¹¹

Justice Sutherland's dissent illustrates how the Court's analysis of whether a statute has created a legal interest in a party implicates the merits of the underlying dispute. The legality of the order at issue in the *Chicago Junction Case* would likely turn on a court's view of the nature of the equality requirement defined by the statute. As we will see, Justice Douglas wished to separate the merits question from the statutory standing question when he defined the zone-of-interests test under the APA.¹¹²

¹⁰⁸ *Chi. Junction*, 264 U.S. at 272–73 (Sutherland, J., dissenting).

¹⁰⁹ *See id.* at 271.

¹¹⁰ *Id.* at 271–72 (“The complainants have no standing to vindicate the rights of the public, but only to protect and enforce their own rights. Redress for public grievances must be sought by public agents, not by private intervention.” (citations omitted)). In this regard, the dissent echoed the reasoning of the *Alexandria Canal* Court in the common law context. *See supra* notes 83–86 and accompanying text.

¹¹¹ *Chi. Junction*, 264 U.S. at 273–74.

¹¹² *See infra* notes 147–49 and accompanying text.

In 1933, the Court decided *ICC v. Oregon-Washington Railroad and Navigation, Co.*¹¹³ and began a second line of statutory standing decisions. This decision marked a turn by the Court away from the legal injury requirement and toward a determination of statutory standing based on Congress's express grant of a right of action. The Court held that a private party could continue to litigate its legal defense of an order issued by the ICC, after the ICC itself declined to appeal an adverse court decision, because Congress had enacted a provision that allowed legal action "by an aggrieved party."¹¹⁴ The Court decided that this provision had to be construed to allow pursuit of the action by a private party or the statutory provision would have no legal effect:

The statute clearly provides that, in the trial of the case, the intervening parties shall not be foreclosed by the action or nonaction of the Attorney General. Even though he concludes not to defend, they are permitted to do so. If, notwithstanding their defense, a decree goes against them and the United States, can it have been the purpose of Congress that the failure of the Attorney General to prosecute an appeal concludes such interveners? We think not. So to hold would render meaningless and superfluous section 2 of the act, which permits a review of the action of the court below 'if appeal to the Supreme Court be taken by an aggrieved party. . . .' The section can be given effect only by holding that an aggrieved party may challenge the decree not only to vindicate his own rights, but those of the United States as well. Congress evidently intended the Attorney General should represent and protect the interests of the United States as such, but should not at any stage control the litigation against the objection of the other parties and to their disadvantage, and that any aggrieved party might obtain a decree which the United States could have secured had it defended the action or prosecuted an appeal.¹¹⁵

¹¹³ *Interstate Commerce Comm'n v. Oregon-Washington R.R. & Navigation Co.*, 288 U.S. 14 (1933).

¹¹⁴ *Id.* at 26.

¹¹⁵ *Id.* at 25–26. The fact that a private party suffered actual aggrievement would have to be demonstrated in order to prove the required Article III standing.

Two aspects of the Court's decision are notable. First, the Court's interpretation is grounded fully on the statute's text. The Court employs the superfluity canon, which directs that a court should interpret a statute so that all of its provisions have legal effect.¹¹⁶ We will see that this canon has been notably employed¹¹⁷ and ignored¹¹⁸ in the Court's statutory standing jurisprudence.

Second, by focusing on the congressional grant of statutory standing to any "aggrieved party," the Court was able to focus on the consequences of the action being challenged (and whether the party was thereby aggrieved), rather than the legal rights protected by the statute, a determination that, as we have seen, may implicate the merits of the litigation.¹¹⁹

Five years later, the Court returned to the question of statutory standing in *Alabama Power Co. v. Ickes*.¹²⁰ There, Justice Sutherland, a dissenter in *Chicago Junction*,¹²¹ wrote the Court's opinion holding that the plaintiff could not bring a court action claiming that a federal agency had acted unlawfully when it issued loans to a competitor of the plaintiff. Justice Sutherland concluded that the injury suffered by the plaintiff, economic damage caused by a competitor who was able to supply energy because of the federal loans it had received, was a consequence of lawful competition¹²² and did not result from the "invasion of some legal or equitable right."¹²³ He distinguished *Chicago Junction* on the ground that the claimants in that case had "a special interest recognized by certain provisions contained in [the 1920 Transportation Act], and under section 212 of the Judicial Code, which gave any party to a proceeding before the commission the right to

¹¹⁶ *Id.* at 14.

¹¹⁷ In addition to the application of the canon here, see *infra* notes 132–34 and accompanying text.

¹¹⁸ See *infra* notes 140–42 and accompanying text.

¹¹⁹ See *infra* notes 148–49 and accompanying text. The decision is reminiscent of the National Credit Union case, discussed *infra* note 282. In each case, the conservative majority views statutory standing broadly and is thereby able to decide that the agency sought to exercise excessive regulatory power.

¹²⁰ 302 U.S. 464 (1938).

¹²¹ *Chicago Junction Case*, 264 U.S. 258 (1924).

¹²² See *Alabama Power*, 302 U.S. at 479–80.

¹²³ *Id.* at 483. This language is very similar to the Court's language in *Ellerman*. See *supra* note 87.

become a party to any suit wherein the validity of an order made in the proceeding is involved.”¹²⁴ Justice Sutherland accordingly decided that statutory standing for the plaintiff was not available under either of the two possible bases for statutory standing: the claimant could show neither a legal interest nor an express grant of statutory standing by Congress. Justice Sutherland believed that Alabama Power’s lack of statutory standing was controlled by the Court’s decision in *Ellerman*, which had held that mere competitive injury does not give rise to a right to bring a court action.¹²⁵ *Ellerman* was, as we have seen, a case involving a common law action.¹²⁶

Two years after *Alabama Power*, the line of the Court’s pre-APA statutory standing decisions ended with *FCC v. Sanders Bros. Radio Station*.¹²⁷ The case allowed the Court to elaborate on the two alternate rationales it had developed for determining whether a claimant had statutory standing. The claimant had claimed that the FCC’s issuance of a license had injured it because the agency had allowed a competitor to operate a radio station in an area where the claimant offered radio services. The FCC was authorized to issue licenses when the issuance of the license was in the public interest.¹²⁸ The FCC, relying on the line of cases requiring a claimant to demonstrate a legal injury in order to have statutory standing, argued that Sanders Bros. suffered no legal injury because the FCC may not refuse issuance of a license on the ground that granting a license would cause economic injury to a competitor.¹²⁹

The Court agreed with the FCC that the statute did not require the agency to consider competitive effects when deciding whether to grant a

¹²⁴ *Alabama Power*, 302 U.S. at 479–80.

¹²⁵ See *id.* at 483–84 (“A reading of the [*Chicago Junction*] case in connection with the dissenting opinion shows very clearly that, but for express statutory provision creating a different rule, the decision in the *Ellerman* Case would have been controlling.”).

¹²⁶ See *supra* notes 90–91 and accompanying text. The Court employed the same reasoning to reach the same conclusion in *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118 (1939). There, the Court concluded that power companies lacked standing, because they could not demonstrate that “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.” *Id.* at 137–38.

¹²⁷ 309 U.S. 470 (1940).

¹²⁸ See *id.* at 471–72.

¹²⁹ See *id.* at 472–73.

license.¹³⁰ The FCC argued further that, because the statute did not protect the company's right to broadcast without competition, the competitive injury it was claiming was not a legal interest that gave the company statutory standing to sue.¹³¹ The FCC argument against statutory standing was that "absence of right implies absence of remedy."¹³²

The Court rejected this argument by focusing on the text of the statute, which granted a right of appeal to a court "by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."¹³³ Employing reasoning similar to *Oregon-Washington R.R.*,¹³⁴ the Court decided that it had to give legal effect to this statutory provision:

Congress had some purpose in enacting section 402(b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.¹³⁵

Sanders Bros. thus confirms that a party has statutory standing to bring a claim in two circumstances: (1) the statute provides a legal right to the claimant that the claimant believes has been violated; and (2) Congress has expressly granted a right of review to a party aggrieved by the claimed statutory violation.¹³⁶ The first circumstance will often involve inferential reasoning about the interests protected by a statute, while the second circumstance will involve an express provision of the statute.

¹³⁰ See *id.* at 476 ("We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license.").

¹³¹ See *id.* at 476-77.

¹³² *Id.* at 477.

¹³³ *Id.* at 476-77 (quoting section 402(b)(2) of the Communications Act).

¹³⁴ See *supra* notes 113-15 and accompanying text. See also *Sanders Bros.*, 309 U.S. at 477 n.9 (citing *Interstate Commerce Comm'n v. Oregon-Washington R.R. & Navigation Co.*, 288 U.S. 14, 23-25 (1933)).

¹³⁵ *Id.* at 477.

¹³⁶ In either circumstance, the claimant would also have to demonstrate Article III standing. See *supra* Part II.

The next critical step in the development of the modern law of statutory standing was the enactment in 1946 of the APA.¹³⁷ In that statute, Congress addressed the issue of a person's statutory standing by including the following language: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . ."¹³⁸ Although the language of the text is hardly perfect, it does make it clear by the use of the disjunctive, "or," that the "entitle[ment] to judicial review" may be grounded in either "suffering legal wrong" or being "adversely affected or aggrieved by agency action within the meaning of a relevant statute." The last phrase is unfortunately obscure, and would have been far clearer if, for example, it had read, "adversely affected or aggrieved by agency action if a relevant statute grants review to a party in such a case."

The text of section 702 accordingly recognized statutory standing to challenge an agency's action for either of the two reasons that had been recognized by the Supreme Court for such standing: a party suffering legal injury or a party "aggrieved" by an agency action and granted statutory standing by Congress to sue by another statute. The legislative history of the APA confirms this understanding of the intent of those who developed the statute:

The Attorney General advised the Senate Committee on the Judiciary of his understanding that [the first sentence of APA § 702] was a restatement of existing law. More specifically he indicated his understanding that [the first sentence of APA § 702] preserved the rules developed by the courts in such cases as *Alabama Power . . . Chicago Junction . . .* and *Sanders Bros. . . .* This construction of [the first sentence of APA § 702] was not questioned or contradicted in the legislative history.¹³⁹

In sum, if one considers statutory standing under the text and intent of the APA, the statute simply codified the understanding of

¹³⁷ See Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551 *et seq.* (2006)).

¹³⁸ 5 U.S.C. § 702 (2018).

¹³⁹ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 96 (1947).

statutory standing that had emerged through the nineteenth and the first half of the twentieth century. That understanding was that a party had statutory standing to sue when a statute gave the party a legal interest that the government had injured or when a statute gave any aggrieved party the right to sue. Therefore, section 702 had not granted statutory standing itself, but looked to statutory standing being determined by a statute either creating a legal interest or granting standing expressly to any aggrieved party.¹⁴⁰

In *Data Processing*,¹⁴¹ the Supreme Court decided the question of statutory standing under the APA. A group of companies providing data processing services brought a court action against the Comptroller of the Currency, claiming that the Comptroller had acted unlawfully when he permitted banks to provide data processing services to their customers.¹⁴²

The court of appeals had affirmed the district court decision that the plaintiff lacked statutory standing. The Supreme Court quoted the reasoning of the court of appeals, which was the following:

“(A) plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, . . . (2) a legal interest by reason of statutory protection, . . . or (3) a “public interest” in which Congress has

¹⁴⁰ Justice Scalia had strongly suggested in *Lujan v. National Wildlife Federation* this view that the APA, properly understood, had simply restated the law of statutory standing that had been accepted at the time of its enactment:

[T]he party seeking review under § 702 must show that he has “suffer[ed] legal wrong” because of the challenged agency action, or is “adversely affected or aggrieved” by that action “within the meaning of a relevant statute.” Respondent does not assert that it has suffered “legal wrong,” so we need only discuss the meaning of “adversely affected or aggrieved . . . within the meaning of a relevant statute.” As an original matter, it might be thought that one cannot be “adversely affected or aggrieved within the meaning” of a statute unless the statute in question uses those terms (or terms like them)—as some pre-APA statutes in fact did when conferring rights of judicial review. *See, e.g.*, Federal Communications Act of 1934, § 402(b)(2), 48 Stat. 1093, as amended, 47 U.S.C. § 402(b)(6) (1982 ed.). We have long since rejected that interpretation, however, which would have made the judicial review provision of the APA no more than a restatement of pre-existing law.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990) (emphasis omitted).

¹⁴¹ 397 U.S. 150 (1970).

¹⁴² *See id.* at 151.

recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public”¹⁴³

Before considering Justice Douglas’s reaction to each of these three bases for statutory standing, it may be helpful to relate them to the law that the Court had developed up until the time of the APA. The first court of appeals rationale did not relate to statutory standing, but instead reflected the rationale of the Court’s earliest common law cases, in which the Court held that a party had standing only when the common law gave the person the right to assert a claim by recognizing the party’s legal interest.¹⁴⁴ Its second rationale resulted from the application of that common law rule to statutory cases and held that a plaintiff had standing to sue under a statute only when the statute gave the party a legal interest.¹⁴⁵ The third rationale of the court of appeals was based on Congress allowing broad review by granting any aggrieved party the right to bring an action.¹⁴⁶

Despite the well- and long-established bases for the court of appeals analysis, Justice Douglas quickly rejected that court’s view of the statutory standing requirement. Regarding the legal interest or legal injury basis for statutory standing, Justice Douglas stated twice that this inquiry into the existence of a legal interest is *not* a proper basis for recognizing a party’s statutory standing to sue.¹⁴⁷ As we have seen, Justice Douglas’s position is inconsistent with a long line of Supreme Court decisions. Justice Douglas also concluded that the third test, “which rests on an explicit provision in a regulatory statute conferring standing and is commonly referred to in terms of allowing suits by ‘private attorneys general,’ is inapplicable to the present case.”¹⁴⁸ Justice Douglas is stating here his conclusion that the statute that the plaintiff

¹⁴³ *Id.* at 152–53 (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 406 F.2d 837, 842–43 (8th Cir. 1969)).

¹⁴⁴ *See supra* text accompanying notes 83–94.

¹⁴⁵ *See supra* text accompanying notes 100–07, 120–25.

¹⁴⁶ *See supra* text accompanying notes 113–19, 127–39.

¹⁴⁷ *See* *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 n.1 (1970) (“[T]he existence or non-existence of a ‘legal interest’ is a matter quite distinct from the problem of standing.”) (citation omitted), 153 (“The ‘legal interest’ test goes to the merits. The question of standing is different.”).

¹⁴⁸ *Id.* at 153 n.1.

claimed had been violated did not grant *Sanders Bros.* statutory standing to any person aggrieved by the claimed violation of law. He provided no explanation for this inapplicability. Presumably, the explanation was that the statute governing the activities of the Comptroller did not include a provision granting a right to judicial review for “any aggrieved party.” The fact that Justice Douglas stated a conclusion about the inapplicability of *Sanders Bros.* standing indicates that such a provision would have provided statutory standing for the plaintiff, if the statute at issue had included such a provision. Justice Douglas therefore did not decide in *Data Processing* that the APA had affected the ability of a party to assert *Sanders Bros.* standing when a statute provided such standing for the plaintiff.

Having rejected the conventional tests for statutory standing employed by the court of appeals, Justice Douglas fashioned his own new test out of whole cloth and defined the law of statutory standing post-APA: “The question of standing is different. It concerns, apart from the ‘case’ or ‘controversy’ test, the question 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. Thus the Administrative Procedure Act grants standing to a person ‘aggrieved by agency action within the meaning of a relevant statute.’”¹⁴⁹ This reading of § 702 of the APA conflicts with the understanding of the Attorney General’s Manual, which had understood the provision to be looking to another statutory provision for the grant of statutory standing, rather than to § 702 itself.¹⁵⁰ Moreover, as an interpretation of the text of § 702, the interpretation conflicts directly with the superfluity canon employed by the Court in

¹⁴⁹ *Id.* at 153 (citation omitted). In addition to its impact on a plaintiff’s standing to bring a statutory claim, Justice Douglas’s decision in *Data Processing* regarding the application of the zone-of-interests test had important consequences for prudential standing in constitutional cases. See *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982) (“Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. . . . [T]he Court has required that the plaintiff’s complaint fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’”). This effect emerged despite the fact that *Data Processing* did not involve a question of standing to bring a constitutional claim and Justice Douglas’s statement about constitutional claims was dictum.

¹⁵⁰ See *supra* note 139 and accompanying text.

*Oregon-Washington R.R.*¹⁵¹ Justice Douglas's reading renders superfluous the first part of the first sentence of the provision. The first sentence of § 702 is the following: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . ."¹⁵² To hold that the second part of the section itself grants standing to any person "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"¹⁵³ means that the first part, which grants standing to "[a] person suffering legal wrong because of agency action,"¹⁵⁴ is legally superfluous and without effect. A person who suffers legal wrong by an agency action would always be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

Justice Douglas presented his view that Congress was extending the scope of statutory standing to challenge agency action: "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend."¹⁵⁵ Justice Douglas's opinion is, however, a consequence of the Court's own interest in expanding the scope of statutory standing, rather than congressional action in the APA. His conclusion is a simple *ipse dixit* and accounts for neither the statute's text nor the legislative history. His interpretive approach foreshadows Justice Scalia's decisions to apply the zone-of-interests test in non-APA cases many years later.¹⁵⁶

¹⁵¹ 288 U.S. 14, 25–26 (1933) (quoted *supra* note 115).

¹⁵² 5 U.S.C. § 702 (2018).

¹⁵³ *Data Processing*, 397 U.S. at 153.

¹⁵⁴ 5 U.S.C. § 702.

¹⁵⁵ *Data Processing*, 397 U.S. at 154. Justice Douglas gave two examples of cases allowing parties standing to challenge government action. *See id.* at 154–55 (discussing *Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77 (1958); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968)). In each of those two cases, however, the competitor seeking to challenge government action would traditionally have been understood to have a legal interest protected by a statute. The cases are unexpected examples of the "trend" described by Justice Douglas. Better examples would have involved the congressional grant of statutory standing to any person aggrieved by agency action.

¹⁵⁶ *See infra* notes 167–69 and accompanying text.

The *Data Processing* Court completed its analysis by concluding without additional reasoning that § 4 of the Bank Service Corporation Act of 1962¹⁵⁷ “arguably brings a competitor within the zone of interests protected by it.”¹⁵⁸ The tone of the Court’s analysis reflected a desire to ensure that statutory standing would be widely available, allowing interested, aggrieved parties to secure judicial review of agency actions.¹⁵⁹ Justice Douglas’s decision, however, does not necessarily ensure the broadest possible scope of statutory standing. To be sure, the group of claimants that the Court concluded had been granted statutory standing by the APA was broader than the group that would have been able to demonstrate a legal injury under the reasoning of *Alabama Power*.¹⁶⁰ In that respect, the decision expanded standing. However, the grant of standing by the APA, as construed by Justice Douglas, was narrower than Congress’s grant of statutory standing to “any aggrieved party,” as the Court construed that exceptionally broad grant of standing in *Sanders Bros*. Such a party would have had statutory standing as long as the party met the minimum standing requirements of Article III.¹⁶¹ To be sure, Justice Douglas stated that this “private attorneys general standing,” to use his term, was not applicable to the plaintiff in *Data Processing*.¹⁶² Therefore, he did not claim to be changing the scope of standing granted by a statutory provision like the

¹⁵⁷ Pub. L. No. 87-856, 76 Stat. 1132 (codified at 12 U.S.C. § 1864) (“No bank service corporation may engage in any activity other than the performance of bank services for banks.”). This provision was replaced in 1982. See Pub. L. No. 97-320, 96 Stat. 1469, Tit. VII, § 709.

¹⁵⁸ *Data Processing*, 397 U.S. at 156.

¹⁵⁹ Justice Brennan’s dissent, joined by Justice White, argued that the Court should determine standing by considering only the constitutional requirement of injury in fact and by rejecting analysis of statutory standing. See *id.* at 167–68 (Brennan, J., dissenting). Justice Brennan opined that, “[b]y requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests.” *Id.* at 168 (citation omitted). Justice Brennan’s characterization of the legal interest requirement as “discredited” simply ignores the fact that the provision at issue, § 702, specifically established legal injury as one of the two alternative bases for statutory standing. The enacting Congress, which had the authority to define the scope of statutory standing, apparently did not share Justice Brennan’s view that the doctrine was “discredited.” *Id.*

¹⁶⁰ See *Alabama Power Co. v. Ickes*, 302 U.S. 464, 483 (1938).

¹⁶¹ See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940).

¹⁶² *Data Processing*, 397 U.S. at 153 n.1.

one in *Sanders Bros.* Nevertheless, Justice Douglas never explained how language that yielded the broadest possible statutory standing in *Sanders Bros.* provided, in the context of the APA's § 702, statutory standing only for the smaller class of those arguably within the zone of interests.¹⁶³ He provided the conclusion, but none of the reasoning.

In sum, after *Data Processing*, statutory standing to bring an action under the APA required the plaintiff to demonstrate that the party was arguably within the zone-of-interests protected by the provision that the claimant contended had been violated by the agency.

B. *Justice Scalia and the Increased Scope of Application of the Zone-of-Interests Test*

Given that the zone-of-interests test was established by an activist Court reaching its interpretive conclusion without consideration of the text and the legislative history of § 702, it is unsurprising that Justice Scalia expressed skepticism about the test.¹⁶⁴ Moreover, Justice Scalia had been the leading jurist who supported a narrow view of the scope of

¹⁶³ Judge Fletcher has commented that the *Data Processing* decision also originated the injury in fact requirement for constitutional standing, a requirement that Justice Douglas would have been dismayed to fix limits on Article III standing. See William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 279 (2013) (“[T]he Court tells us that a plaintiff must have suffered ‘injury in fact’ in order to have Article III standing. This requirement originated in Justice Douglas’s 1970 opinion in *Association of Data Processing Service Organizations v. Camp*. Prior to 1970, the Court had never insisted that a plaintiff have ‘injury in fact.’ I am fairly confident that Justice Douglas was not trying to make standing more difficult for plaintiffs. But ever since Justice Douglas articulated the injury-in-fact requirement, the Court has used it as a way of denying, rather than granting, standing to plaintiffs.”) (citation omitted).

¹⁶⁴ See *Data Processing*, 397 U.S. at 153.

constitutional standing.¹⁶⁵ He believed that broad standing undermines the unitary executive and gives courts too much power.¹⁶⁶

Because the zone-of-interests test had been defined by the Court in construing § 702, the test applied to actions brought under the APA to challenge the actions of federal agencies. The zone-of-interests test had not been applicable to claims brought under other federal statutes, usually because there was no agency action at issue.¹⁶⁷ In this non-APA context, Justice Scalia unexpectedly became a champion of the zone-of-interests test and in two decisions he established the test as the presumptive test for statutory standing to bring an action under any federal statute. In both of these cases, the scope of statutory standing actually enacted by Congress in the statutory text was, as will be seen, the broad aggrieved party standing that the Court had construed in *Oregon-Washington R.R. and Sanders Bros.*¹⁶⁸

¹⁶⁵ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (Scalia, J.); Pfander, *supra* note 77, at 105 (“One can hardly overstate either the degree to which Justice Scalia remade the law of Article III standing or the degree to which he did so in the absence of support in the original meaning of the document he set about to apply.”); Tara Leigh Grove, *Justice Scalia’s Other Standing Legacy*, 84 U. CHI. L. REV. 2243, 2243 (2017) (“[F]ew decisions in Article III standing jurisprudence are as noteworthy (or as notorious) as Justice Antonin Scalia’s opinion for the Court in *Lujan*, which restricted Congress’s power to confer standing on private individuals.”) (citation omitted).

¹⁶⁶ *Lujan*, 504 U.S. at 577 (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an individual right vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to take Care that the Laws be faithfully executed, Art. II, § 3. It would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, and to become virtually continuing monitors of the wisdom and soundness of Executive action.”) (internal quotations and citations omitted); Pfander, *supra* note 77, at 99 (“*Lujan* achieved at least three of Justice Scalia’s stated goals: it cut back on environmental standing; it established Article III as a constraint on the extent to which Congress could involve the federal courts in the oversight of the exercise of government enforcement discretion in the public law context; and it firmed up the ban on the exercise of jurisdiction over generalized grievances by framing them as a violation of the separation of powers.”); Grove, *supra* note 165, at 2251 (“To Scalia, standing was a way to constrain the federal courts and prevent them from usurping the authority of the political branches.”).

¹⁶⁷ Depending on the particular agency action and the content of the applicable federal statute, an agency action may be reviewed under a federal statute other than the APA. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 175 (1997). Such a case would not have involved the zone-of-interests test as understood in *Data Processing*. See *id.*

¹⁶⁸ See *supra* notes 113–16, 127–33 and accompanying text.

In the first of these decisions authored by Justice Scalia, *Thompson v. North American Stainless, LP*, the Court considered whether an employee who had been fired could bring a Title VII action against his employer.¹⁶⁹ The employee claimant alleged that he had been fired in retaliation for a gender discrimination claim that his fiancé had filed with the Equal Employment Opportunity Commission (EEOC) against the employer of both the claimant and the fiancé. The Court first had to decide whether Title VII prohibited the firing of the claimant in retaliation for his fiancé's filing of a gender discrimination claim. The Court held, "Title VII's antiretaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text."¹⁷⁰

The Court therefore had to address "[t]he more difficult question" of whether Title VII granted the claimant the right to assert a cause of action for the alleged retaliation. Just as the anti-retaliation provision of Title VII is "worded broadly,"¹⁷¹ so, too, is the provision of Title VII that defines the scope of statutory standing under the statute. That provision, enacted by Congress in 1964, six years *before* Justice Douglas's unexpected decision for the Court in *Data Processing*, states that "a civil action may be brought . . . by the person claiming to be aggrieved."¹⁷² This language, by permitting a party "claiming to be aggrieved" to bring an action, is arguably even broader than the broadly-worded grants of statutory standing that the Court had construed in *Oregon-Washington R.R.* and *Sanders Bros.*, which allowed any aggrieved party to bring an action.¹⁷³ The *Sanders Bros.* Court concluded that, by enacting that text, Congress intended to provide to any person who suffered a cognizable Article III injury a right to bring a claim.¹⁷⁴ Perhaps for this reason, "[t]he Sixth Circuit concluded that this provision was merely a

¹⁶⁹ See *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011).

¹⁷⁰ *Id.* at 175.

¹⁷¹ *Id.*

¹⁷² *Id.* at 173 (citing Civil Rights Act, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260 (1964) (codified at 42 U.S.C. § 2000e-5(b), (f)(1))).

¹⁷³ See *supra* note 113 and accompanying text (*Oregon Washington R.R.*); *supra* note 127 and accompanying text (*Sanders Bros.*).

¹⁷⁴ See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940).

reiteration of the requirement that the plaintiff have Article III standing.”¹⁷⁵

In writing the decision for the Court in *Thompson*, Justice Scalia initially conceded, without reference to *Sanders Bros.*, that “[i]t is arguable that the aggrievement referred to is nothing more than the minimal Article III standing, which consists of injury in fact caused by the defendant and remediable by the court.”¹⁷⁶ The Court then acknowledged that in an earlier decision, the Court, in dictum, had accepted exactly this conclusion:

We have suggested in dictum that the Title VII aggrievement requirement conferred a right to sue on all who satisfied Article III standing. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), involved the “person aggrieved” provision of Title VIII (the Fair Housing Act) rather than Title VII. In deciding the case, however, we relied upon, and cited with approval, a Third Circuit opinion involving Title VII, which, we said, “concluded that the words used showed ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.’” *Id.*, at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (1971)). We think that dictum regarding Title VII was too expansive. Indeed, the *Trafficante* opinion did not adhere to it in expressing its Title VIII holding that residents of an apartment complex could sue the owner for his racial discrimination against prospective tenants. The opinion said that the “person aggrieved” of Title VIII was coextensive with Article III “insofar as tenants of the same housing unit that is charged with discrimination are concerned.” 409 U.S., at 209 (emphasis added). Later opinions, we must acknowledge, reiterate that the term “aggrieved” in Title VIII reaches as far as Article III permits, see *Bennett v. Spear*, 520 U.S. 154, 165–166 (1997); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), though the holdings of those cases are compatible with the “zone of interests” limitation that we discuss below. In any event, it is Title VII

¹⁷⁵ *Thompson*, 562 U.S. at 175–76 (citation omitted).

¹⁷⁶ *Id.* (citation omitted).

rather than Title VIII that is before us here, and as to that we are surely not bound by the *Trafficante* dictum.¹⁷⁷

Given this opportunity to reconsider the *Trafficante* dictum and the dictum in subsequent cases, Justice Scalia viewed the earlier position as “ill-considered.”¹⁷⁸ He claimed that “[i]f any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow.”¹⁷⁹ He “therefore conclude[d] that the term ‘aggrieved’ *must be* construed more narrowly than the outer boundaries of Article III.”¹⁸⁰ Justice Scalia did not describe any of the potential absurdities in any detail. A reason to wonder whether there is any absurdity is that a party claiming statutory standing based on aggrievement must, of course, be able to demonstrate Article III standing by showing an actual injury caused by the claimed illegality and which is redressable by a court’s judgment.¹⁸¹ Justice Scalia also did not consult legislative history, as he had done in *Green v. Bock Laundry Machine Co.*, to determine whether Congress intended the consequence that is claimed to be absurd.¹⁸²

Finally, Justice Scalia failed to address the fact that the Court had previously interpreted very similar language in *Oregon-Washington R.R.* and *Sanders Bros.* to reach the interpretive result that he now viewed as “absurd.” Congress, of course, would have been aware of these decisions when it drafted and enacted in 1964 the terms of Title VII, as part of the landmark Civil Rights Act of that year. The usual interpretive rule is that Congress understands how the Supreme Court has interpreted statutory

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁸² In *Green v. Bock Laundry Mach. Co.*, Justice Scalia, concurring in the judgment, concluded that the text of Rule 609 of the Federal Rules of Evidence, “if interpreted literally, produces an absurd, and perhaps unconstitutional, result.” In this circumstance, he wrote that “I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word ‘defendant’ in the Rule.” 490 U.S. 504, 527 (1989).

text and that Congress's use of such text indicates that Congress expects the language to have the same legal effect.¹⁸³

As he proceeded to determine the narrower scope of statutory standing defined by Title VII of the Civil Rights Act of 1964, Justice Scalia rejected the interpretation “[a]t the other extreme” advocated by the employer.¹⁸⁴ The Court concluded that the grant of statutory standing was not limited only to “the employee who engaged in the protected activity.”¹⁸⁵ In his view, Congress would have used different language in the text if it had intended to limit the availability of the cause of action in this way.¹⁸⁶

Having rejected what he regarded as the two “extreme” interpretations of the statute,¹⁸⁷ Justice Scalia settled on what he believed was the proper construction of the statutory standing provision:

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, authorizes suit to challenge a federal agency by any “person . . . adversely affected or aggrieved . . . within the meaning of a relevant statute.” § 702. We have held that this language establishes a regime under which a plaintiff may not sue unless he “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990). We have described the “zone of interests” test as denying a right of review “if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399–400 (1987). We hold that the term “aggrieved” in Title VII incorporates this test, enabling suit by any plaintiff with an interest “arguably [sought] to be protected by the statute,” *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 495 (1998) (internal quotation marks omitted),

¹⁸³ See e.g., *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 267–68 (1992).

¹⁸⁴ *Id.*

¹⁸⁵ *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011).

¹⁸⁶ *Id.* The Court also concluded that “such a reading contradicts the very holding of *Trafficante*[.]” *Id.*

¹⁸⁷ *Id.* at 176–177; see also *id.* at 177 (Court’s interpretation “avoids the extremity of equating [statutory standing] with Article III”).

while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII.¹⁸⁸

Justice Scalia's decision in *Thompson* has the effect of extending the flawed reasoning of *Data Processing* and limiting the effect of *Oregon-Washington R.R.* and *Sanders Bros.* Justice Scalia accepted that the APA itself granted statutory standing when the judicially fabricated zone-of-interests test has been met. His reasoning was that statutory text similar to the text of the APA provision was to be read to have that same effect, without regard to when that statutory text was enacted.¹⁸⁹ Justice Scalia took no account of the fact that Title VII's grant of statutory standing was enacted several years prior to the *Data Processing* decision.¹⁹⁰ The Congress enacting that text would have had very good reason to expect that the Supreme Court would have interpreted the broad grant of the cause of action in Title VII, in the same way that the Court had construed the scope of the right of action in *Sanders Bros.*, which had been interpreted to allow parties suffering Article III injury to bring an action in federal court. Because it had been accepted and applied by the Court in previous decisions, that understanding of the broad scope of statutory standing would hardly have been understood as absurd by Congress or other actors in the legal system. The *Thompson* Court instead reached its own anachronistic conclusion about the scope of the congressional grant of statutory standing. This judicial limitation on the scope of statutory standing conflicts directly with Justice Scalia's claim in *Lexmark International* that statutory standing is defined by Congress, rather than determined by the Court's own view of the class of proper plaintiffs.¹⁹¹

¹⁸⁸ *Id.* at 177–178.

¹⁸⁹ *Id.*

¹⁹⁰ See *supra* note 172 and accompanying text.

¹⁹¹ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) (quoted *supra* note 74). Justice Scalia's conclusion that Congress's broad textual grant of *Sanders Bros.*-type standing resulted in the application of the zone-of-interests test contrasts sharply with his conclusion in *Bennett v. Spear*, 520 U.S. 154 (1997), about the scope of statutory standing. There, Justice Scalia, writing for the Court, considered the scope of statutory standing provided by the citizen suit provision of the Endangered Species Act. Justice Scalia wrote that, "[t]he first operative portion of the provision says that 'any person may commence a civil suit'—an authorization of remarkable breadth when compared with the language Congress

Justice Scalia's more recent statutory standing decision, *Lexmark International*,¹⁹² considered whether a company could pursue a claim that the counterclaim defendant had violated section 43(a) of the Lanham Act by its false advertising.¹⁹³ Congress had provided in that section that an action claiming a violation may be brought "in a civil action by any person who believes that he or she is or is likely to be damaged by such act."¹⁹⁴ The district court dismissed Static Control's counterclaim, because it concluded that the company "lacked 'prudential standing' to bring that claim[.]"¹⁹⁵ The Sixth Circuit reversed

ordinarily uses." *Id.* at 164–65. He stated that "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." *Id.* at 163 (citation omitted). He concluded, however, that the statutory provision "negates the zone-of-interests test (or, perhaps more accurately, expands the zone of interests)." *Id.* at 164. He also stated that:

Our readiness to take the term "any person" at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general"—evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later.

Id. at 165. He also stated that, given the broad statutory text, "there is no textual basis for saying that its expansion of standing requirements applies to environmentalists alone." *Id.* at 166.

¹⁹² *Lexmark Int'l*, 572 U.S. 118.

¹⁹³ See *id.* at 120–122. The Lanham Act provision is codified at 15 U.S.C. § 1125(a). *Lexmark* had brought an action against Static Control Components (Static Control) alleging that the company had violated the Copyright Act and the Digital Millennium Copyright Act by supplying components for use in refurbishing computer printer cartridges; Static Control brought its counterclaim in that action alleging that *Lexmark International* had violated the Lanham Act. *Id.* at 122.

¹⁹⁴ 15 U.S.C. § 1125(a) (2018) (emphasis added).

¹⁹⁵ *Lexmark Int'l*, 572 U.S. at 123. The district court reached this conclusion based on its application of the test for prudential standing that it had "attributed to *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519 (1983)." *Id.*; see also *id.* at 123–24 ("The court emphasized that there were more direct plaintiffs in the form of remanufacturers of *Lexmark's* cartridges; that Static Control's injury was remot[e] because it was a mere byproduct of the supposed manipulation of consumers' relationships with remanufacturers; and that *Lexmark's* alleged intent [was] to dry up spent cartridge supplies at the remanufacturing level, rather than at [Static Control]'s supply level, making remanufacturers *Lexmark's* alleged intended target.") (citation and internal quotations omitted).

that decision after it applied a different, “reasonable-interest test” to determine whether Static Control could bring the Lanham Act claim.¹⁹⁶ There was general agreement that Static Control had Article III standing to bring the claim.¹⁹⁷

Justice Scalia began his analysis for the Court by revising the terminology that applies to the question of whether a party with Article III standing may bring an action in federal court. This analysis, described above,¹⁹⁸ led to an understanding that this was a question to be resolved by Congress and how Congress defined the scope of statutory standing, rather than how a court views the proper prudential limits on jurisdiction.¹⁹⁹ Justice Scalia therefore acknowledged that “this case presents a straightforward question of statutory interpretation: Does the cause of action in § 1125(a) extend to plaintiffs like Static Control?”²⁰⁰

The Court’s resolution of the interpretive question began with the relevant text, which defines in *exceptionally* broad terms parties who are authorized to bring suit: “The statute authorizes suit by ‘any person who believes that he or she is likely to be damaged’ by a defendant’s false advertising.”²⁰¹ This text was enacted in 1946²⁰²—a date after the Court’s decisions in *Oregon-Washington R.R.* and *Sanders Bros.* Justice Scalia barely assessed the meaning of the text, which permits an action to be brought by “any person who believes that he or she is likely to be damaged” by the prohibited conduct. That language, of course, would be subject to the usual constitutional-avoidance canon,²⁰³ so that any potential statutory claimant would be required to demonstrate Article III standing in order to avoid having to adjudicate the constitutionality of the provision, which on its face does not require an injury in fact, an

¹⁹⁶ See *id.* at 124. This test had been used by the Second Circuit Court of Appeals. See *id.*

¹⁹⁷ See *id.* at 125–26 (“Lexmark does not deny that Static Control’s allegations of lost sales and damage to its business reputation give it standing under Article III to press its false-advertising claim, and we are satisfied that they do.”).

¹⁹⁸ See *supra* note 191 and accompanying text.

¹⁹⁹ See *supra* note 191 and accompanying text.

²⁰⁰ *Lexmark Int’l*, 572 U.S. at 128–30.

²⁰¹ *Id.* (citation omitted).

²⁰² The text was originally included in Ch. 540 (July 5, 1946), Tit. VIII § 43, 60 Stat. 441.

²⁰³ See, e.g., *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (application of constitutional avoidance canon).

irreducible minimum requirement of Article III.²⁰⁴ Justice Scalia presented only his understated view that “[r]ead literally, that broad language *might suggest* that an action is available to anyone who can satisfy the minimum requirements of Article III.”²⁰⁵ This is an understatement, of course, because the text does not “literally” require an inquiry into whether the claimant suffered an injury in fact, but requires only the claimant’s “*belie[ff]* that he or she is *likely* to be damaged” by the statutory violation.²⁰⁶ Justice Scalia accordingly moved on quickly from the plain meaning of the text, remarking that “[n]o party makes that argument, however, and the ‘unlikelihood that Congress *meant* to allow all factually injured plaintiffs to recover persuades us that [§ 1125(a)] should not get such an expansive reading.”²⁰⁷ This statement is curious because, rather than determine the meaning of the text, Justice Scalia states concern for what Congress “meant,” which is simply another way of inquiring into (or stating a conclusion about) Congress’s intent. Such reasoning, of course, violates the Holmesian principle that an interpreter should not ask what the legislators meant, but what the words mean to a common reader of the text.²⁰⁸ Justice Scalia has famously given his strong support to this principle.²⁰⁹ The statement is also surely wrong about “what Congress meant” when it enacted this provision. Congress would have been aware at the time of enactment of the Lanham Act in 1946²¹⁰ that the Court

²⁰⁴ A party must have Article III standing in order to bring a claim as an aggrieved party. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

²⁰⁵ *Lexmark Int’l*, 572 U.S. at 128–30 (emphasis added).

²⁰⁶ *Id.* (emphasis added). That language might be interpreted to require the claimant demonstrate Article III standing in order to avoid having to adjudicate the constitutionality of the provision. *See Murray*, 6 U.S. at 118 (application of constitutional avoidance canon).

²⁰⁷ *Lexmark Int’l*, 572 U.S. at 128–30 (emphasis added) (citation and internal quotations omitted). This is similar to the rhetorical point he made in *Thompson*, 562 U.S. 170, 175–77 (2011), when he rejected the broad construction that the statutory text appeared to compel because of unidentified absurd results.

²⁰⁸ *See Holmes*, *supra* note 27, at 419 (“We do not inquire what the legislature meant; we ask only what the statute means.”).

²⁰⁹ *See, e.g., Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part) (“Whether governing rules are made by the national legislature or an administrative agency, we are bound by *what they say*, not by the unexpressed intention of those who made them.”).

²¹⁰ 15 U.S.C. § 1125(a) (2018), *see also supra* note 193.

had given very similar, though narrower, text the broadest interpretation in *Oregon-Washington R.R.*²¹¹ and *Sanders Bros.*²¹²

Justice Scalia then proceeded to construe the broad textual grant of statutory standing “in light of two relevant background principles . . . : zone of interests and proximate causality.”²¹³ Regarding zone of interests, which of course was never understood as a legal test until Justice Douglas fabricated it in 1970, Justice Scalia opined that “we presume that a statutory cause of action extends only to plaintiffs whose interests ‘fall within the zone of interests protected by the law invoked.’”²¹⁴ He then provocatively described the zone-of-interests test “as a limitation on the cause of action for judicial review conferred by the [APA].”²¹⁵ This description is provocative for two reasons. First, as we have seen, Justice Douglas in *Data Processing* fashioned the zone-of-interests test to give effect to the Court’s flawed view that the APA had itself provided statutory standing, rather than requiring that courts look to the scope of statutory standing that Congress had defined in other statutes to determine whether APA standing was present.²¹⁶ Second, Justice Douglas believed that he was reading the APA’s grant of statutory standing generously, rather than as “a limitation.”²¹⁷

The *Lexmark International* Court then stated that the zone-of-interests test “applies to *all* statutorily created causes of action,”²¹⁸ “unless it is expressly negated.”²¹⁹ Indeed, Congress would have to accomplish that negation by the use of statutory text even clearer than the quite clear and exceptionally broad text of the Lanham Act provision defining statutory standing, because Justice Scalia then concluded that “[t]he zone-of-interests test is therefore an appropriate tool for determining who may invoke the cause of action in § 1125(a).”²²⁰ This requirement was imposed despite the fact that the provision had been

²¹¹ 288 U.S. 14 (1933).

²¹² 309 U.S. 470 (1940).

²¹³ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014).

²¹⁴ *Id.* (citation omitted).

²¹⁵ *Id.*

²¹⁶ See *supra* notes 140–50 and accompanying text.

²¹⁷ See *supra* note 155 and accompanying text.

²¹⁸ *Lexmark Int’l*, 572 U.S. at 129.

²¹⁹ *Id.* (citation omitted).

²²⁰ *Id.* at 130 (citation omitted).

enacted in 1946 and twenty five years would have to pass before anyone would even have heard of a zone-of-interests test. Moreover, acting in 1946, Congress would have understood how broadly the Court had construed similar statutory language in *Oregon-Washington R.R.*²²¹ and *Sanders Bros.*²²²

Justice Scalia's interpretive strategy here conflicted with textualism's claim to be an objective interpretive method.²²³ He relied, instead, on the application of a decisive background rule against which Congress legislates that determines a narrow interpretive result that is more attractive to the Court, notwithstanding very clear and very broad text.²²⁴ Perhaps because he may have felt uncomfortable defining so pervasive a background presumption for the scope of a congressionally created cause of action, Justice Scalia included a footnote in which he opined that the zone-of-interests test, although recognized in *Data Processing* at a relatively late date, had "roots" in the common law of torts.²²⁵ He asserted that "[s]tatutory causes of action are regularly interpreted to incorporate standard common law limitations on civil liability—the zone-of-interests test no less than the requirement of proximate causation."²²⁶ We will evaluate here the application of the zone-of-interests test and discuss in the next Part the application of the proximate cause limitation.

Justice Scalia attempts in this footnote to bolster his decision that the zone-of-interests test is to be applied, along with the proximate cause test, to a claimant asserting a false advertising claim under the Lanham Act, notwithstanding its exceptionally broad 1946 text. He finds that the common law "roots" of the zone-of-interests test "lie in the common-law rule that a plaintiff may not recover under the law of negligence for injuries caused by violation of a statute unless the statute is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in

²²¹ 288 U.S. 14 (1933).

²²² 309 U.S. 470 (1940).

²²³ See *supra* note 29 and accompanying text.

²²⁴ Justice Scalia's penchant for such rules is discussed *infra* at notes 352–56 and accompanying text.

²²⁵ *Lexmark Int'l*, 572 U.S. at 130 n.5.

²²⁶ *Id.* (citation omitted).

fact occurred as a result of its violation.”²²⁷ This is a curious argument for two reasons. First, the zone-of-interests test has never inquired into whether the legislature, that is Congress, sought to benefit a particular group that includes the plaintiff by the enactment of the provision that has allegedly been violated.²²⁸ This type of analysis would have been appropriate in deciding whether the plaintiff has the other type of statutory standing based on the existence of a legal interest established by the statute.²²⁹

More importantly, Justice Scalia's argument here conflicts directly with the evolution of the law of statutory standing. As we have seen, the common law did directly affect this area of the law by forming the basis for the requirement that a party demonstrate a legal injury in order to bring a statutory claim.²³⁰ Congress itself, of course, defined the other basis for statutory standing, granting the right to assert a claim to any “person aggrieved,” in order to extend the right to seek review of government action that is claimed to be unlawful.²³¹ This purely statutory basis for a plaintiff's right of action was recognized by the Court in *Oregon-Washington R.R.*²³² and *Sanders Bros.*²³³ and reiterated by Congress in § 702 of the APA. The Court acting through Justice Douglas remade this law in 1971. More than forty years later, Justice Scalia extended the Court's reshaping of this area of the law by refusing to accept Congress's broad grant of statutory standing and rationalizing the result by claiming that the Court was simply recognizing common law limits on the right to bring an action that the legislature understood to be in place. To claim that this interpretation respects what Justice Scalia asserts to be the determinative role of the legislature in defining the scope of statutory standing is laughable.

²²⁷ *Id.* (internal quotations and citations omitted).

²²⁸ See *infra* notes 279–80 and accompanying text.

²²⁹ See *supra* notes 215–16 and accompanying text.

²³⁰ See *supra* notes 94–97 and accompanying text.

²³¹ See *supra* notes 173–74 and accompanying text.

²³² 288 U.S. 14 (1933).

²³³ 309 U.S. 470 (1940). Indeed, the Court's pre-APA construction of the “person aggrieved” provision was that broader standing had to be recognized in order to give legal effect to the legislature's inclusion of provisions granting such standing. Justice Scalia has now turned this history on its head by reintroducing common law limits into the grant of statutory standing by Congress by means of these “person aggrieved” provisions.

C. *Evaluating the Victory of the Zone-of-Interests Test As the Default Standard for Statutory Standing*

Before proceeding to an analysis of the evolving application of the now-pervasive zone-of-interests test, an evaluation of the improbably broad applicability of the zone-of-interests tests is appropriate. How is one to explain the passing strange alignment of the two Supreme Court Justices, who stand at either end of the Court's application of the test. Justice Douglas, the famous New Deal liberal who initially fabricated the test, is now half of a surprising pair along with Justice Scalia, the equally-famous contemporary conservative, who then extended the scope of application of this test. How is it that they each emerged as a supporter of a test that the Court fabricated out of whole cloth of its own making to determine a claimant's right to bring an action defined by the legislature?

The role of Justice Douglas in defining this law is easier to understand. Concerned that expert administrative agencies had been captured by the industries that they were empowered to regulate, Justice Douglas hoped to expand standing for parties wanting to challenge agency action in court²³⁴ and he was happy to end the application of the legal interest test, which he viewed as overly narrow.²³⁵ He also criticized the legal interest test, because he believed that the test conflated the issue of statutory standing with the merits of the plaintiff's claim. He wanted those issues to be separate.²³⁶ Finally, Justice Douglas likely preferred to interpret § 702 of the APA so that the provision directly provided standing for a wide range of claimants, rather than having to rely on the provisions of another statute to establish statutory standing.

²³⁴ See JOHN M. ROGERS, MICHAEL P. HEALY & RONALD J. KROTOSZYNSKI, JR., ADMINISTRATIVE LAW 659 (3d ed. 2013).

²³⁵ See *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 153, 153 n.1 (1970) (“[T]he existence or non-existence of a ‘legal interest’ is a matter quite distinct from the problem of standing.” (citation omitted)); *id.* at 153 (“The ‘legal interest’ test goes to the merits. The question of standing is different.”).

²³⁶ Justice Scalia has expressed some support for separating the standing analysis from the merits of a case. See Pfander, *supra* note 77, at 96 (Justice Scalia “called for the separation of jurisdiction and merits, distinguishing statutes that specify the elements of a cause of action and the available remedies from those that confer jurisdiction.”).

Justice Scalia's acceptance of the broad presumptive application of the zone-of-interests test is harder to understand. First, his two recent decisions have the effect of aligning him with the judicial activism of Justice Douglas. Justice Scalia is also associated with strong support for a narrow scope of Article III standing.²³⁷ Why would Justice Scalia support a test defined by Justice Douglas to provide expansive statutory standing if Justice Scalia generally preferred to limit standing to sue? The issue of statutory standing, of course, does not arise if Article III standing is lacking. Perhaps for Justice Scalia, if Article III proved effective in limiting standing for plaintiffs, there was less reason to be concerned about the scope of statutory standing. Also, Justice Scalia's use of the absurdity canon indicates that, while Justice Scalia had worked to narrow the scope of Article III standing, he believed the scope of standing continued to be overly broad and other, new standing limits must be found.

Moreover, an understanding of Justice Scalia's position requires emphasis of the fact that one consequence of the zone-of-interests test is that its only legal effect would be to constrain statutory standing in comparison to the scope of statutory standing defined by Congress in statutory text that allows any aggrieved party or any party claiming to be aggrieved to bring an action. In short, Justice Scalia has engaged in a stealthy narrowing of standing compared to where textualism would have been expected to lead him. The decision also provides a new example of Justice Scalia's ability to shape the interpretive rules of textualism that permitted him, when needed, to ignore clear text and reach his preferred interpretive result. He had already famously developed a rule of clear statement to limit the power that agencies may exercise.²³⁸ In these statutory standing decisions, he relied on the claimed background understandings of congressional action to ensure that the zone-of-interests test applies in the place of Congress's grant in the statutory text of the broadest possible statutory standing (i.e., those

²³⁷ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *FEC v. Akins*, 524 U.S. 11 (1998) (Scalia, J., dissenting).

²³⁸ See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). This canon is discussed and criticized in ROGERS, HEALY & KROTOSZYNSKI, *supra* note 234, at 684–86, and Healy, *Legislative Intent*, *supra* note 31, at 415–16.

able to demonstrate Article III standing). These are impressive successes for a textualist who purports to apply only the meaning of the words enacted by Congress.²³⁹ Justice Scalia accomplished these limits on the scope of statutory standing defined by Congress, at the same time that he was redefining the legal question as one of statutory standing and purporting to reject the authority of the judiciary to limit the statutory standing defined by Congress based on the judiciary's sense of prudence.²⁴⁰ This was, in short, an interpretive effort that belied the claims of the interpretive approach championed by Justice Scalia.

In the next Part, we will consider another reason why Justice Scalia's acceptance of a test crafted by Justice Douglas is more understandable.

IV. JUSTICE SCALIA'S CHANGED APPLICATION OF THE ZONE-OF-INTERESTS TEST: TEACHING THE OLD DOG NEW TRICKS

We saw in the last Part how Justice Scalia broadened the scope of application of the zone-of-interests test. Justice Scalia's decisions established that the zone-of-interests test is the presumptive test for statutory standing under all federal statutes, unless Congress has defined an alternative rule for standing with exceptional clarity in the text of the statute.²⁴¹ We turn now to consider how Justice Scalia began the work of changing how the zone-of-interests test is applied in order to narrow the scope of what Justice Douglas had viewed as a very broad grant of statutory standing. In order to understand Justice Scalia's motives and methods regarding the content of the zone-of-interests test, we must first describe briefly how the Supreme Court traditionally applied the test and how the application of the test became problematic with the Court's use of the textualist method for statutory interpretation.

²³⁹ The second irony is that Justice Scalia has accepted a test for statutory standing that does not work well with textualism, rather than intentionalism, which was the dominant interpretive method when Justice Douglas articulated the test.

²⁴⁰ See *supra* Part II.

²⁴¹ See *supra* notes 213–16 and accompanying text.

A. *The Problem of Textualism and the Zone-of-Interests Tests*

1. The Non-Textualist Foundation for the Zone-of-Interests Test

As has been discussed, Justice Douglas defined the zone-of-interests test in his decision in *Data Processing*.²⁴² Because the test was freshly minted, *Data Processing* itself was the first example of how the new test would apply. The Court's discussion of this issue was limited and relied on the analysis of a lower court:

The Court of Appeals for the First Circuit held in *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147, 1153, that by reason of § 4 a data processing company has standing to contest the legality of a national bank performing data processing services for other banks and bank customers:

“Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled ‘banks to engage in a nonbanking activity,’ S. Rep. No. 2105, (87th Cong., 2d Sess., 7-12) (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute ‘a serious exception to the accepted public policy which strictly limits banks to banking.’ (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.”

We do not put the issue in those words, for they implicate the merits. We do think, however, that § 4 arguably brings a competitor within the zone of interests protected by it.²⁴³

The Court accordingly was comfortable looking outside of the text to determine whether the plaintiff was arguably within the zone of interests.²⁴⁴

²⁴² See *supra* notes 234–37 and accompanying text.

²⁴³ *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 155–56 (1970).

On the same day that the Court decided *Data Processing*, the Court decided *Barlow v. Collins*,²⁴⁵ a case in which the Court also applied its new zone-of-interests test. There, the Court reviewed a decision in which the Court of Appeals affirmed the dismissal of an action brought by tenant farmers who sought review of Department of Agriculture regulations that limited the ability of the farmers to assign upland cotton payments to be made by the government.²⁴⁶

The Court decided that “the tenant farmers are clearly within the zone of interests protected by the Act.”²⁴⁷ The basis for this conclusion was the Court’s conclusion that there was “congressional intent that the Secretary protect the interests of tenant farmers,” which the Court found to be “[i]mplicit in the statutory provisions and their legislative history.”²⁴⁸ The Court relied upon two statutory provisions²⁴⁹ and “sparse” legislative history to determine that Congress had that intent.²⁵⁰

The Court returned to the application of the zone-of-interests test in *Clarke v. Securities Industry Ass’n*.²⁵¹ There, a group of securities brokers and dealers challenged a regulation by the Comptroller of the Currency that authorized national banks to provide securities brokerage services at their non-branch locations.²⁵² The Comptroller’s position was that the plaintiff lacked statutory standing to bring the claim because the statute the plaintiff claimed had been violated protected the interests of state and federal banks, rather than dealers or brokers of

²⁴⁴ See also *id.* at 157 (“Both Acts are clearly ‘relevant’ statutes within the meaning of § 702. The Acts *do not in terms* protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of ‘aggrieved’ persons who, under § 702, are entitled to judicial review of ‘agency action.’”) (emphasis added). Justice Douglas’s willingness to construe a broad grant of statutory standing in § 702 is consistent with his recognition of implied rights of action under federal statutes defining only a rule of primary conduct. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (Clark, J., for the Court) (Section 14(a) of the 1934 Securities Act). Cf. *Clearfield Tr. Co. v. United States*, 318 U.S. 363 (1943).

²⁴⁵ 397 U.S. 159 (1970).

²⁴⁶ See *id.* at 160–61.

²⁴⁷ *Id.* at 164–65.

²⁴⁸ *Id.* at 164.

²⁴⁹ See *id.*

²⁵⁰ *Id.* at 164–65.

²⁵¹ 479 U.S. 388 (1987).

²⁵² See *id.* at 392.

securities.²⁵³ The Court concluded that the plaintiff did have statutory standing based on “the purposes implicit in the statute,”²⁵⁴ and the “infer[ence] that Congress ‘intended petitioner’s class of plaintiffs to be relied upon to challenge agency disregard of the law.’”²⁵⁵

These early applications of the zone-of-interests test are reflected in Justice Douglas’s unexpected decision in *Data Processing* that the APA itself had defined a broad scope of statutory standing.²⁵⁶ The broad scope of that standing was to be discerned by considering Congress’s intent and purpose in enacting the statutory provisions that the plaintiff claimed had been violated. Justice Scalia, who, as we have seen, rejected broad standing,²⁵⁷ also rejected the interpretation of statutes based on legislative intent,²⁵⁸ and rejected the interpretation of statutes based on purpose,²⁵⁹ would be expected to have been doubtful at best about all three of these aspects of the zone-of-interests test.

It is notable that Justice Scalia had sought, soon after *Clarke*, to describe the potential *limits* of the scope of APA statutory standing. In *Lujan v. National Wildlife Federation*,²⁶⁰ Justice Scalia, writing for the Court, included a well-known explanation that a party will not be within a statute’s zone of interests when the party is a mere incidental beneficiary of a statutory requirement: “Thus, for example, the failure of an agency to comply with a statutory provision requiring ‘on the record’ hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency’s proceedings; but since the provision was obviously enacted to protect the interests of the

²⁵³ See *id.* at 393.

²⁵⁴ *Id.* at 399. Justice Stevens wrote a concurring opinion that was joined by Chief Justice Rehnquist and Justice O’Connor. He agreed that the brokers had standing based on “the multiple purposes behind the branch banking restrictions.” *Id.* at 416 (Stevens, J. concurring). He concluded that, “[j]ust as the Court found in *Association of Data Processing Service Organizations* and *Arnold Tours*, there is embodied in the antibranching rule of the McFadden Act a congressional purpose to protect competitors of national banks in order to ensure that national banks remain limited entities.” *Id.*

²⁵⁵ *Id.* at 403 (internal quotations, brackets, and citations omitted).

²⁵⁶ See *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

²⁵⁷ See *supra* note 163 and accompanying text.

²⁵⁸ See *infra* Section IV.A.2.

²⁵⁹ See *supra* note 41 and accompanying text.

²⁶⁰ 497 U.S. 871 (1990).

parties to the proceedings and not those of the reporters, that company would not be ‘adversely affected within the meaning’ of the statute.”²⁶¹

In *Air Courier Conference of America*,²⁶² the Court, in a decision by Chief Justice Rehnquist (and joined by Justice Scalia), applied the zone-of-interests test and concluded that the plaintiff postal workers union lacked statutory standing under the APA. The Union had challenged as unlawful under the Postal Express Statutes (PES) the decision of the Postal Service to permit international remailing by private carriers.²⁶³ The conclusion that the Union had Article III standing because the rule would harm union employment had not been appealed.²⁶⁴ The Court understood that its determination of whether the plaintiff had statutory standing depended on the *intent* of Congress: “We must inquire then, as to Congress’ intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes.”²⁶⁵

To discern that intent, the Court looked first at the statutory text and concluded that “[t]he particular language of the statutes provides no support for respondents’ assertion that Congress intended to protect jobs with the Postal Service.”²⁶⁶ The Court then considered “the history of this legislation.”²⁶⁷ The history reviewed by the Court included both a summary of statutes dating back to “the first statutes limiting private carriage of letters on post roads [] enacted in 1792,” and a committee report and floor statements,²⁶⁸ the stuff of traditional legislative history. This review convinced the Court that “[t]he postal monopoly [] exists to ensure that postal services will be provided to the citizenry at large, and not to secure employment for postal workers.”²⁶⁹

The Court also reviewed the legislative history of the Postal Reorganization Act (PRA),²⁷⁰ which had reenacted the PES and had

²⁶¹ *Id.* at 883 (citation omitted).

²⁶² 498 U.S. 517 (1991).

²⁶³ *See id.* at 519–21.

²⁶⁴ *See id.* at 524.

²⁶⁵ *Id.* at 524.

²⁶⁶ *Id.* at 524–25 (citation omitted).

²⁶⁷ *Id.* at 526.

²⁶⁸ *See id.* at 526–27.

²⁶⁹ *Id.* at 528.

²⁷⁰ Pub. L. No. 91-375, 84 Stat. 719 (1970).

contained provisions addressing the relationship between the Postal Service and its workers.²⁷¹ The Court concluded that, “[n]one of the documents constituting the PRA legislative history suggest that those concerned with postal reforms saw any connection between the PES and the provisions of the PRA dealing with labor-management relations.”²⁷²

In sum, the Court continued to ground its application of the zone-of-interests test in its judgment about whether Congress intended (or had the purpose) to protect, at least arguably, the interests that the plaintiff was asserting in support of its claim for relief. Discerning that intent or purpose was accomplished by considering the text and the legislative history of the statute at issue. In the case of the PES, the Court found that Congress had not acted, even arguably, to protect the interests of Postal Service employees.

2. Textualism and the Zone-of-Interests Test

We have seen that Justice Scalia played the key role in the emergence of the modern focus on statutory text, rather than legislative intent or purpose, as the basis for interpreting statutes.²⁷³ The textualist method has now been employed in the application of the zone-of-interests test and the arguable result has been broader statutory standing, a result that Justice Douglas may have lauded, but that would likely have concerned Justice Scalia.

Justice Scalia wrote the Court’s opinion in *Bennett v. Spear*.²⁷⁴ There, the Court found that the zone-of-interests test applied to determine whether the plaintiff had statutory standing to bring an action “alleg[ing] a violation of § 7 of the [Endangered Species Act (ESA)], 16 U.S.C. § 1536, which requires, *inter alia*, that each agency ‘use the best scientific and commercial data available,’ § 1536(a)(2).”²⁷⁵ The plaintiffs claimed that the agency had violated this requirement when it issued a Biological Opinion that contained findings used to support a decision that minimum lake water levels were necessary to

²⁷¹ See *Air Courier*, 498 U.S. at 527–30.

²⁷² *Id.* at 530.

²⁷³ See *supra* Part I.

²⁷⁴ *Bennett v. Spear*, 520 U.S. 154 (1997).

²⁷⁵ *Id.* at 176.

avoid “a detrimental impact on the endangered suckers.”²⁷⁶ Justice Scalia did not consult the legislative history and instead simply stated his inference that,

The obvious purpose of the requirement that each agency “use the best scientific and commercial data available” is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA’s overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.²⁷⁷

Justice Scalia supported his inference about the “obvious purpose” of the best scientific evidence provision by employing the classic textualist whole act canon and discussing a different provision of the ESA:²⁷⁸

That economic consequences are an explicit concern of the ESA is evidenced by § 1536(h), which provides exemption from § 1536(a)(2)’s no-jeopardy mandate where there are no reasonable and prudent alternatives to the agency action and the benefits of the agency action clearly outweigh the benefits of any alternatives. We believe the “best scientific and commercial data” provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations. Petitioners’ claim that they are victims of such a mistake is plainly within the zone of interests that the provision protects.²⁷⁹

To be sure, Justice Scalia did state that the “provision is similarly intended.”²⁸⁰ This language, however, must be inadvertent, given Justice Scalia’s hostility toward grounding interpretation on congressional intent.²⁸¹

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 176–77.

²⁷⁸ See *supra* notes 273–76 and accompanying text.

²⁷⁹ 520 U.S. at 177.

²⁸⁰ *Id.*

²⁸¹ See *supra* notes 31–44 and accompanying text.

Justice Scalia's aversion to the consideration of legislative intent, rather than simply consideration of text, in the context of the zone-of-interests test can be seen in the Court's next decision applying the test in an APA case. In *National Credit Union Administration (NCUA) v. First National Bank & Trust Co.*,²⁸² the Court considered whether the plaintiff banks had statutory standing under § 702 to challenge a regulation promulgated by the NCUA that had changed its interpretation of the common bond requirement to allow credit unions to provide services to additional customers.

Justice Thomas wrote the opinion for the Court, which was joined by Justice Scalia "except as to footnote 6."²⁸³ That footnote had briefly discussed the legislative history of the provision that the plaintiff claimed had been violated.²⁸⁴ Justice Thomas stated that, "in applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests 'arguably . . . to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them."²⁸⁵ Justice Thomas considered the "express terms" of the provision at issue:

§ 09 limits membership in every federal credit union to members of definable "groups." Because federal credit unions may, as a general matter, offer banking services only to members, see, e.g., 12 U.S.C. §§ 1757(5)-(6), § 109 also restricts the markets that every federal credit union can serve. Although these markets need not be small, they unquestionably are limited. The link between § 109's regulation of federal credit union membership and its limitation on the markets that federal credit unions can serve is unmistakable. Thus, even if it cannot be said that Congress had the specific purpose of benefiting commercial banks, one of the interests "arguably . . . to be protected" by § 109 is an interest in limiting the markets that federal credit unions can serve. This interest is precisely the interest of respondents affected by the NCUA's interpretation of § 109. As competitors of

²⁸² 522 U.S. 479 (1998).

²⁸³ *Id.* at 482.

²⁸⁴ *See id.* at 493 n.6.

²⁸⁵ *Id.* at 492.

federal credit unions, respondents certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA's interpretation has affected that interest by allowing federal credit unions to increase their customer base.²⁸⁶

In short, the Court's application of the test of statutory standing followed from the Court's inference, as in *Bennett*, about the reasons for and the interests that would (arguably) be protected by the statutory provision. The application did not depend on an investigation into Congress's intent when it enacted the statutory provision.

Justice O'Connor's dissent on behalf of four Justices opined that "the Court applies the [zone-of-interests] test in a manner that is contrary to our decisions and, more importantly, that all but eviscerates the zone-of-interests requirement."²⁸⁷ In Justice O'Connor's view, the Court's application was "contrary" and "quite different," because the Court "eschew[ed] any assessment of whether the common bond provision was intended to protect respondents' commercial interest."²⁸⁸ Justice O'Connor explained that the Court instead had pursued a textualist approach, which considered "the terms of the common bond provision"²⁸⁹ and the "citing [of] other statutory provisions."²⁹⁰ She stated that, based on the statutory text, the majority "reasons that one interest sought to be protected by the common bond provision is an interest in limiting the markets that federal credit unions can serve."²⁹¹ The "crux" of this approach, in Justice O'Connor's view, "is simply that the plaintiff must 'have' an interest in enforcing the pertinent statute."²⁹² She warned that "every litigant who establishes injury in fact under Article III will automatically satisfy the zone-of-interests requirement, rendering the zone-of-interests test ineffectual"²⁹³ in constraining the

²⁸⁶ *Id.* at 492–94 (footnotes omitted). In footnote 6, the four concurring Justices concluded that the legislative history of § 109 demonstrates that "one of the interests 'arguably . . . to be protected' by § 109 is an interest in limiting the markets that federal credit unions can serve." *Id.* at 493.

²⁸⁷ *Id.* at 503 (O'Connor, J., dissenting).

²⁸⁸ *Id.* at 503–05.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* (internal quotation marks and citation omitted).

²⁹² *Id.* at 506.

²⁹³ *Id.* (citation omitted).

scope of statutory standing based on congressional intent. Justice O'Connor stated that the Court's new approach would change the conclusion about the hypothetical that Justice Scalia had presented in *National Wildlife Federation*: "Under the Court's approach today, however, the reporting company would have standing under the zone-of-interests test: Because the company is injured by the failure to comply with the requirement of on-the-record hearings, the company would certainly 'have' an interest in enforcing the statute."²⁹⁴ Later in the dissent, Justice O'Connor strengthened her view that the majority had changed the zone-of-interests test by its textualist method and failure to evaluate seriously the intent of Congress: "The pertinent question under the zone-of-interests test is whether Congress *intended* to protect certain interests through a particular provision, not whether, irrespective of congressional intent, a provision may have the *effect* of protecting those interests."²⁹⁵

Justice O'Connor conducted what she believed was the required inquiry into congressional intent.²⁹⁶ She concluded:

[N]either the terms of the common bond provision, nor the way in which the provision operates, nor the circumstances surrounding its enactment[] evince a congressional desire to legislate against competition. This, then, is an action the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The zone-of-interests test seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives, and one can readily envision circumstances in which the interests of competitors, who have the incentive to suppress credit union expansion in all circumstances, would be at odds with the statute's general aim of supporting the growth of credit unions that are cohesive and hence financially stable.²⁹⁷

²⁹⁴ *Id.* at 507.

²⁹⁵ *Id.* at 516 (citations omitted).

²⁹⁶ *See id.* at 513–17.

²⁹⁷ *Id.* at 517 (quotations and citations omitted). *See id.* at 518 ("[T]he most that can be said is that the provision has the incidental effect of benefiting the plaintiffs. That was not enough to establish standing in *Air Courier*, and it should not suffice here.").

In sum, the Court's decision in *NCUA* demonstrates how the textualist method has the apparent effect of broadening the scope of statutory standing under the zone-of-interests test.

In a more recent decision, *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*,²⁹⁸ the Roberts Court applied the zone-of-interests test again using the textualist method and found broad standing. There, the Court considered whether the plaintiff, an owner of property near lands purchased by the federal government in trust for a Tribe, had statutory standing to challenge the purchase. The Secretary of the Interior had acted under section 5 of the Indian Reorganization Act (IRA).²⁹⁹ That provision grants authority to the Secretary of the Interior to obtain property "for the purpose of providing land for Indians."³⁰⁰ The plaintiff brought the action under the APA.³⁰¹

The district court dismissed the suit, because the court concluded that "Patchak lacked prudential standing to challenge the Secretary's acquisition of the Bradley Property. The court reasoned that the injuries Patchak alleged fell outside § 465's 'zone of interests.'"³⁰² The Interior Department and the Tribe argued that the plaintiff lacked statutory standing because "the relationship between § 465 and Patchak's asserted interests is insufficient. That is so, they contend, because the statute focuses on land *acquisition*, whereas Patchak's interests relate to the land's *use* as a casino."³⁰³

The Court introduced its analysis of the statutory standing issue by stressing that the zone-of-interests test does not greatly limit such standing for a plaintiff bringing an APA action:

²⁹⁸ 567 U.S. 209 (2012).

²⁹⁹ Ch. 576, § 5, 73 Pub. L. No. 383, 48 Stat. 985 (1934) (codified as amended at 25 U.S.C. §§ 5101–5129 (2012)).

³⁰⁰ 25 U.S.C. § 5108 (formerly codified at § 465).

³⁰¹ See *Patchak*, 567 U.S. 209; see also *id.* at 212–15 (Patchak, the plaintiff, "requested only a declaration that the decision to acquire the land violated the IRA and an injunction to stop the Secretary from accepting title.") (citation omitted).

³⁰² *Id.* at 213–15 (citation omitted). The district court decision on statutory standing was reversed by the court of appeals. See *id.* The Court also considered in the case the issue of the waiver of sovereign immunity, which implicated the claimed application of the Quiet Title Act. See *id.* at 213–22. Justice Sotomayor dissented on the ground that there was no waiver of sovereign immunity. The Court's consideration of this question is beyond the scope of this article.

³⁰³ *Id.* at 224–25 (citations omitted).

The prudential standing test Patchak must meet “is not meant to be especially demanding.” *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399 (1987). We apply the test in keeping with Congress’s “evident intent” when enacting the APA “to make agency action presumptively reviewable.” *Ibid.* We do not require any “indication of congressional purpose to benefit the would-be plaintiff.” *Id.*, at 399–400. And we have always conspicuously included the word “arguably” in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff’s “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”³⁰⁴

The Court also described the test as focused on the “issues” implicated by the provision that the plaintiff claims has been violated: “The question is not whether § 465 seeks to benefit Patchak; everyone can agree it does not. The question is instead, as the Band’s and the Government’s main argument acknowledges, whether issues of land use (arguably) fall within § 465’s scope—because if they do, a neighbor complaining about such use may sue to enforce the statute’s limits.”³⁰⁵

The Court then considered the “context and purpose” of § 465,³⁰⁶ and stated that the provision “functions as a primary mechanism to foster Indian tribes’ economic development.”³⁰⁷ In the Court’s view, “when the Secretary obtains land for Indians under § 465, she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development.”³⁰⁸

The Court found that the provision’s concern with the use of the lands being purchased is made “crystal clear” by the Department’s regulations,³⁰⁹ which “show that the statute’s implementation centrally depends on the projected use of a given property.”³¹⁰ The Court also

³⁰⁴ *Id.* (footnote omitted).

³⁰⁵ *Id.* at 225 n.7 (citation omitted).

³⁰⁶ *Id.* at 226.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* (discussing 40 C.F.R. § 151).

³¹⁰ *Id.*

concluded that the Department's decision to purchase the property at issue in *Patchak* "from start to finish . . . involved questions of land use."³¹¹

The final step in the Court's analysis was to relate the "issues" or "interests" implicated by the provision that Patchak had claimed was violated to the interests being asserted by the plaintiff:

And because § 465's implementation encompasses these issues, the interests Patchak raises—at least arguably—fall "within the zone . . . protected or regulated by the statute." If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring landowner would have prudential standing to bring suit to enforce the statute's limits. The difference here, as the Government and Band point out, is that § 465 specifically addresses only land acquisition. But for the reasons already given, decisions under the statute are closely enough and often enough entwined with considerations of land use to make that difference immaterial. As in this very case, the Secretary will typically acquire land with its eventual use in mind, after assessing potential conflicts that use might create. See 25 CFR §§ 151.10(c), 151.10(f), 151.11(a). And so neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465's regulatory ambit.³¹²

The Court's method of analysis in *Patchak* thus conformed to the method of analysis the Court had defined in *NCUA*.³¹³ There, the Court stated that, "in applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests 'arguably . . . to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them."³¹⁴ To be sure, the Court in

³¹¹ *Id.*

³¹² *Id.* at 226–28.

³¹³ *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479 (1998).

³¹⁴ *Id.* at 492.

Patchak did refer to the purpose of the statutory provision.³¹⁵ Justice Thomas had made the same reference in *NCUA*.³¹⁶ The Court did not, however, inquire into the intent of Congress through a consideration of the legislative history.

B. *Justice Scalia's New Content for the Zone-of-Interests Test*

The Court's decisions applying the zone-of-interests test demonstrate how the textualist method of inferring from statutory text, rather than considering legislative intent, has had the effect of broadening the scope of parties who are determined to have statutory standing. This consequence of the textualist method likely concerned Justice Scalia, who had generally supported limits on standing.

In this Section, we will consider how Justice Scalia began to narrow the test for statutory standing that threatened to allow too many parties to have a right to bring an action in federal court. As we have seen, Justice Scalia, writing for the Court in *Lexmark International*,³¹⁷ established the presumptive use of the zone-of-interests test in non-APA cases.³¹⁸ The Court there also applied the zone-of-interests test to determine whether the claimant had statutory standing to bring its action under the Lanham Act.³¹⁹

³¹⁵ *Patchak*, 567 U.S. at 224–26.

³¹⁶ See *NCUA*, 522 U.S. at 492–94.

³¹⁷ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

³¹⁸ See *supra* notes 216–20 and accompanying text.

³¹⁹ Section 43(a) of the Lanham Act, which defines the claim brought by Static Control, provides as follows:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

One might have anticipated that the Court, after concluding, notwithstanding the Lanham Act's broad text,³²⁰ that the statute required the application of the zone-of-interests test, would have applied that test as it is applied under the APA, the statute from which the test emerged. Justice Scalia, however, introduced his application of the test by stating that the Court takes a "lenient approach" to the test when deciding whether a party has statutory standing under the APA.³²¹ Summarizing the Court's analysis in *Patchak*,³²² Justice Scalia stated that

[I]n the APA context, . . . the test is not especially demanding. In that context we have often conspicuously included the word arguably in the test to indicate that the benefit of any doubt goes to the plaintiff, and have said that the test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue.³²³

Justice Scalia then explained the generous scope of the test in the APA context by stating that

That lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review. We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes.³²⁴

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (2018).

³²⁰ See *supra* note 216.

³²¹ *Lexmark Int'l*, 572 U.S. 118, 130.

³²² The Court's analysis in *Patchak* is discussed in text accompanying *supra* notes 298–312.

³²³ *Lexmark Int'l*, 572 U.S. at 130 (citations and internal quotations omitted).

³²⁴ *Id.* (citation and internal quotations omitted).

Having suggested that the zone-of-interests test will not be quite so “generous” in this non-APA context,³²⁵ Justice Scalia proceeded to decide whether Static Control had statutory standing under the Lanham Act. He stated that: “Identifying the interests protected by the Lanham Act, however, requires no guesswork, since the Act includes an unusual, and extraordinarily helpful, detailed statement of the statute’s purposes.”³²⁶ The relevant Lanham Act provision states that:

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.³²⁷

Justice Scalia concluded that this provision indicated that the statute protects *commercial interests* by preventing “injuries to business reputation and present and future sales.”³²⁸ He distinguished this commercial interest from the interests of either “[a] consumer who is hoodwinked into purchasing a disappointing product”³²⁹ or “a business misled by a supplier into purchasing an inferior product.”³³⁰ Rather than commercial interests, these are consumer interests.³³¹

³²⁵ Justice Scalia had made a similar statement in *Bennett v. Spear*, although the language is not altogether clear: “We have made clear [] that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes.” 520 U.S. 154, 163 (1997) (internal quotations and citation omitted).

³²⁶ *Lexmark Int’l*, 572 U.S. at 131 (citation omitted).

³²⁷ 15 U.S.C. § 1127 (2006).

³²⁸ *Lexmark Int’l*, 572 U.S. at 131 (citation omitted).

³²⁹ *Id.* at 132.

³³⁰ *Id.*

³³¹ Justice Scalia did not discuss whether a commercial interest is implicated if the disappointing product harms a company’s production of the products that it offers for sale. *Id.*

The Court's approach to evaluating the interests protected by the statute and the interests that the plaintiff claims have been harmed seems largely consistent with how the Court applies the zone-of-interests test in APA cases. Justice Scalia, however, next proceeded to identify a new, additional component of zone-of-interests analysis:

We generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute. For centuries, it has been a well-established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause. That venerable principle reflects the reality that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.³³²

Because Justice Scalia had established earlier in *Lexmark International* that the scope of statutory standing is defined by the legislature, rather than a court's notion of appropriate prudential limits,³³³ he needed to establish his newly articulated limit on zone-of-interests standing as one that the legislature itself had defined. Justice Scalia had rehearsed this exact interpretive move more than twenty years earlier in a separate concurring opinion in *Holmes v. Securities Investor Protection Corp.*³³⁴

There, the Court had granted certiorari to resolve an issue of statutory standing upon which the Courts of Appeals had divided.³³⁵ The plaintiff, the Securities Investor Protection Corp. (SIPC), was neither a purchaser nor a seller of the securities that had allegedly been illegally traded.³³⁶ The lower courts had reached contrary conclusions about whether the SIPC had statutory standing to bring the action under the Racketeer Influenced and Corrupt Organizations Act (RICO)³³⁷ when the predicate offenses were claimed violations of the Securities Exchange Act of 1934.³³⁸

³³² *Id.* (citations and internal quotations omitted).

³³³ *See supra* note 72.

³³⁴ *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 286–90 (1992) (Scalia, J., concurring).

³³⁵ *See id.* at 286.

³³⁶ *See id.* at 264–65, n.7 (majority opinion).

³³⁷ *Id.* at 258; 18 U.S.C. §§ 1961–62 (2018).

³³⁸ *See* 15 U.S.C. § 78j(b) (2018); 17 C.F.R. § 240.10b-5 (2019).

The Court held, in an opinion by Justice Souter, that the SIPC could not maintain the action under RICO.³³⁹ Justice Souter held that a party may bring an action under RICO only when it is able to prove proximate cause, because the language allowing the RICO claim was borrowed from the Sherman Act and the Clayton Act and Congress was aware that the Court had previously established a proximate cause limit on the injuries for which claimants could recover under those statutes.³⁴⁰ Having concluded that the SIPC could not bring its claims for a reason other than that it was not a purchaser or a seller of securities, the Court declined to decide the statutory standing issue on which it had granted review.³⁴¹

Justice O'Connor, joined by Justices White and Stevens, joined the majority, but presented her view that the Court should still resolve the remaining statutory standing issue.³⁴² Justice O'Connor's analysis of statutory standing under RICO began with the text, which "authorizes '[a]ny person injured in his business or property by reason of a violation of section 1962' to sue for treble damages in federal court."³⁴³ She first concluded that "RICO's civil suit provision, considered on its face, has no purchaser/seller standing requirement."³⁴⁴ She emphasized in this regard that "the words 'any person' cannot reasonably be read to mean only purchasers and sellers of securities."³⁴⁵

Although Justice O'Connor agreed with the majority that the textual requirement that the plaintiff's injury occur "by reason of" a statutory violation necessitated a proximately-caused injury,³⁴⁶ she declined to find that the language required that a plaintiff be a purchaser or a seller of securities: "Although the words 'injury in [one's] business or property' and 'by reason of' are words of limitation, they do not categorically exclude nonpurchasers and nonsellers of securities from the universe of RICO plaintiffs."³⁴⁷

³³⁹ See *Holmes*, 503 U.S. at 261.

³⁴⁰ See *id.* at 267–68.

³⁴¹ See *id.* at 275–76.

³⁴² See *id.* at 276–77 (O'Connor, J., concurring).

³⁴³ *Id.* at 278 (quoting 18 U.S.C. 1964(c) (1982 ed., Supp. II)).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 279.

³⁴⁶ See *id.*

³⁴⁷ *Id.* at 279–80.

Justice O'Connor then concluded that a seller or purchaser limitation should not be inferred because the predicate act of violating § 10(b) of the Securities Exchange Act and Rule 10b-5 required that the party be a purchaser or seller of a security.³⁴⁸ Justice O'Connor decided that the Court itself had inferred a private right of action for a violation of § 10(b) and that the purchaser or seller limitation on that action was a proper "prudential means of avoiding the problems of proof when no security was traded and the nuisance potential of vexatious litigation."³⁴⁹

A plaintiff's action under RICO is expressly provided by Congress, rather than inferred by the judiciary. Justice O'Connor argued that, even if the broad scope of the right of action defined by Congress gives rise to the "very real specter of vexatious litigation based on speculative damages,"³⁵⁰ the Court must defer to and accept the decision of Congress:

Congress has authorized "[a]ny person injured in his business or property by reason of" a RICO violation to bring suit under § 1964(c). Despite the very real specter of vexatious litigation based on speculative damages, it is within Congress' power to create a private right of action for plaintiffs who have neither bought nor sold securities. For the reasons stated above, I think Congress has done so. That being the case, the courts are without authority to restrict the application of the statute.³⁵¹

In sum, Justice O'Connor decided that, because of the broad scope of statutory standing defined by Congress in RICO, a plaintiff could bring an action based on a violation of the Securities Exchange Act even if the plaintiff was neither the purchaser nor seller of the securities, provided that the plaintiff met the proximate cause requirement defined by Congress's grant of statutory standing.

Justice Scalia was alone in his separate opinion concurring in the Court's judgment.³⁵² His decision in *Holmes* provides an important insight into his interpretive method. For Justice Scalia, although the text

³⁴⁸ See *id.* at 280.

³⁴⁹ *Id.* at 285 (citation omitted).

³⁵⁰ *Id.*

³⁵¹ *Id.* at 285–86 (emphasis in original) (internal quotations and citation omitted).

³⁵² *Id.* at 286 (Scalia, J., concurring).

of a provision is important, the background legal rule against which Justice Scalia determines the legislature has acted may have even greater importance. In evaluating the statutory standing of the plaintiff in *Holmes*, Justice Scalia was not moved by the majority's view that the statutory language borrowed by Congress from earlier statutes included a well understood proximate cause limit.³⁵³ Justice Scalia rejected this narrow, statute specific approach. He instead asserted that when Congress enacted RICO, Congress was acting within a legal structure that broadly accepted the requirement of proximate cause and that this limitation on a statutory right of action applies unless Congress enacts text very clearly providing that the accepted limitation does not apply:

The ultimate question here is statutory standing: whether the so-called *nexus* (mandatory legalese for "connection") between the harm of which this plaintiff complains and the defendant's so-called predicate acts is of the sort that will support an action under civil RICO. One of the usual elements of statutory standing is proximate causality. It is required in RICO not so much because RICO has language similar to that of the Clayton Act, which in turn has language similar to that of the Sherman Act, which, by the time the Clayton Act had been passed, had been interpreted to include a proximate-cause requirement; but rather, I think, because it has always been the practice of common-law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct. Life is too short to pursue every human act to its most remote consequences; "for want of a nail, a kingdom was lost" is a commentary on fate, not the statement of a major cause of action against a blacksmith.³⁵⁴

In the next paragraph of his concurrence, Justice Scalia employed this same interpretive approach to support his conclusion that a private RICO claimant has statutory standing only if the claimant comes within the statutory zone of interests. This too is "a background practice

³⁵³ See *id.* at 267 (majority opinion). For more on Justice Souter's majority opinion, see *supra* notes 339–41.

³⁵⁴ *Id.* at 286–87 (Scalia, J., concurring) (emphasis in original) (citations omitted).

against which Congress legislates”³⁵⁵ and which Congress overrules only when it includes text that clearly accomplishes that result:

Yet another element of statutory standing is compliance with what I shall call the “zone-of-interests” test, which seeks to determine whether, apart from the directness of the injury, the plaintiff is within the class of persons sought to be benefited by the provision at issue. Judicial inference of a zone-of-interests requirement, like judicial inference of a proximate-cause requirement, is a background practice against which Congress legislates. Sometimes considerable limitations upon the zone of interests are set forth explicitly in the statute itself—but rarely, if ever, are those limitations so complete that they are deemed to preclude the judicial inference of others. If, for example, a securities fraud statute specifically conferred a cause of action upon “all purchasers, sellers, or owners of stock injured by securities fraud,” I doubt whether a stockholder who suffered a heart attack upon reading a false earnings report could recover his medical expenses. So also here. The phrase “any person injured in his business or property by reason of” the unlawful activities makes clear that the zone of interests does not extend *beyond* those injured in that respect—but does not necessarily mean that it includes *all* those injured in that respect. Just as the phrase does not exclude normal judicial inference of proximate cause, so also it does not exclude normal judicial inference of zone of interests.³⁵⁶

Justice Scalia also reinforced his view of the close link between the proximate cause and zone of interests limit on statutory standing:

My terminology may not be entirely orthodox. It may be that proximate causality is itself an element of the zone-of-interests test as that phrase has ordinarily been used, but that usage would leave us bereft of terminology to connote those aspects of the “violation-injury connection” aspect of standing that are distinct from proximate causality.³⁵⁷

³⁵⁵ *Id.*

³⁵⁶ *See id.* at 287–88 (emphasis in original) (citation and footnote omitted).

³⁵⁷ *Id.* at 287 n.*.

In sum, Justice Scalia's separate opinion in *Holmes* presented his view that, when defining the scope of statutory standing, Congress acts against a background rule that the limits of proximate cause and zone of interests will be recognized by courts unless Congress plainly negates those limits in the text of the provision defining the cause of action. He found a majority of the Court to adopt this view of the applicability of the zone-of-interests test to determine statutory standing earlier in *Lexmark International*, notwithstanding very broad statutory text.³⁵⁸ The *Lexmark International* Court also presented a majority ready to join Justice Scalia's view that there is also a presumptive proximate cause limit on statutory standing, at least in the non-APA context.

Writing for the *Lexmark International* majority, Justice Scalia opined that:

[W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute. For centuries, it has been a 'well established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.' That venerable principle reflects the reality that 'the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.' Congress, we assume, is familiar with the common-law rule and does not mean to displace it *sub silentio*. We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation. No party disputes that it is proper to read § 1125(a) as containing such a requirement, its broad language notwithstanding.³⁵⁹

Justice Scalia admitted that this presumed proximate cause limit "is not easy to define, and over the years it has taken various forms."³⁶⁰ He suggested, however, that courts will make the limitation work because they "have a great deal of experience applying it, and there is a wealth of precedent for them to draw upon in doing so."³⁶¹ Justice Scalia did not acknowledge the implicit irony that he had taken the position that

³⁵⁸ See *supra* notes 328–33 and accompanying text.

³⁵⁹ *Lexmark Int'l Inc. v. Static Control Components Inc.*, 572 U.S. 118 (2014).

³⁶⁰ *Id.*

³⁶¹ *Id.* (citations omitted).

statutory standing is a status that is to be defined by the legislature, which he now interpreted to have implicitly delegated to the courts the authority to apply an uncertain limit on the scope of the cause of action.³⁶² He did, however, state that the proximate cause determination will be informed by the statutory context: “Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.”³⁶³ Justice Scalia distinguished the proximate cause limit on statutory standing from the far less limiting cause-in-fact requirement for Article III standing.³⁶⁴

Applying the proximate cause limitation to the question of statutory standing, the Court:

[H]old[s] that a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff. That showing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff. For example, while a competitor who is forced out of business by a defendant’s false advertising generally will be able to sue for its losses, the same is not true of the competitor’s landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor’s inability to meet [its] financial obligations.³⁶⁵

After summarizing the Court’s decision “that a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue,”³⁶⁶ the Court decided that

³⁶² See *supra* notes 347–52.

³⁶³ *Lexmark Int’l*, 572 U.S. at 131–32.

³⁶⁴ See *id.* at 134 n.6 (“Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff’s injury be fairly traceable to the defendant’s conduct.”). Article III standing of Static Control was not contested. See *id.* at 125 (“Lexmark does not deny that Static Control’s allegations of lost sales and damage to its business reputation give it standing under Article III to press its false-advertising claim, and we are satisfied that they do.”).

³⁶⁵ *Id.* (citation, footnote, and internal quotations omitted).

³⁶⁶ *Id.*

Static Control's allegations were sufficient to meet the statutory standing requirements. Regarding the zone-of-interests test, the Court concluded that, "Static Control's alleged injuries—lost sales and damage to its business reputation—are injuries to precisely the sorts of commercial interests the Act protects. Static Control is suing not as a deceived consumer, but as a 'perso[n] engaged in' 'commerce within the control of Congress' whose position in the marketplace has been damaged by Lexmark's false advertising. § 1127. There is no doubt that it is within the zone of interests protected by the statute."³⁶⁷

The Court also concluded that the plaintiff's allegations of injury were sufficient to meet the initial requirements for proximate cause:

Static Control adequately alleged proximate causation by alleging that it designed, manufactured, and sold microchips that both (1) were necessary for, and (2) had no other use than, refurbishing Lexmark toner cartridges. It follows from that allegation that any false advertising that reduced the remanufacturers' business necessarily injured Static Control as well. Taking Static Control's assertions at face value, there is likely to be something very close to a 1:1 relationship between the number of refurbished Prebate cartridges sold (or not sold) by the remanufacturers and the number of Prebate microchips sold (or not sold) by Static Control.³⁶⁸

The question, however, was not finally resolved, because Static Control was still required to present proof of proximate cause: "Although we conclude that Static Control has alleged an adequate basis to proceed under § 1125(a), it cannot obtain relief without evidence of injury proximately caused by Lexmark's alleged misrepresentations. We hold only that Static Control is entitled to a chance to prove its case."³⁶⁹

³⁶⁷ *Id.* at 137.

³⁶⁸ *Id.* at 138–39 (citations and footnote omitted).

³⁶⁹ *Id.* at 140. After this decision, Apex Technology, the company that owns Static Control, purchased Lexmark International, thereby rendering functionally moot the Lanham Act claims. *Lexmark announces completion of acquisition by Apex Technology and PAG Asia Capital*, LEXMARK (Nov. 29, 2016) <https://newsroom.lexmark.com/2016-11-29-Lexmark-announces-completion-of-acquisition-by-Apex-Technology-and-PAG-Asia-Capital> [<https://perma.cc/UZ5P-JAZD>].

C. *How Justice Scalia's New Limits on the Zone-of-Interests Test Show the Limits of the Textualist Method*

An evaluation of Justice Scalia's decision for the Court in *Lexmark* should begin at the place where a textualist would demand that the analysis of the scope of statutory standing defined by Congress must begin: the statutory text. In that relevant text, Congress had provided that an action claiming a violation may be brought "by any person who believes that he or she is or is likely to be damaged by such act."³⁷⁰ We have seen and evaluated Justice Scalia's conclusion that a claimant would have statutory standing only if the person were within the zone-of-interests.³⁷¹ We have now seen two other conclusions that Justice Scalia presented about this statutory provision. He decided that the injury to the plaintiff's interests must have been proximately caused by the claimed statutory violation,³⁷² and that this proximate cause requirement would not be applicable to a person who was bringing an APA action and subject to showing that the person was arguably within the zone of interests.³⁷³ We will now discuss how each of the latter two components of the Court's decision in *Lexmark* conflicts with the claims of the textualist method.

1. The Judicial Source of the New Proximate-Cause Requirement

We have discussed how the textualist method, because it relies upon inference of interests, rather than the intent of Congress, is ineffective in limiting the scope of statutory standing determined by the zone-of-interests test.³⁷⁴ We have also seen that Justice Scalia was a strong supporter of constrained constitutional standing under Article III.³⁷⁵ Despite Justice Scalia's admonition that courts should not ignore

³⁷⁰ 15 U.S.C. § 1125(a) (2018).

³⁷¹ See *supra* Part III.

³⁷² See *supra* Section IV.B.

³⁷³ See *supra* text accompanying notes 313–19.

³⁷⁴ See *supra* Section IV.A.2.

³⁷⁵ See *supra* text accompanying notes 161–63.

text in order to “avoid[] unhappy consequences,”³⁷⁶ his recent effort to constrain the scope of zone-of-interests standing has the appearance of the judicial activism that he claimed to constrain by use of the textualist method.³⁷⁷

More than a century ago, Roscoe Pound described how a court, through the use of “spurious interpretation,” may act in a legislative manner by itself defining the law through the interpretive process.³⁷⁸ Justice Scalia’s claim was that the textualist method constrains courts by ensuring that they focus their interpretive efforts only on the text enacted by Congress.³⁷⁹

Lexmark International presents an example, however, of how Justice Scalia reached interpretive conclusions that did not reflect the meaning of the statutory text. Notwithstanding the exceptionally broad text enacted by the legislature and the Court’s initial understanding of that breadth in *Oregon-Washington R.R.*³⁸⁰ and *Sanders Bros.*,³⁸¹ the textualist Justice Scalia initially restricted the statutory standing to those within the zone-of-interests³⁸² and later to those whose injury is viewed by a court as having been proximately caused by the claimed illegality.³⁸³

Rather than give the words used by Congress their ordinary meaning, Justice Scalia imputed to Congress an ornate understanding of the meaning of the words included in the statutory text.³⁸⁴ He thereby avoided having to do the work of locating in the legislative history evidence that Congress specifically intended the text to have a complex, unstated meaning. Whereas reliance on legislative history would have

³⁷⁶ *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring) (“I do not think, however, that the avoidance of unhappy consequences is adequate basis for interpreting a text.”).

³⁷⁷ See *supra* text accompanying notes 352–357.

³⁷⁸ Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382 (1907) (“[T]he object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy’s hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process . . .”).

³⁷⁹ See *supra* text accompanying notes 20–23.

³⁸⁰ See *supra* text accompanying notes 113–18.

³⁸¹ See *supra* text accompanying notes 127–36.

³⁸² See *supra* text accompanying notes 188–229.

³⁸³ See *supra* text accompanying notes 352–62.

³⁸⁴ See *supra* text accompanying notes 373–76.

necessitated the use of and reference to legislative materials, Justice Scalia's approach skipped the middleman and permitted the Court simply to impute a meaning to words that was nowhere evident in legislative history and appeared to contradict the ordinary meaning of text and how that text would be understood to a reader today or at the time of enactment. This result is one that Justice Scalia, in a different case, might have condemned as a "curious, narrow, hidden" meaning that a court must avoid.³⁸⁵

Justice Scalia's interpretive move in *Lexmark* was not new. When reviewing agency actions, Justice Scalia became adept at discerning rules of interpretation that permitted him to look past the ambiguous statutory text, which would ordinarily permit agency action, to hold that an agency action was unlawful, because he decided that the agency could lawfully take the action being challenged only when clear statutory text authorized the agency action.³⁸⁶ His decisions recognized that the law necessarily involved the exercise of discretion because of arguable indeterminacy.³⁸⁷ The core issue was accordingly the legal actor

³⁸⁵ King v. Burwell, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) ("[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.") (quoting Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925)) (internal quotation marks omitted).

³⁸⁶ See Healy, *supra* note 34, at 416 (discussing how Justice Scalia has rejected an agency interpretation because he concluded that statutory ambiguity, "because of the application of a required clear statement rule, is an insufficient legislative grant of power when the agency is making a decision that has great regulatory effect"); Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 36–37 (2011) ("[T]he Supreme Court's use of clear statement rules has had the effect of making facially ambiguous statutes insufficient to authorize some administrative actions. When a clear statement rule applies, the Court has held that Congress must have provided an agency with clear authority to take administrative action or the agency's exercise of regulatory authority will be viewed as contrary to the law defined by Congress.").

³⁸⁷ See *Christensen v. Harriss County*, 529 U.S. 576, 590 (2000) (Scalia, J. concurring), where Justice Scalia discussed the significance of statutory indeterminacy and the rules of construction regarding discretion delegated to agencies:

Chevron establishes a presumption that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency. The implausibility of Congress's leaving a highly significant issue unaddressed (and thus "delegating" its resolution to the administering agency) is assuredly one of the factors to be considered *in determining whether there is ambiguity*, but once ambiguity is established the consequences of *Chevron* attach.

who had the authority to exercise that discretion. In the statutory standing context, who determined the right of a party to bring a statutory claim in federal court? Justice Scalia's rules of interpretation typically located that authority in courts. That authority was not presented as discretionary; it was authority located in the court as a consequence of the court's own rules of interpretation.

The effect of this new proximate cause requirement is to limit the scope of statutory standing. Under this limitation, the plaintiff may have an interest that is within the zone-of-interests arguably protected by the statute, but nevertheless not have statutory standing because that interest is not injured proximately by the breach of the statutory provision that forms the gravamen of the plaintiff's complaint. Under this approach, a plaintiff who has Article III standing may lack statutory standing because the court determines there is no proximate cause. Given that Article III standing has already imposed a causation-in-fact requirement, it is noteworthy that the Court held that the legislature—by the enactment of text broadly granting statutory standing—has also required that there be proximate causation. Justice Scalia had decided in *Defenders of Wildlife* that a party had to have Article III standing in order to bring a claim as an aggrieved party.³⁸⁸ In *Lexmark International*, he decided that a party with Article III standing must have been proximately injured to bring an “aggrieved party” claim, even without any direct evidence that Congress actually intended any such limit.³⁸⁹

It is bad enough that the Court presumed that Congress had provided for the use of a statutory standing test that was not even identified by the Court itself until after the relevant statutory text had been enacted. It is even worse that the Court has imported into the standard limits on a party's ability to assert a statutory claim that is additive to the limits defined by Article III with neither statutory text nor legislative intent to support the newly minted limits. It is ironic in the “person aggrieved” context that the Court appended a common law limit on the form of statutory standing that Congress enacted to

Id. at 589 n.* (internal citation omitted).

³⁸⁸ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

³⁸⁹ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

supersede the then-applicable legal interest test, with its source in the common law.³⁹⁰

2. The Unconvincing Distinction Between the Zone-of-Interests Test in the APA and the Non-APA Contexts

The other curious aspect of Justice Scalia's decision in *Lexmark International* to graft a proximate cause requirement onto the zone-of-interests test was his decision that the proximate cause requirement would not apply to the APA zone-of-interests test. This decision needs to be assessed in the context of Justice Scalia's claim that the legislature had the power to define the scope of statutory standing.³⁹¹

For more than forty years, the zone-of-interests test, which was, of course, entirely the invention of the judiciary,³⁹² did not include a proximate-cause requirement. After the decision in *Lexmark International*, a party claiming zone-of-interests standing under a statute *that is not the APA* must demonstrate proximate-cause of the injury.³⁹³ What is the explanation for the difference in the application of the two tests? One might expect that there would be a plain difference in the relevant statutory text. Justice Scalia did not, however, rely on statutory text to explain the application of the proximate cause limit. He relied, instead, on his view that the legislature expected that this limit would apply.³⁹⁴

³⁹⁰ See *supra* text accompanying notes 219–30.

³⁹¹ See *supra* text accompanying notes 78–80.

³⁹² See *supra* note 148 and accompanying text.

³⁹³ See *Lexmark Int'l*, 572 U.S. at 131–32.

³⁹⁴ Justice Scalia's argument in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring), which disavowed reliance on the meaning of text, was that:

One of the usual elements of statutory standing is proximate causality. It is required in RICO not so much because RICO has language similar to that of the Clayton Act, which in turn has language similar to that of the Sherman Act, which, by the time the Clayton Act had been passed, had been interpreted to include a proximate-cause requirement; but rather, I think, because it has always been the practice of common-law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct.

Id.

Although this explanation is unconvincing in assigning to the legislature the source of the proximate-cause requirement, it begs the question about how this legislative understanding applies to the zone-of-interests test *only outside* of the APA context.³⁹⁵ Justice Scalia did not clearly answer this question. Certainly, he did not find a distinction in the relevant text of the different statutory standing provisions. Those provisions, of course, make no mention of a zone-of-interests test, which was invented by the Supreme Court in 1970, after Congress had enacted provisions referring to the right of an aggrieved party to bring an action.³⁹⁶

He grounds the different scope of statutory standing under the APA on the Supreme Court's understanding that the APA had provided broadly for such standing.³⁹⁷ The decision to view the statutory standing granted by "person aggrieved" provisions outside of the APA as limited by proximate-cause has no relation to statutory text and appears unbound from the claims of externality and objectivity made by the textualist method. An important question for future statutory standing law is whether the proximate-cause limit is applicable in determining statutory standing under § 702 of the APA. As we have seen, Congress did not intend to provide statutory standing directly when it enacted § 702.³⁹⁸ Indeed, when the text and intent of Congress are considered, a proximate cause limitation is arguably more defensible under the APA than under other statutes that directly provide person aggrieved standing.

That Justice Scalia decided that a proximate cause limit applies to the non-APA zone-of-interests test but not to the APA zone-of-interests is itself compelling evidence that the limit applies because of the preferences of the Court, rather than because of the decision of

³⁹⁵ See *supra* Section IV.C.1.

³⁹⁶ See *supra* notes 214–16 and accompanying text.

³⁹⁷ *Lexmark Int'l*, 572 U.S. at 130 (2014) (the Court takes a "lenient approach" when deciding whether a party has statutory standing under the APA); *Bennett v. Spear*, 520 U.S. 154, 163 (1997) ("[T]he breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes.") (citations and internal quotation marks omitted).

³⁹⁸ See *supra* note 139 and accompanying text. Rather, Congress intended to codify current law, which did not account for proximate cause. See *supra* note 138 and accompanying text.

Congress. An interpretive method that permits this conclusion without the consideration of what Congress intended should be accepted, if at all, with humility and the most modest of claims.

CONCLUSION

Two decisions written by Justice Scalia near the end of his life reshaped the law of statutory standing and provided important insights into the claims and limits of textualism. By changing the legal terminology from prudential standing to statutory standing, Justice Scalia framed his claim that Congress had sole authority to define the parties who have a right to bring a claim in federal court, assuming Article III standing requirements were met. Locating this authority in the legislature, rather than in the judiciary's exercise of its own prudential power, reinforced Justice Scalia's claim that his textualist method ensured legislative supremacy and limited opportunities for judicial activism.

Despite this claim, Justice Scalia's other two changes to the law of statutory standing had the effect of constraining, by judicial interpretation, the scope of statutory standing relative to statutory text and legislative intent. First, Justice Scalia interpreted statutory text that was extremely broad in the legislative grant of statutory standing and intended to allow an action by an aggrieved party suffering Article III injury-in-fact by a claimed government illegality to grant statutory standing only to a party who met the zone-of-interests test. Justice Scalia reached this conclusion despite the fact that the zone-of-interests test was fabricated by an activist Supreme Court after Congress had enacted the statutes at issue in the cases.

The second change was that Justice Scalia, having determined for the Court that the zone-of-interests test would determine whether a party had statutory standing, concluded that the zone-of-interests test, when applied outside the APA context, necessitated a showing that the claimed illegality proximately caused the injury to the person bringing the claim. This proximate cause requirement cannot be found in statutory text or in legislative history. Rather, Justice Scalia decided that Congress must have imposed a proximate cause limit when the zone-of-interests test applied and, at least for now, when the claim was not brought under the APA.

This interpretive result is, of course, claimed to follow from the prescription of the legislature, rather than the prudent activism of the judiciary. Contrary to this claim of textualism, the decisions in *Lexmark International* and *Thompson* show that Justice Scalia was willing and able to be an activist judge when the text enacted by Congress did not align with his own views of good policy. These decisions show the limits of textualism and provide strong reasons to doubt the claims that the preeminent advocate of textualism made about the virtues of that interpretive method.