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## Statutory Standing and the Tyranny of Labels

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# STATUTORY STANDING AND THE TYRANNY OF LABELS

RADHA A. PATHAK\*

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## *Introduction*

Constitutional and prudential standing doctrines have received an abundance of scholarly consideration. Statutory standing, in contrast, has remained largely unexplored. The Supreme Court’s use of the term is relatively consistent and unobjectionable, but the meaning that many lower courts ascribe to it is anything but innocuous. This article develops a conceptual framework for understanding the different ways in which different courts conceive of statutory standing, and it uses the Employee Retirement Income Security Act of 1974 (ERISA) as a paradigmatic example to illustrate the pernicious effects that result from common misconceptions of statutory standing.

According to the Supreme Court, “the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of

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\* Assistant Professor, Whittier Law School. J.D., New York University Law School. B.A., University of California, Berkeley. The idea for this article grew out of my experience representing a group of eleven law professors as *amici* in a recent landmark ERISA case before the United States Supreme Court: *LaRue v. DeWolff, Bobert, & Assocs., Inc.*, 552 U.S. 248 (2008). The paper also benefitted substantially from the feedback I received as a result of presenting it to faculty and students at the University of Houston Law Center, as well as to my faculty colleagues at Whittier Law School. Finally, special thanks to Professors Patricia Leary, Brendan S. Maher, and Peter K. Stris for their help and Erica Amin for her research assistance.

particular issues.”<sup>1</sup> The process of answering this question implicates both “constitutional limitations” on federal jurisdiction and “prudential limitations on its exercise.”<sup>2</sup> These limitations are “founded [o]n concern about the proper—and properly limited—role of the courts in a democratic society.”<sup>3</sup>

Constitutional standing requires that a plaintiff “allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>4</sup> There are three well-established requirements of constitutional standing: the plaintiff must prove that she has suffered or imminently will suffer an “injury in fact,” that the injury is “fairly traceable” to the conduct of the defendant(s), and that a favorable judicial outcome is likely to redress the plaintiff’s injury.<sup>5</sup> The legitimacy of this doctrine—which is based on the Court’s interpretation of the “Cases” and “Controversies” language in Article III of the Constitution<sup>6</sup>—is the subject of considerable academic debate.<sup>7</sup>

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1. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also, e.g., Allen v. Wright*, 468 U.S. 737, 750-51 (1984). It is well-settled that constitutional and prudential standing inquiries are separate from the merits of a dispute, but a seminal 1988 law review article by now-Judge William A. Fletcher persuasively argued that such a distinction is artificial. William A. Fletcher, *The Structure of Standing*, 98 *YALE L.J.* 221, 223 (1988). Unfortunately, the Supreme Court has never agreed. However, one contention of this article is that there is room for courts to acknowledge that *statutory* standing is nothing more than an element of the cause of action.

2. *Warth*, 422 U.S. at 498 (citations omitted); *see also, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

3. *Warth*, 422 U.S. at 498 (citations omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997).

4. *Allen*, 468 U.S. at 751; *see also, e.g., Valley Forge*, 454 U.S. at 472.

5. *Bennett*, 520 U.S. at 162; *see also, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

6. Article III provides that “[t]he judicial Power shall extend to all Cases” that fall within certain enumerated categories, as well as “Controversies” that fall within six other categories. U.S. CONST. art. III, § 2, cl. 1, *amended by* U.S. CONST. amend. XI.

7. Compare John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 *N.Y.U. L. REV.* 962, 1004 (2002) (“[N]o one seriously believes that the Framers chose [the words ‘Cases’ and ‘Controversies’] with anything like the Supreme Court’s doctrinal framework in mind or that the Court’s justiciability rulings are anything other than a judicially invented gloss on the Constitution.”), and Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, ‘Injuries,’ and Article III*, 91 *MICH. L. REV.* 163, 166 (1992) (arguing that existing standing doctrine is a recent “invention” of federal judges), with Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine*, 102 *MICH. L. REV.* 689, 691 (2004) (arguing that although “history [does not] compel[ ] acceptance of the modern Supreme Court’s vision of standing [, it also] does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution’s meaning”) (emphasis added).

In addition to the “irreducible constitutional minimum”<sup>8</sup> of standing, the Supreme Court has articulated a series of “rule[s] of self-restraint.”<sup>9</sup> These judicially-created rules are referred to as the prudential standing limits, and they include: the bar against third party standing, the prohibition on generalized grievances, and the zone of interests test.<sup>10</sup> As with constitutional standing, some scholars challenge the propriety and need for these prudential standing limits. Academic criticisms notwithstanding, doctrines of constitutional and prudential standing appear to be here to stay, and they place generally applicable limits on the ability of litigants to pursue claims in federal court.<sup>11</sup>

This article addresses one particular aspect of standing that, to date, has received surprisingly little considered attention. It is often referred to by courts and commentators as “statutory standing.” Unlike the generally applicable principles of constitutional standing and the other principles of prudential standing, the concept of statutory standing applies only to legislatively-created causes of action.<sup>12</sup> Broadly speaking, it asks whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action.<sup>13</sup> The central thesis of this article is that the meaning regularly ascribed to the term statutory standing by lower courts can and does lead to pernicious consequences.<sup>14</sup>

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8. *Valley Forge*, 454 U.S. at 472; *see also Lujan*, 504 U.S. at 560.

9. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

10. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”).

11. Maxwell L. Stearns, *From Lujan to Laidlaw: A Preliminary Model of Environmental Standing*, 11 DUKE ENV. L. & POL. FOR. 321, 323 n.8 (2001) (“Constitutional and prudential standing rules come into play in virtually all standing cases, regardless of whether the cause of action arises under the Constitution or a statute.”).

12. The zone of interests test has strong connections to statutory standing, *see infra* Part I.B.2, but the Supreme Court has applied the zone of interests test to a non-statutory cause of action. *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318 (1977). There is good reason to believe this decision was anomalous, such that the zone of interests test is best viewed as applying only to statutorily-created causes of action. In any event, despite the connection between the zone of interests test and statutory standing generally, the concept of statutory standing does not appear outside of the context of statutorily-created causes of action.

13. *See, e.g., Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 92, 97, n.2 (1998) (identifying the question of statutory standing as “whether *this* plaintiff has a cause of action under the statute”).

14. The phenomenon described in this article is yet another illustration of what Justice Kennedy recently described as the “tyranny of labels.” *See* Transcript of Oral Argument at 35,

Part I develops a conceptual framework for understanding the ways in which courts conceive of “statutory standing.” In Part I.A, I identify one common and legitimate use of the term—as a descriptive label of the *fact* that the plaintiff in a particular lawsuit is the kind of person to whom Congress intended to allow recovery under the statutory cause of action. Part I.A also explains that the term statutory standing may be used to describe the *legal rule* that a plaintiff cannot recover under a statutory cause of action unless he or she is the kind of person to whom Congress intended to allow recovery. These two uses of the term stem from the same basic conception of statutory standing—that it has the same status as any other element of the cause of action. Unfortunately, even these uses of the term give the impression that one particular statutorily-imposed requirement—whether the plaintiff is within the class of persons to whom Congress has granted a private right of action—should be distinguished from all others. Nonetheless, Part I.B explains that both of these uses of the term—and the conception of statutory standing that lies beneath those two uses—find support in the scholarly literature and case law.

Part II identifies yet another conception of the term statutory standing: as shorthand for the legal rule that the court must conduct a *threshold* inquiry (which may be jurisdictional) into the question of whether the plaintiff is within the class of persons for whom Congress intended to allow recovery under a statutory cause of action. This legal rule is different from the legal rule described in Part I, because it elevates the question of whether the plaintiff falls within the class of persons to whom Congress has granted the private right of action to an inquiry that must be conducted at the outset of the case, separate from the “merits,” and possibly also as a jurisdictional imperative of the case. In contrast, the legal rule described in Part I conceives of statutory standing as merely one element of the cause of action, such that failure to “satisfy” the statutory standing “requirement” is no more or less important than failure to satisfy any other prerequisite to recovery. Unfortunately, it is the former, rather than the latter, conception that lower courts have embraced. That is, lower federal courts have widely accepted the idea that statutory standing is a threshold inquiry, and indeed most courts consider statutory standing to be jurisdictional. Part II examines the perverse effects of the application of this conception by using one important and paradigmatic example: statutory claims brought pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). Part II.A provides some necessary background regarding ERISA and its civil enforcement provisions. Part II.B

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Pleasant Grove City v. Sumnum, 129 S. Ct. 1125 (2009) (No. 07-665), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-665.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-665.pdf).

demonstrates the effects of senselessly elevating the question of “statutory standing” to a special status. Finally, Part II.C, argues that the label of “statutory standing” can and often does obfuscate the essential inquiry of whether the plaintiff before the court is within the class of persons to whom Congress has granted a private right of action.

### *I. Confronting Statutory Standing*

The OYEZ Project, a comprehensive relational database of information about the United States Supreme Court,<sup>15</sup> has associated twenty-one decided cases with the label of “statutory standing.”<sup>16</sup> A cursory examination of these cases, however, reveals few similarities. This compels several questions. What does it mean to describe litigation as involving concerns about statutory standing? Is there an established statutory standing doctrine that imposes

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15. The OYEZ Project is available at <http://www.oyez.org>. It is maintained by Professor Jerry Goldman. See Northwestern University Department of Political Science Website, Biography of Professor Jeremy Goldman, <http://www.polisci.northwestern.edu/people/goldman.html> (last visited Aug. 25, 2009). The United States Supreme Court lists the OYEZ Project as an unofficial source of information about the Court. See Where to Obtain Supreme Court Opinions 4 (Aug. 2009), available at <http://www.supremecourtus.gov/opinions/obtainopinions.pdf>.

16. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *United Food & Commercial Workers v. Brown Group Inc.*, 517 U.S. 544 (1996); *Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995); *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992); *Gollust v. Mendell*, 501 U.S. 115 (1991); *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517 (1991); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990); *Jackson Transit Auth. v. Transit Union*, 457 U.S. 15 (1982); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Vill. Of Bellwood*, 441 U.S. 91 (1979); *United States v. SCRAP*, 412 U.S. 669 (1973); *Trafficante v. Metro. Life Ins.*, 409 U.S. 205 (1972); *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972); *Gutknecht v. United States*, 369 U.S. 295 (1970); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1 (1968); *Fed. Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597 (1966); *Am. Trucking Ass'ns v. United States*, 364 U.S. 1 (1960); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956); see The OYEZ Project, Search Results - Statutory Standing, [http://www.oyez.org/search/apachesolr\\_search/%22statutory%20standing%22](http://www.oyez.org/search/apachesolr_search/%22statutory%20standing%22) (last visited Nov. 10, 2009). For a complete list of all terms “tagged” in the database, see The OYEZ Project, Tags, <http://www.oyez.org/tagadelic/chunk/2> (last visited Aug. 26, 2009). Until March 2009, the OYEZ Project included a subcategory on its list of case issues entitled “Judicial Power: Statutory Standing,” which included fourteen of the twenty-one Supreme Court opinions listed above. *Id.* This subcategory, previously available at The OYEZ Project, Cases - Judicial Power, Standing to Sue, <http://www.oyez.org/issues/judicial-power/statutory-standing/> (last visited Nov. 10, 2009), now redirects users to the broader category of “standing to sue” cases.

requirements on the federal judiciary? If so, what are the contours of that doctrine? This Part addresses these questions.

#### A. Defining Statutory Standing

The adjudication of any cause of action requires that certain questions be answered in the affirmative before a plaintiff is permitted to recover. For a cause of action created by statute, one such question is whether the plaintiff falls within the class of people to whom the legislature has granted a private right of action. Courts and commentators sometimes use the phrase “statutory standing” to describe this question or to describe the conclusion that the question has been answered in the affirmative.<sup>17</sup> Put another way, the term “statutory standing” often functions merely as a descriptive label of a fact—the fact that the plaintiff falls within the class of people to whom Congress has granted a private right of action. For example, if a federal statute contains a provision allowing “any person” to bring a civil suit against an alleged violator of the statute, then a court or scholar might describe the statute as conferring statutory standing on all citizens to sue for violations of the statute. If the existence of the fact is in doubt, then there is a question as to whether there “is” statutory standing.

Relatedly, the term “statutory standing” is used to describe the legal rule that a plaintiff cannot recover unless he or she falls within the class of persons to whom Congress has granted the private right of action. That is, the term statutory standing is often used as shorthand for the requirement that the statutory standing question must be answered in the affirmative before the plaintiff can recover.<sup>18</sup> This is not a terribly complicated rule, and if statutory standing is viewed in this way, then it is one of many prerequisites to recovery that may require adjudication in litigation involving a statutorily-created cause of action. For example, a plaintiff asserting a statutory claim will often need to establish that (i) the defendant(s) engaged in conduct prohibited by the statute; (ii) the defendant(s)’ conduct is governed by the statute (i.e., the

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17. For example, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, the majority described the issue as whether the plaintiff was “a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act,” 549 U.S. 519, 546 (1983), whereas the dissent characterized the same issue as one of “standing to sue under § 4,” *id.* at 547 (Marshall, J., dissenting). See generally John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993).

18. E.g., *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 175 (2000); see also, e.g., *Gladstone, Realtors*, 441 U.S. at 113 n.25 (framing question of whether § 812 of the Fair Housing Act conferred a private right of action on testers as a question of “standing to sue under § 812”); *Trafficante*, 409 U.S. at 209 n.8 (holding that § 810 of the Fair Housing Act conferred standing to sue on existing tenants, but declining to consider “the question of standing to sue under 42 U.S.C. § 1982”).

defendant is not exempt); (iii) the remedy sought is available under the statute, and (iv) all relevant procedural requirements imposed by the statute have been satisfied.

Other than statutory standing, however, these prerequisites to recovery are not typically given their own label.<sup>19</sup> Indeed, courts and commentators often go to great lengths to describe all questions about such prerequisites as involving the “merits” of a particular claim.<sup>20</sup> It is, therefore, curious that one prerequisite—that the plaintiff fall within the class of people to whom Congress granted a private right of action—is regularly given its own label.

The phrase “statutory standing” is particularly curious because of the generally accepted meaning of the term “standing.” The Supreme Court has defined standing as “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”<sup>21</sup> This appears to suggest that statutory standing is unlike other statutory prerequisites to recovery in that its existence is somehow different from questions involving “the merits of the dispute or of particular issues.” That is, perhaps the term statutory standing is more than a descriptive label for a fact, and perhaps it is more than a label for the familiar and straightforward requirement that a plaintiff must satisfy all of the elements of the cause of action in order to recover. As described in Part I.B, however, common uses of the term do not support such a view. To the contrary, the most plausible understanding of statutory standing is that it serves as nothing more than a shorthand for the principles already described.

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19. Of course, some shorthand labels do exist. The obvious example from the list above is administrative exhaustion—a universally understood label for a certain type of procedural requirement for recovery. Another example appears in litigation governed by ERISA, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461 (2006)). Whether a particular defendant—and, more specifically, the defendant’s conduct—is subject to certain requirements of ERISA is often referred to as a question of “fiduciary status.” See generally Dana Muir, *Fiduciary Status as an Employer’s Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 424-32 (2000). Unlike the phrase “statutory standing,” however, shorthand labels such as “administrative exhaustion” are both universally understood and consistently used. And shorthand labels such as “fiduciary status” are unique to discrete substantive areas of the law. These distinctions are quite significant. As explained in Part II, *infra*, the general applicability of standing as a concept often results in the reflexive importation of elements from unrelated standing doctrines. See, e.g., Crawford v. Lamantia, 34 F.3d 28 (1st Cir. 1994) (holding that *statutory* standing must exist throughout the litigation).

20. E.g., Steel Co. v. Citizens for a Better Env’t., 523 U.S. 83, 89 (1998) (“It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts’ statutory or constitutional *power* to adjudicate the case.”).

21. Warth v. Seldin, 422 U.S. 490, 498 (1975).



### *B. Unearthing a Statutory Standing Doctrine*

If statutory standing is somehow different from other legislatively-imposed requirements, it seems natural to ask “Why?” and “In what respects?” Surprisingly, these questions have attracted little, if any, scholarly attention. This section begins to explore the question of whether statutory standing is more than a term that describes the existence of a particular fact or a familiar legal requirement. An examination of the relevant literature and case law demonstrates, however, that the term should be understood as no more than either a description of a fact or an articulation of the requirement that a plaintiff, in order to recover, must fall within the class of persons to whom Congress has granted a statutorily-created cause of action.

#### *1. Limits on Legislative Authority*

Many important judicial opinions described as “statutory standing cases” involve whether—and to what extent—Congress has exceeded its authority in broadly granting and framing a private right of action in a particular statute. For example, in the words of one noted standing expert:

While the Supreme Court has addressed statutory standing in other contexts, the most recent skirmishes over statutory standing have been fought on the environmental battleground. . . . Among the major questions that [these] cases present is the power of Congress to confer standing on all persons to redress violations of federal environmental law, even when the claimants have suffered no injury distinct from the harm to the public at large as a result of those violations.<sup>22</sup>

Although these “citizen standing” cases are often referred to as presenting questions of “statutory standing,” it is important to understand that the debate in such cases is over the *propriety* of the “statutory standing” granted by Congress.<sup>23</sup> And the propriety of Congress’s action turns on one’s conception of *constitutional* standing principles.<sup>24</sup> In this context, the term “statutory

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22. Stearns, *supra* note 11, at 327.

23. Now-Chief Justice Roberts’ article entitled “Article III Limits on Statutory Standing” focused entirely on the doctrine of constitutional standing. Roberts, *supra* note 17, at 1219 (defending *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as “a sound and straightforward decision applying the Article III injury requirement”).

24. That is, whether Congress is permitted to grant a private right of action to a particular individual will be limited by the individual’s ability to satisfy the constitutional standing requirements. Of course, many excellent papers have been written about this issue. See, e.g., William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL’Y F. 247,

standing” performs the function described in Part I.A. That is, the term refers merely to the existence of the *fact* that Congress has granted the private right of action to a particular plaintiff. The term does not refer to any legal rule or set of legal rules. To the contrary, the legal rules that are implicated are rules of constitutional standing. Whether and to what extent Article III circumscribes Congress’s ability to choose to grant a private right of action to a large group of persons—that is, to confer broad standing by enacting a statute with a sweeping private right of action—is a question about the doctrine of constitutional standing.<sup>25</sup>

### 2. Rules for Ascertaining Legislative Intent

A second group of cases associated with “statutory standing” is a line of Supreme Court decisions involving federal regulatory legislation designed to protect public rights through private enforcement. In this long line of cases, the Court has articulated and applied what is known as the “zone of interests” test. This test requires “a plaintiff’s grievance [to] arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.”<sup>26</sup> It is firmly established as one of the prudential standing doctrines, and it also has clear connections to the requirement of statutory standing.<sup>27</sup> What is less clear, however, is the precise nature of the relationship between the zone of interests test and the requirement of statutory standing.<sup>28</sup> It is the contention of this article that the

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251 (2000) (arguing that “courts should show deference to the legislature in evaluating the existence of injury in fact, traceability, and redressability”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (arguing that the only constitutional standing requirement should be a cause of action).

25. Of course, this does illustrate one way in which statutory standing is different from other legislatively imposed requirements (i.e., it is subject to the limits of Article III). But every federal legislative enactment is subject to *some* constitutional limit. More importantly, the fact that Congress’s ability to confer statutory standing is subject to the limits of Article III hardly justifies the negative consequences that have resulted from the statutory standing label.

26. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

27. For example, Justice Scalia has noted that one “element of statutory standing is compliance with [ ] 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 benefitted by the provision at issue.” *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring); *see also Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 97 (1998) (explicitly connecting the zone of interests test with statutory standing). *See infra* Part II.

28. In the words of one scholar, “[t]he Court managed to confuse standing law” with its initial zone of interests decisions. Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75, 77 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf>. “Courts have spent thirty-five years trying to straighten out statutory standing law since then.” *Id.*

zone of interests cases can shed some light on the possible content of a statutory standing doctrine. The ultimate lesson to be learned from the zone of interests cases, however, is that statutory standing should be viewed like any other element of the cause of action.

One plausible reading of the zone of interests cases is that the test is merely the Court's interpretation of the statutory standing rule intended by Congress in one particular statute: the Administrative Procedure Act (the APA).<sup>29</sup> That is, perhaps the zone of interests test is merely a recognition that Congress intended plaintiffs suing under the APA to be required to show that their interests are protected by the statute(s) that they are alleging to have been violated.<sup>30</sup> If this reading of the zone of interests cases is correct, then statutory standing is a question of legislative intent like any other statutory prerequisite to recovery. Thus, to the extent that there is a "doctrine" of statutory standing, it is comprised of one legal rule—a plaintiff cannot recover unless that plaintiff is within the class of persons to whom Congress has granted a private right of action.

An alternative reading of the zone of interests cases, however, is that the test is a default rule of statutory construction used to assess congressional intent regarding the class of persons to whom any statutorily-created cause of action is available.<sup>31</sup> More specifically, courts will assume that Congress, when creating any cause of action, intends the cause of action to extend only to those plaintiffs who arguably fall within the zone of interests protected by the statute that the plaintiff is alleging to have been violated. If this reading of the zone of interests cases is correct, then there is a special rule of assessing legislative intent on issues of "statutory standing." Even if this is the case, however, the zone of interests test—and statutory standing by extension—is best understood as a method to analyze whether Congress intended a particular plaintiff to fall within the class of persons allowed to recover under a statutorily-created cause of action.

Under either view, statutory standing should be viewed as nothing more than a prerequisite to recovery, like any other element of the statutorily-created cause of action.

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29. Pub. L. No. 111-21, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.); see *infra* Part I.B.2.a (surveying the cases that best support this view).

30. This appears to be the view of Professor Siegel, who authored an important and exhaustive treatment of the zone of interests test. Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 341-42 (2004) ("[U]ltimately, the question posed by the zone of interests test must be whether Congress intended the would-be plaintiff in any given case to be able to bring suit challenging the agency action in question.").

31. See *infra* Part I.B.2.b (surveying the cases that best support this view).

*a) An Introduction to the Zone of Interests Test*

The judicial review provision of the APA<sup>32</sup> allows a private person to seek judicial review of the conduct of a federal administrative agency.<sup>33</sup> In particular, it provides that a “person . . . adversely affected or aggrieved by agency action” may seek judicial review of such action.<sup>34</sup> This judicial review provision serves as a gateway to federal court: when a person challenges agency conduct, the person is often asserting that the agency has failed to comply with one or more of the substantive federal statutes that the agency is charged with administering. Those federal statutes, however, often do not themselves authorize a private person to seek judicial review of the agency’s conduct. It is the judicial review provision of the APA which arguably gives the plaintiff a private right of action.<sup>35</sup> But the language of the provision confers the cause of action only upon a plaintiff who is a “person . . . adversely affected or aggrieved by agency action.”<sup>36</sup>

The zone of interests test was first formulated in two companion cases in which the plaintiffs relied on the judicial review provision of the APA: *Ass’n of Data Processing Service Organizations, Inc. v. Camp*<sup>37</sup> and *Barlow v. Collins*.<sup>38</sup> In *Data Processing*, vendors of data processing services invoked the judicial review provision of the APA<sup>39</sup> to sue the Comptroller of Currency and

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32. 5 U.S.C. § 702 (2006).

33. *Id.*

34. *Id.* (“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.”). There are other “requirements” to sue under section 702: there must be “agency action,” the agency action must be “final,” and Congress cannot have precluded judicial review of the particular action that plaintiff is challenging. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986).

35. For example, the Department of the Interior is charged with administering a variety of federal statutes pertaining to the preservation of the national parks. The APA permits an individual to file a lawsuit in court if the person believes that the Department of the Interior is not abiding by the mandates of those federal statutes. However, the APA makes the cause of action available only to a person who has been “adversely affected or aggrieved” by the Department’s failure to follow the federal statutes. 5 U.S.C. § 702. One perspective on the zone of interests test is that it merely constitutes an interpretation of the word “aggrieved” in the APA; that is, in order to be a person “aggrieved” within the meaning of the APA, a person must be seeking to protect interests that are protected by the statute that the person is contending has been violated by the administrative agency. Thus, a person may sue to challenge conduct of the Interior Department only if the person can show that the person is seeking to vindicate interests that are within the zone of interests arguably protected by the national park statute that the person is claiming the Department has failed to follow.

36. 5 U.S.C. § 702.

37. 397 U.S. 150 (1970).

38. 397 U.S. 159 (1970).

39. 5 U.S.C. § 702.

other defendants to challenge the Comptroller's decision to allow national banks to sell data processing services to their customers and to other banks.<sup>40</sup> The lower courts dismissed the case for lack of standing, but the Supreme Court reversed and remanded. In explaining why the petitioners had standing, the Court explained that "[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."<sup>41</sup> The Court held that there was "no doubt" that the petitioners had sufficiently alleged injury in fact.<sup>42</sup> The Court explained, however, that the question of standing "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."<sup>43</sup> Though the Court did not explicitly attribute this requirement to the text of the APA (as it would later do),<sup>44</sup> the connection is clear.<sup>45</sup>

In *Barlow v. Collins*, decided the same day as *Data Processing*, cash-rent tenant farmers sued the Secretary of Agriculture and other federal and state officials under the APA to challenge the Secretary's decision to change regulations pertaining to the assignment of certain federal benefits.<sup>46</sup> The

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40. *Data Processing*, 397 U.S. at 151 (describing the lawsuit). The plaintiffs argued that the decision to allow national banks to engage in the business of selling data processing services violated § 4 of the Bank Service Corporation Act of 1962, which provided that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks." *Id.* at 155.

41. *Id.* at 152.

42. *Id.*

43. *Id.* at 153.

44. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395-96, 400 n.16 (describing the zone of interests test as a "gloss" on the meaning of the APA).

45. *Data Processing*, 397 U.S. at 153. After articulating the zone of interests test, the Court stated, "Thus, the Administrative Procedure Act grants standing to a person 'aggrieved by agency action within the meaning of the relevant statute.'" *Id.* Ultimately, the Court concluded that the plaintiffs, as competitors, did come within the zone of interests protected by § 4 of the Bank Service Corporation Act, the statute that plaintiffs were claiming to have been violated by the Comptroller's decision. *Id.* at 156. As such, the plaintiffs had standing to bring the suit. *Id.* ("We do think, however, that § 4 arguably brings a competitor within the zone of interests protected by it.").

46. *Barlow v. Collins*, 397 U.S. 159, 162 (1970). The farmers were entitled to receive subsidy payments under a federal cotton program created by the Food and Agriculture Act of 1965. The 1965 Act incorporated a relevant provision from another federal statute, the 1938 Soil Conservation and Domestic Allotment Act. At the time the 1965 Act was enacted, the relevant phrase in the 1938 Act was defined by regulation in a way that would have prohibited the farmers from assigning their right to the cotton subsidy payments for the purpose of securing a lease for land. *Id.* at 160-61. Before any cotton subsidy payments were made, however, the Secretary changed the regulations to allow those payments to be assigned as security for rent.

District Court and Court of Appeals both held that the farmers lacked standing because “they alleged no invasion of a legally protected interest.”<sup>47</sup> Again, the Supreme Court reversed and remanded, first stating that “there is no doubt that in the context of this litigation the tenant farmers . . . have the personal stake and interest that impart the concrete adverseness required by Article III.”<sup>48</sup> Next, the Court held that the tenant farmers were “clearly within the zone of interests” protected by the relevant statutes. The Court explained that the 1965 and 1938 Acts were both intended to protect the tenant farmers.<sup>49</sup> Thus, the tenant farmers were “persons ‘aggrieved by agency action within the meaning of a relevant statute’ as those words are used in [the APA].”<sup>50</sup>

The next year, the Court considered two cases with fact patterns similar to *Data Processing*. In both *Arnold Tours, Inc. v. Camp*<sup>51</sup> and *Investment Company Institute v. Camp*,<sup>52</sup> plaintiffs sued the Comptroller of Currency under the APA in order to challenge the validity of the Comptroller’s decision to allow national banks to engage in a particular type of business—providing travel services in *Arnold Tours*<sup>53</sup> and operating investment funds in *Investment Company Institute*.<sup>54</sup> In *Arnold Tours*, the plaintiffs argued that § 4 of the Bank Service Corporation Act—the exact statute involved in *Data Processing*—prohibited the national banks from engaging in the provision of travel services.<sup>55</sup> The Supreme Court held in a short per curiam opinion that the plaintiffs had standing, because they were competitors who fell within the zone of interests protected by § 4.<sup>56</sup> The Court’s opinion was little more than an explanation that competitors generally, not only the data processing

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*Id.* at 161-62. As a result, the plaintiffs’ landlord began to condition leases upon assignment, and the farmers were deprived of any source of cash or credit to obtain farming supplies. *See id.* at 161-63. They were left with only the option of obtaining supplies on credit from their landlord, whose terms were considerably less favorable than those the farmers could have obtained if they had not been forced to assign their subsidy payments to their landlord. *Id.* at 163.

47. *Id.* at 163-64.

48. *Id.* at 164.

49. *Id.* at 164-65.

50. *Id.* at 165.

51. 400 U.S. 91 (1970) (decided Nov. 23, 1970).

52. 401 U.S. 617 (1971) (decided Apr. 5, 1971).

53. *Arnold Tours*, 400 U.S. at 45.

54. *Inv. Co. Inst.*, 401 U.S. at 618. The Court in *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 491 (1998), described the suit in *Investment Company Institute* as aimed at stopping national banks from “establish[ing] and operat[ing] what in essence were early versions of mutual funds.”

55. *Arnold Tours*, 400 U.S. at 45.

56. *Id.* at 46.

competitors, fell within the zone of interests protected by § 4 of the Bank Service Corporation Act.

In *Investment Company Institute*, the plaintiffs argued that the Glass-Steagall Banking Act of 1933 prohibited the national banks from operating investment funds.<sup>57</sup> The Court again very briefly rejected the argument that plaintiffs lacked standing to bring the suit by stating that such an argument was “foreclosed” by the *Data Processing* case.<sup>58</sup> The Court in *Investment Company Institute* did not even use the term “zone of interests.” Instead, in the sole paragraph addressing standing, the Court made three distinct points. First, the Court held that the plaintiffs’ injury was “indistinguishable” from the injury to the plaintiffs in *Data Processing*, so a “case or controversy” existed.<sup>59</sup> Next, the Court held that “judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks” had not been precluded by Congress.<sup>60</sup> Finally, the Court held “that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury.”<sup>61</sup> This last point was an oblique reference to the zone of interests test.

Thus, *Arnold Tours* and *Investment Company Institute* are easily viewed as straightforward cases in which the Supreme Court reaffirmed its recently-announced interpretation of the judicial review provision of the APA.

*b) A Narrow View of the Zone of Interests Test*

Though the Court in *Data Processing* located the zone of interests test within a standing inquiry, it is not at all clear that the zone of interests test was intended to be a universally applicable rule of prudential standing. Moreover, the actual application of the zone of interests test, in contrast to the way it is often described,<sup>62</sup> supports the view that it should be understood as nothing more than an interpretation of the APA. Nearly every case in which the

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57. *Inv. Co. Inst.*, 401 U.S. at 619.

58. *Id.* at 620.

59. *Id.*

60. *Id.*

61. *Id.*

62. The zone of interests test is routinely listed as one of the three generally applicable prudential standing limits. *E.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998); *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 518 (1998) (O’Connor, J., dissenting) (“The zone-of-interests test is an integral part of the prudential standing inquiry.”); *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (“Numbered among [the] prudential [standing] 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.”).

Supreme Court has applied the zone of interests test has involved the APA.<sup>63</sup> And the Supreme Court has expressed the view that the zone of interests test is no more than its interpretation of congressional intent in enacting the APA.<sup>64</sup> For example, in *Clarke v. Securities Industry Ass'n*,<sup>65</sup> the Court identified the question in *Data Processing* as “basically one of interpreting congressional intent,” even though it had been “described as one of standing.”<sup>66</sup> The Court stated that the zone of interests test was a “gloss on the meaning”<sup>67</sup> of the judicial review provision of the APA, necessary to limit the availability of the APA to not only persons suffering an injury in fact, but also those who could demonstrate compliance with the zone of interests test.<sup>68</sup>

When the zone of interests test is viewed as merely a rule to interpret the meaning of the APA, it becomes clear that its label as a prudential standing doctrine is somewhat misleading. More importantly, this view of the zone of interests test permits the conclusion that the term “statutory standing” stands for nothing more than the straightforward legal rule that a plaintiff must fall

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63. See *Nat'l Credit Union Admin.*, 522 U.S. 479; *Bennett*, 520 U.S. 154; *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517 (1990); *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388 (1987); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986). Even *Akins*, a case in which the Court cursorily applied the zone of interests test to a cause of action created directly by the Federal Election Campaign Act (FECA), involved statutory language that was strikingly similar to that of the APA. *Akins*, 524 U.S. at 19-20 (citing 2 U.S.C. § 437g(a)(8)(a) (2006)) (pointing out that the FECA uses the word “aggrieved” in the statutory provision that creates the cause of action). Moreover, it is difficult to read *Akins* as standing for the proposition that every statutorily-created cause of action must be subject to the zone of interests test because the Court’s treatment of the test was extremely brief, and it merely supported, rather than drove, its conclusion that Congress had authorized the plaintiffs in that case to assert the statutorily-created cause of action. *But see Bennett*, 520 U.S. 154, discussed *infra* part I.B.2.b.

64. *But see infra* Part II.B.2.c.

65. *Clarke*, 479 U.S. 388. The fact pattern of *Clarke* was similar to *Data Processing*, *Arnold Tours*, and *Investment Company Institute*: in *Clarke*, a trade association of securities brokers, underwriters, and investment bankers sued under the APA to challenge the decision by the Comptroller of the Currency to allow two national banks to offer brokerage services—services that directly competed with those provided by plaintiff’s members. *Id.* at 392 n.2 (describing the suit and Comptroller’s approval of applications by Security Pacific National Bank of Los Angeles and Union Planters National Bank of Memphis to offer brokerage services). The plaintiff in *Clarke* argued that the Comptroller’s decision violated the McFadden Act and the Glass-Steagall Act (but only the McFadden Act argument was before the Supreme Court). *Id.* at 392 n.4. The Court held that the plaintiff had standing because its competitive injury fell within the zone of interests protected by the McFadden Act. *Id.* at 403. The Court’s conclusion is hardly surprising in light of the prior competitor cases.

66. *Id.* at 394.

67. *Id.* at 395-96, 400 n.16.

68. *Id.* at 396 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 155 (1970)).



within the class of persons to whom Congress has granted a cause of action in order to recover.

*c) A Broader View of the Zone of Interests Test*

A second view of the relevant cases is that the zone of interests test is a default presumption of statutory construction. That is, federal courts will assume that Congress, when creating a cause of action, intends the claim to extend only to those plaintiffs who arguably fall within the zone of interests protected by the statute that the plaintiff is alleging to have been violated. Congress is free to explicitly reject such a presumption, but in the absence of such indication, federal courts will apply the presumption to any cause of action created by Congress.<sup>69</sup>

This conception of the zone of interests test is most strongly supported by the Court's decision in *Bennett v. Spear*.<sup>70</sup> In determining whether the plaintiffs were required to demonstrate that they were seeking to protect interests that were arguably within the zone of interests protected by the Endangered Species Act, the Court acknowledged that the zone of interests test was "one of the prudential requirements"<sup>71</sup> of standing and that it had been applied to suits in which the plaintiffs were not proceeding under the APA.<sup>72</sup>

The Court in *Bennett* stated, 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."<sup>73</sup> That is, "Congress legislates against the background of [the zone of interests requirement], which applies unless it is expressly negated."<sup>74</sup> It went on to hold that Congress had "negate[d] the zone-of-interests test (or, perhaps more accurately, expanded the zone of interests)"<sup>75</sup> in the ESA, such that plaintiffs did not lack standing to sue.<sup>76</sup>

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69. It is worth noting that the zone of interests cases all involve public rights. In theory, then, a zone of interests presumption of statutory construction could be limited to only public rights cases.

70. *Bennett v. Spear*, 520 U.S. 154 (1997). In that case, plaintiffs sued federal officials for failing to comply with certain obligations imposed by the Endangered Species Act. *Id.* The plaintiffs proceeded under the citizen suit provision of the ESA, which permitted "any person" to sue for violations of the statute. *Id.* at 164 n.2 (quoting citizen suit provisions of the ESA).

71. *Id.* at 162.

72. *Id.* at 163.

73. *Id.*

74. *Id.*

75. *Id.* at 164.

76. *Id.* at 166 ("The Court of Appeals therefore erred in concluding that petitioners lacked standing under the zone of interests test to bring their claims under the ESA's citizen suit

In arriving at this conclusion, the Court pointed to the breadth of the language used by Congress in creating the cause of action: Congress authorized “any person” to “commence a civil suit” in the ESA, which the Court characterized as “an authorization of remarkable breadth when compared to the language Congress ordinarily uses.”<sup>77</sup> The Court also found it “even more plausible” that Congress “inten[ded] to permit enforcement by everyman”<sup>78</sup> because “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 [because] the obvious purpose of the particular provision in question is to encourage enforcement by so-called ‘private attorneys general.’”<sup>79</sup> Thus, the Court examined the text of the statute as well as the purpose behind it to conclude that Congress did not intend the zone of interests test to apply to the cause of action created by the ESA.<sup>80</sup>

If the zone of interests test is intended to serve as a background rule of statutory construction, which Congress can override, then its identification as a prudential standing doctrine is somewhat more understandable. Like the limit on third party standing, courts will use the test to assume that Congress intended one result unless it clearly indicates otherwise. Specifically, courts will assume that Congress intended to grant a private right of action to only those plaintiffs within the zone of interests protected by the statute, unless Congress specifies otherwise. Even under this view of the zone of interests test, however, the term statutory standing is best viewed as referring only to the legal rule that it is necessary to ascertain Congress’s intent in creating a cause of action, because the plaintiff cannot recover without a finding that he

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provision.”).

77. *Id.* at 164-65.

78. *Id.* at 166.

79. *Id.* at 165.

80. An alternative way to describe the Court’s holding is that the ESA arguably protected a much broader range of interests than the APA, so the “zone” within which plaintiffs had to locate themselves for purposes of invoking the cause of action created by the ESA was much bigger than the “zone” for the APA. *See id.* at 164 (pointing out that the question of whether Congress has “negate[d]” the zone of interests test might be more accurately conceived of as whether Congress has “expand[ed] the zone of interests”). For purposes of this article, this is a distinction without a difference. The point is that the zone of interests test as understood by its various applications over time did not apply to plaintiffs suing under the ESA because Congress had indicated the intent to override that particular test.

Ultimately, the plaintiffs in *Bennett v. Spear* were not allowed to assert all of their claims under the ESA, because judicial review had been precluded for some of the claims. *Id.* at 171-74. But the zone of interests test was not the impediment to their ESA claims. The Court clearly held that the plaintiffs were permitted to avail themselves of the cause of action created by the ESA without demonstrating that they fell within the zone of interests arguably protected by the statutory provisions that the plaintiffs were claiming to have been violated. *Id.* at 164-65.

or she is within the class of persons for whom Congress intends to make recovery available. Thus, even though statutory standing has been linked to the zone of interests test, and the zone of the interests test has been labeled a prudential standing doctrine, statutory standing should not be conceived of as a standing doctrine at all. Rather, it should be understood as shorthand for the familiar rule that a plaintiff cannot recover unless the plaintiff is within the class of persons to whom Congress has conferred a private right of action.

## II. Statutory Standing and ERISA

Part I explored one conception of the term statutory standing. An examination of lower court opinions, however, reveals another—and more problematic—conception of the term. This view is that statutory standing refers to *more* than the requirement that the plaintiff must fall within the class of plaintiffs to whom Congress granted a private right of action in order to recover. Many lower courts have embraced this view. They assume that statutory standing is a prerequisite not only to recovery, but also to filing. That is, they assume that statutory standing is, at a minimum, a *threshold* requirement, and they often assume that it is a jurisdictional requirement as well.<sup>81</sup> Using ERISA as a paradigmatic example, this Part will demonstrate the pernicious effects that this understanding of statutory standing can have.

### A. ERISA Background

ERISA regulates any “employee benefit plan,”<sup>82</sup> which is defined as either an “employee welfare benefit plan” or “employee pension benefit plan.”<sup>83</sup>

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81. *E.g.*, *Miller v. Rite Aid Corp.*, 334 F.3d 335 (3d Cir. 2003) (“The requirement that the plaintiff be a plan participant is both a standing and subject matter jurisdictional requirement.”); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1464 and n.6 (4th Cir. 1996) (identifying the question of whether a plaintiff is a fiduciary as a question of standing, which is jurisdictional); *Swinney v. General Motors Corp.*, 46 F.3d 512, 518 (6th Cir. 1995) (considering for the first time on appeal the issue of whether plaintiffs qualified as participants within the meaning of ERISA “because standing is necessary for our exercise of jurisdiction”); *Harris v. Provident Life and Acc. Ins. Co.*, 26 F.3d 930, 933 (9th Cir. 1994) (identifying the question of whether plaintiff is a participant, beneficiary or fiduciary as a jurisdictional question); *Coleman v. Champion Intern. Corp./Champion Forest Prods.*, 992 F.2d 530, 532-33 (5th Cir. 1993) (identifying the question of whether a plaintiff is a beneficiary as one of standing, which is jurisdictional and “a ‘threshold question . . . [that] determin[es] the power of the court to entertain the suit”); *Alexander v. Anheuser-Busch Cos., Inc.*, 990 F.2d 536, 538 (10th Cir. 1993) (raising *sua sponte* the issue of whether plaintiff is a participant because “[t]he issue of standing is jurisdictional in nature”).

82. 29 U.S.C. § 1003 (2006).

83. *Id.* § 1002(3) (“The term ‘employee benefit plan’ or ‘plan’ means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare

Both of these terms have a fairly wide scope, but their precise definition is not important for the purposes of this article. An “employee welfare benefit plan”<sup>84</sup> is basically any organized provision of health or disability insurance by an employer.<sup>85</sup> An “employee pension benefit plan”<sup>86</sup> is basically any employer-sponsored plan that provides retirement income to its employees.<sup>87</sup> There are two common varieties of employer-sponsored retirement benefit plans. The first is the traditional pension plan,<sup>88</sup> in which retirees receive a certain, specified amount of money on a regular basis. They will commonly receive a check every month; the amount of the check will be the same every month, and the amount is usually calculated with reference to what the employee earned when he or she was still working. The second type of employer-sponsored retirement benefit plan is exemplified by the now-familiar 401(k) plan.<sup>89</sup> Such a plan does not promise certain, specified benefits upon retirement. Instead, the employee—and often the employer—makes

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benefit plan and an employee pension benefit plan.”).

84. *Id.* § 1002(1).

85. Plans providing “vacation benefits,” “training programs,” “day care centers,” or “prepaid legal services” are also defined as employee welfare benefit plans. *Id.* (“The terms ‘employee welfare benefit plan’ and ‘welfare plan’ mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).”).

86. *Id.* § 1002(2)(A).

87. *Id.* (“Except as provided in subparagraph (B), the terms ‘employee pension benefit plan’ and ‘pension plan’ mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program-- (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.”).

88. I use this informal term to refer to the first of the two types of employee benefit plans identified in ERISA: the “defined benefit plan.” *Id.* § 1002(35).

89. A 401(k) plan is an example of the second of the two types of an employee benefit identified in ERISA: the “defined contribution plan,” also known as an “individual account plan.” *Id.* § 1002(34).

contributions over time to the employee's individual account within the plan; the plan fiduciaries invest that money, and the employee is permitted eventually to withdraw funds from his or her individual account, which now ideally contains more money than was set aside over the course of his or her time with the employer.

ERISA imposes significant substantive obligations upon the establishment, maintenance, and administration of these employee benefit plans. To enforce these duties, ERISA provides for civil enforcement.<sup>90</sup> The civil enforcement scheme is set forth in section 502 of ERISA, codified in § 1132 of title 29, and it contemplates both administrative and judicial enforcement. More specifically, § 1132(a) creates causes of action that can be asserted in court; some of the causes of action are available to the government (the Secretary of Labor and, in one instance, the states), but several causes of action are private rights of action, available to individuals. The most significant of these are located in § 1132(a)(1),<sup>91</sup> § 1132(a)(2),<sup>92</sup> and § 1132(a)(3).<sup>93</sup> Because of an

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90. ERISA also provides for limited criminal enforcement. *Id.* § 1111 (punishing the assumption of the fiduciary role by certain convicted criminals); § 1131 (punishing the willful violation of ERISA Title I); § 1141 (punishing the coercive interference with ERISA rights).

91. "Section [1132(a)(1)] is the workhorse of ERISA remedy law, the provision under which routine benefit denial and other ERISA claims proceed." John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1334 (2002) (footnotes omitted). Section 1132(a)(1) creates a cause of action to recover benefits due under the terms of a plan. 29 U.S.C. § 1132(a)(1)(B). It also creates a cause of action to recover the statutory penalties provided by ERISA for failure to comply with various disclosure obligations imposed by the statute. *Id.* § 1132(a)(1)(A).

92. Section 1132(a)(2) provides that a "civil action may be brought . . . for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). Section 1109 (often referred to as ERISA section 409) in turn imposes personal liability upon any fiduciary who breaches the duties imposed by ERISA. *Id.* § 1109. It requires the fiduciary to "make good to [the] plan any losses to the plan resulting from" the fiduciary's breach of duty and "to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary . . ." *Id.* § 1109(a). Thus, § 1109 (and § 1132(a)(2)) provides for direct recovery by the plan, not the plaintiff who brings suit. In addition to permitting a court to require the breaching fiduciary to make the plan whole, section 1109 further provides that the fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." *Id.*

93. Section 502(a)(3) provides that a "civil action may be brought . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). Section 1132(a)(3) has been described as a "'catchall' provision," which "'act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section 1132] does not elsewhere adequately remedy.'" Langbein, *supra* note 91, at 1334 (footnotes omitted). The Supreme Court has taken a conservative approach to § 1132(a)(3), however, dramatically limiting the relief that it offers to injured individuals. See generally Paul M. Secunda, *Sorry*,

extremely strong ERISA preemption doctrine, the causes of action created by § 1132 represent the only way in which individuals can obtain judicial remedies for violations of ERISA. And because ERISA has such a wide scope, the causes of action created in § 1132(a) provide the only means for individuals to seek redress for most of the wrongs they have suffered in the context of employer sponsored health care or retirement benefits.

ERISA speaks in terms of “participants,” “beneficiaries,” “fiduciaries,” and the Secretary of Labor, and § 1132(a) is no exception. The statutory provision is entitled, “Persons empowered to bring a cause of action”; it begins with the following: “A civil action may be brought—” and each subsection then contains the following language (or its equivalent): “by a participant, beneficiary, fiduciary, or the Secretary of Labor.”<sup>94</sup> It is therefore important to be able to identify whether a person falls into one of those categories. However, it cannot be forgotten that whether a person is a “participant,” “beneficiary,” and/or “fiduciary” has tremendous significance *outside* of § 1132(a) because important substantive obligations are imposed *upon* “fiduciaries,” and the plans owe substantive obligations *to* “participants” and “beneficiaries.”<sup>95</sup>

Not surprisingly, ERISA contains a general definition provision, in which it defines all three of the relevant terms. Significantly for the following discussion, ERISA defines a “participant” as:

any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.<sup>96</sup>

The Supreme Court interpreted this language in *Firestone Tire & Rubber Company v. Bruch*<sup>97</sup> to mean either (1) “‘employees in, or reasonably expected to be in, currently covered employment,’” or (2) “‘former employees who ‘have . . . a reasonable expectation of returning to covered employment’ or who have ‘a colorable claim’ to vested benefits.’”<sup>98</sup> Thus, the first prong of the definition

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*No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1273840](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273840) (explaining the Supreme Court’s narrow interpretation of the remedies available under § 1132(a)(3)).

94. 29 U.S.C. § 1132(a).

95. It is presumably also important to be able to identify the Secretary of Labor, to whom some substantive obligations are owed, but the question is not a difficult one. The identity of the Secretary of Labor is, of course, self-evident!

96. 29 U.S.C. § 1002(7).

97. 489 U.S. 101 (1989).

98. *Id.* at 117 (citations omitted). The Court continued,

pertains to current employees and the second prong pertains to former employees; both categories of employees can qualify as “participants.”<sup>99</sup>

Seizing on the statutory language in § 1132(a) that extends the causes of action to participants, as well as the Supreme Court’s definition of that word in *Firestone*, lower courts have become consumed with the question of whether the plaintiff qualifies as a participant and can therefore initiate or maintain a lawsuit under ERISA.<sup>100</sup> They have conceived of this issue as a statutory standing question.<sup>101</sup> As a result, they have been unable to thoughtfully consider the role that the word “participant” should play in the different subsections of § 1132(a).

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In order to establish that he or she “may become eligible” for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable claim to vested benefits “may become eligible.” A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the [phrase] “may become eligible.”

*Id.* at 117-18 (quoting *Saladino v. I.L.G.W.U. Nat’l Ret. Fund*, 754 F.2d 473, 476 (2d Cir. 1985)).

99. The court in *Firestone* was not defining “participant” in the context of that word’s meaning in § 1132. Rather, the issue in *Firestone* was whether the plan administrator (Firestone) owed a substantive obligation to the plaintiffs, former Firestone employees. More specifically, the issue was whether Firestone had been required to respond to requests for information from the plaintiffs. ERISA provides that a plan administrator must provide certain information “upon written request of any participant,” 29 U.S.C. § 1024(b)(4), and further provides that the administrator “may be personally liable to such participant” for failure or refusal to comply with a request. 29 U.S.C. § 1132(c)(1)(B). The district court had granted summary judgment for Firestone on the ground that the plaintiffs were not participants when they requested the information, so Firestone could not be held liable for its failure to respond to the request. *Firestone*, 489 U.S. at 107. The Court of Appeals reversed, holding that Firestone was required to respond to the request of any person who claimed to be a participant, even if that person was not in fact a participant at the time of the request. *Id.* at 108. The Supreme Court rejected this interpretation as overly expansive, because “Congress did not say that all ‘claimants’ could receive information about benefit plans.” *Id.* at 117. Rather, only “participants” were entitled to such information, and “[a] former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits” simply [did] not fit within the definition of that word. *Id.* at 118.

100. It is more accurate to say that courts are concerned with the question of whether the plaintiff qualifies as a participant, beneficiary or fiduciary. However, there appear to be many more cases in which the plaintiff is a putative participant, rather than a putative beneficiary or fiduciary. Nonetheless, there are statutory standing cases in which the court was focused on whether the plaintiff qualified as a beneficiary or fiduciary and was thus entitled to bring suit.

101. *E.g.*, *Kendall v. Employees Ret. Plan*, 561 F.3d 112 (2d Cir. 2009); *Bridges v. Am. Elec. Power Co.*, 498 F.3d 442 (6th Cir. 2007); *Leuthner v. Blue Cross & Blue Shield of Ne. Pa.*, 454 F.3d 120 (3d Cir. 2006).

### B. The Elevation Problem

One of the harms caused by the careless use of the term “statutory standing” is that lower courts assume that the question of whether the plaintiff falls within the class of persons to whom Congress has extended the private right of action has some special significance.<sup>102</sup> That is, lower courts often elevate the statutory standing question above other questions that should be treated similarly. They elevate the question by making it a threshold inquiry, which means it must be considered first and separate from other questions regarding whether the plaintiff may ultimately recover.<sup>103</sup> Some courts not only make the statutory standing question a threshold one; they make it jurisdictional.<sup>104</sup>

It is apparent that lower courts believe that the “doctrine” of statutory standing impels them to set aside for special treatment the question of whether the plaintiff qualifies as a participant.<sup>105</sup> But if courts were to set aside their preconceived notions regarding the “doctrine” of statutory standing, it is not at all clear that the question of whether the plaintiff qualifies as a participant

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102. In the ERISA context, the question of “whether the plaintiff falls within the class of persons to whom Congress has extended the private right of action” turns on whether the plaintiff qualifies as a “participant” under the statute. Courts, however, do not usually frame the question as simply whether the plaintiff “qualifies” as a participant. *See infra* Part II.C. Rather, some courts ask whether the plaintiff “was” a participant at the time of filing the suit, and some courts ask whether the plaintiff “is” currently a participant; that is, whether the party is a participant at the time the party is appearing before the court. Occasionally, a court may ask whether the plaintiff was a participant at the time the alleged wrongdoing occurred. This timing issue is discussed in more detail in Part II.C, *infra*.

103. *E.g.*, *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1464, n.6 (4th Cir. 1996) (“Because the issue of standing under ERISA is jurisdictional in nature, we decide it first.”)

104. As one source states,

Courts consistently hold that federal courts lack subject matter jurisdiction over causes of action brought by plaintiffs who lack [statutory] standing to bring an ERISA claim. Courts sometimes express this notion by observing that the requirement that a private plaintiff be a plan participant or beneficiary is a requirement of standing as well as subject matter jurisdiction.

JAYNE E. ZANGLEIN & SUSAN J. STABILE, *ERISA LITIGATION* 400 (2d ed. 2005) (footnotes and citations omitted); *see also supra* note 81.

105. *E.g.*, *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 294 (3d Cir. 2007) (describing question of whether plaintiff is participant as question of statutory standing, which “is an issue of subject-matter jurisdiction”); *Crawford v. Lamantia*, 34 F.3d 28, 32 (1st Cir. 1994) (explaining that the question of whether plaintiff is a participant is one of standing, which “goes to the very power of the court to act . . .” (quoting *Sommers Drug Store Co. Employee Profit Sharing Trust v. Corregan*, 883 F.2d 345, 348 (5th Cir. 1989)); *Sommers*, 883 F.2d at 348 (identifying the issue of whether the plaintiff is a participant as one of standing and stating that “standing is essential to the exercise of jurisdiction . . .”); *see also supra* note 81.



is different from any of the other questions implicated by the causes of action created by § 1132.<sup>106</sup>

For example, the cause of action created by § 1132(a)(2) provides that a plaintiff may sue a fiduciary for breach of fiduciary duty.<sup>107</sup> The defendant will not be liable if he or she was never a fiduciary of the plan, or if his or her allegedly wrongful conduct occurred “before he became a fiduciary or after he ceased to be a fiduciary,” or if the allegedly wrongful conduct does not rise to the level of a breach of fiduciary duty.<sup>108</sup>

It would be equally accurate to say that the *plaintiff will not recover*—which of course is the same as saying that the defendant will not be liable—if the defendant was never a fiduciary of the plan, or if the defendant’s allegedly wrongful conduct occurred before the defendant became a fiduciary or after the defendant ceased to be a fiduciary, or if the defendant’s allegedly wrongful conduct does not rise to the level of a breach of fiduciary duty. That statement could be rephrased yet again in the following way: Congress did not intend to grant the cause of action created by § 1132(a)(2) to a plaintiff who was injured by a defendant who is not a fiduciary of the plan, or by a defendant whose allegedly wrongful conduct occurred before becoming a fiduciary or after ceasing to be a fiduciary, or by a defendant whose allegedly wrongful conduct does not rise to the level of a breach of fiduciary duty. The different formulations are simply different articulations of the same basic idea: there are a variety of conditions to recovery under § 1132(a)(2).

If it is clear at the very outset of the case that the plaintiff cannot satisfy all of the conditions, then the plaintiff will not be allowed to proceed beyond the initial pleading stage. The defendant need only satisfy the burdens of prevailing on a Rule 12(b)(6) or Rule 12(c) motion. If the pleadings do not make it clear that the plaintiff will fail to satisfy all the relevant conditions of recovery, but discovery does make such a conclusion apparent, then summary judgment is available. That is, the plaintiff will no longer be allowed to proceed with the § 1132(a)(2) claim. In other words, the plaintiff will lose. The issue of whether the plaintiff qualifies as a participant can be treated identically. If it is clear at the outset of the case that plaintiff does not qualify as a participant,<sup>109</sup> the plaintiff will fail to proceed beyond the initial pleading

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106. It is black-letter law that “[t]he failure to prove certain elements of an ERISA cause of action does not operate to deprive a federal court of subject matter jurisdiction.” ZANGLEIN & STABILE, *supra* note 104, at 395 (footnotes and citations omitted).

107. 29 U.S.C. §§ 1109, 1132(a)(2); *see supra* note 92.

108. 29 U.S.C. § 1109(b).

109. For example, if the plaintiff cannot even colorably claim that he or she qualifies as either a participant, beneficiary, or fiduciary, then it may be clear at the outset of the case that the plaintiff does not fall within the class of persons to whom Congress has granted the causes

stage. If such a conclusion becomes apparent later in the litigation, summary judgment is available. And if the issue of plaintiff's status remains unclear (i.e., genuinely disputed), the jury will decide the issue at trial.

There is nothing inherently offensive about a defendant being forced to litigate a case in which the plaintiff is ultimately unable to prove that he or she qualifies as a participant. The situation is identical to one in which the defendant is forced to litigate a case in which the plaintiff is ultimately unable to prove that the defendant was a fiduciary or that the defendant breached its fiduciary duty. Nor is anything in the participant inquiry logically antecedent to any of the other questions regarding the plaintiff's right to recovery. Indeed, in some instances, the determination of whether the plaintiff qualifies as a participant turns on whether the plaintiff is capable of satisfying all the other elements of recovery. Recall that a participant includes a former employee who has a "colorable claim that . . . he or she will prevail in a suit for benefits."<sup>110</sup> In such an instance, the issue of whether the plaintiff qualifies as a participant turns on whether the plaintiff's claim in the lawsuit is for "benefits" and whether that claim is "colorable." This means that if the issue of whether the plaintiff qualifies as a participant is made into a threshold question, the court will have to decide at the outset of the case whether the plaintiff is suing for something that can be characterized as a "benefit"—an often complicated question that entails policy judgments about the purpose of the statute and that may require detailed inquiry into the nature of the defendant's wrongdoing. The court will further have to decide whether the plaintiff's claim is colorable, which may also be a laborious inquiry.<sup>111</sup>

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of action created by § 1132(a). In such a case, it is unnecessary to reach for any doctrine of standing, because the plaintiff's claim will fail on the grounds that he or she is not one of persons whom Congress intended to be allowed to recover under the statute, and the case can be dismissed on a motion for failure to state a claim. In such cases, the defendant will almost certainly argue that it does not owe any substantive obligation to the plaintiff.

110. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989) (citations omitted) ("[T]he term 'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits.").

111. Moreover, if the courts intend to elevate the statutory standing question on account of its status as a "standing" doctrine, they may need to elevate it in all relevant senses. For example, if the question of whether the plaintiff qualifies as a participant is genuinely a question of "standing," then at least two curious consequences flow from that determination. First, the court will be required to decide the issue, which may entail the adjudication of disputed facts. Second, because standing is a limitation on only the federal judiciary, the requirement that the plaintiff qualify as a "participant" would not be one that state courts would have to impose. Thus, in suits for benefits under § 1132(a)(1)(B), where the state courts have concurrent jurisdiction, the issue of whether the plaintiff is a participant would disappear entirely. These

Nor is there a benefit to elevating the statutory standing question to a threshold question. Such an inquiry is unnecessary to ensure that the federal court is adjudicating a particularized dispute in which the plaintiff has a sufficiently personal stake for the adversarial system to function appropriately. The constitutional requirement of injury in fact already serves the function of requiring the plaintiff to have a personal stake in the outcome of the case because the plaintiff is required to show that he or she has personally suffered or will imminently suffer a concrete harm, that the defendant's conduct is the cause of the harm, and that a favorable outcome in the case is likely to redress the harm. Whether the plaintiff qualifies as a "participant" adds nothing to the plaintiff's incentive to vigorously litigate the case.

Statutory standing is also unnecessary to ensure that the plaintiff is not asserting a generalized grievance. The cases in which statutory standing is invoked to deny standing do not involve plaintiffs who are asserting harms that are common to all members of the public.<sup>112</sup> For example, the ERISA cases often entail a plaintiff suing the plan or fiduciaries of the plan for failing to pay the plaintiff some money that the plaintiff alleges is owed by the terms of the plan, or for failing to provide information that the plaintiff alleges is owed by the terms of the plan. In such cases, separation of powers concerns are entirely absent; these cases do not raise the specter of a federal judiciary attempting to oversee another branch of government. It is, therefore, unnecessary to force the court to consider as a threshold matter whether the plaintiff qualifies as a participant.<sup>113</sup>

Finally, significant consequences follow when courts designate as *jurisdictional* the question of whether a plaintiff qualifies as a participant. Issues that go to the federal court's subject-matter jurisdiction must be raised

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consequences are not costless.

112. The zone of interest cases are the most likely candidates for the plaintiff to assert a generalized grievance, because they involve plaintiffs—who are not themselves the direct subjects of agency action—attempting to force a federal agency to comply with the applicable law. In such cases, separation of powers concerns—to the extent that they are valid at all—are most significant. But the injury in fact requirement and the prohibition against generalized grievances screen out all such cases. Thus, even the zone of interests cases do not involve plaintiffs who are simply asking the federal agency to follow the law. Instead, the plaintiffs have an interest that is adversely affected by the agency action, so the agency's decision or conduct inflicts harm on the plaintiff that is distinct from the harm inflicted on every citizen when the government acts illegally.

113. For similar reasons, it has been argued that even constitutional standing limits should not apply in cases involving purely private rights. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 277-78 (2008) (arguing that "whatever the virtue of limiting the judiciary's role in the vindication of public interests, the restriction on a litigant's ability to seek redress in the courts for a violation of a private right is ahistorical and unjustified.").

*sua sponte* by the court.<sup>114</sup> The court is required to always consider the question of its own subject-matter jurisdiction, even if the parties have not raised the issue.<sup>115</sup> Moreover, a subject-matter jurisdiction challenge is not waivable by the parties.<sup>116</sup> When a question goes to a federal court's subject matter jurisdiction, any litigant can raise the question at any time, even after the entry of judgment<sup>117</sup> or on appeal.<sup>118</sup> Thus, when the lower courts characterize the issue of whether the plaintiff qualifies as a participant as a jurisdictional one, they obligate themselves to raise the issue regardless of whether the parties have done so,<sup>119</sup> and they authorize the parties to raise the issue at any time during the litigation or appellate process.<sup>120</sup> In addition, if an issue is jurisdictional, rather than merely an element of the cause of action, then—as with standing—the court, rather than a jury, will decide the issue and may be called upon to resolve disputed facts.<sup>121</sup> Finally, if the failure of the plaintiff to qualify as a participant strips the court of federal question jurisdiction over the ERISA claim, then the entire complaint must be dismissed (unless the ERISA claim can rely on some other basis of jurisdiction).<sup>122</sup> As

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114. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884); *see also, e.g., Alexander v. Anheuser-Busch Cos., Inc.*, 990 F.2d 536, 538 (10th Cir. 1993) (raising *sua sponte* the issue of whether the plaintiff is a participant because “[t]he issue of standing is jurisdictional in nature”).

115. *Arbaugh*, 546 U.S. at 514; *Ruhrgas*, 526 U.S. at 583 (“[S]ubject-matter delineations must be policed by the courts on their own initiative . . .”); *Mansfield*, 111 U.S. at 382.

116. *Arbaugh*, 546 U.S. at 514; *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see also, e.g., Swinney v. General Motors Corp.*, 46 F.3d 512, 518 (6th Cir. 1995) (considering for the first time on appeal the issue of whether plaintiffs qualified as “participants” within the meaning of ERISA “because standing is necessary for our exercise of jurisdiction”); *Sommers Drug Store Co. Employee Profit Sharing Trust v. Corregan*, 883 F.2d 345, 348 (5th Cir. 1989) (rejecting the argument that defendants have waived a challenge to plaintiffs’ status as participants because “lack of standing can be raised at any time by a party or by the court.”).

117. FED. R. CIV. PRO. 12(h)(3); *Arbaugh*, 546 U.S. at 506.

118. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884); *Capron v. Van Noorden*, 2 Cranch 126, 127 (1804).

119. *E.g., Alexander*, 990 F.2d at 538 (raising *sua sponte* the issue of whether plaintiff is a participant because “[t]he issue of standing is jurisdictional in nature”).

120. *E.g., Swinney*, 46 F.3d at 518 (considering for the first time on appeal the issue of whether plaintiffs qualified as “participants” within the meaning of ERISA “because standing is necessary for our exercise of jurisdiction”); *Sommers*, 883 F.2d at 348 (rejecting the argument that defendants have waived a challenge to plaintiffs’ status as participants because “lack of standing can be raised at any time by a party or by the court.”).

121. *See Arbaugh*, 546 U.S. at 514.

122. *E.g., Harris v. Provident Life & Acc. Ins. Co.*, 26 F.3d 930, 933-34 (9th Cir. 1994) (dismissing ERISA claim and accompanying state-law claims because plaintiff lacked standing to assert ERISA claim); *see also Arbaugh*, 546 U.S. at 514. *Arbaugh* seems to hold that the general federal question statute, 28 U.S.C. § 1331, would not save a § 1132(a) claim if the

the Supreme Court has recognized, these features impose significant costs on both litigants and courts, so it is advisable to require clear congressional intent to designate an issue as jurisdictional.<sup>123</sup>

### C. *The Obfuscation Problem*

Injecting the “doctrine” of statutory standing into the ERISA context also prevents courts from clearly identifying and resolving issues that pertain to whether the plaintiff is within the class of persons to whom Congress has granted the causes of action created by section 1132(a) of ERISA. For example, in ERISA litigation, one such issue has led to particular confusion: *when* must the plaintiff be a “participant” in order to proceed with the causes of action created by section 1132(a)(1), (a)(2), and (a)(3).<sup>124</sup> This article will refer to this issue as the “participant timing” issue.

In short, lower courts have failed to see that the participant timing issue is simply a question of statutory interpretation; specifically, the relevant question to be answered is whether Congress intended the causes of action in § 1132(a)(1), (a)(2), and (a)(3) to be available to (i) any person who is a participant when the alleged wrongdoing by the defendant occurred, (ii) only a person who is a participant when the complaint is filed, or (iii) only a person who is a participant throughout the entire duration of the lawsuit. A court can pick one of these three options by examining the text of § 1132(a), as well as the purpose of the statutory provision. Unfortunately, courts have not meaningfully engaged in this relatively straightforward—albeit challenging—task of statutory interpretation. Instead, they have allowed the “doctrine” of statutory standing to drive their understanding of the participant timing issue.

This can be seen in the way courts analyze cases involving a person who is no longer actively receiving benefits from a health care or retirement plan. In these cases, defendants often argue that such an individual is not allowed to initiate or continue a suit under § 1132(a), because the person was not a “participant” when the suit was filed or because the person ceased being a

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participant issue were jurisdictional but not satisfied. *Id.*; see also ZANGLEIN & STABILE, *supra* note 104, at 402-03 (“[I]f . . . federal claims are dismissed for lack of subject matter jurisdiction . . . pendent state law claims must be remanded to state court. This means that it makes a difference whether a federal court dismisses a case on grounds of lack of subject matter jurisdiction or on alternative grounds.” (citations omitted)).

123. *Arbaugh*, 546 U.S. at 515-16.

124. *E.g.*, *McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 743-44 (9th Cir. 1999) (noting that “standing is measured at the time of filing suit,” but refusing to do so in the particular case before the court); *Raymond v. Mobile Oil Corp.*, 983 F.2d 1528, 1534-35 (10th Cir. 1993) (holding that plaintiffs’ “standing as participants should be judged as of the time of” filing, rather than as of the time of the ERISA violation).

participant at some point during the litigation. A commonly recurring example is the “cashed out” former employee—an employee whose employment ends and then, either immediately upon cessation of employment or at some subsequent point, receives the remainder of all his or her undisputed retirement benefits in a lump sum. When a former employee who has “cashed out” brings a suit under § 1132(a), or when a former employee “cashes out” after initiating a suit, lower courts struggle with the question of whether the suit is viable.

*Crawford v. Lamantia*<sup>125</sup> is a representative example of a case in which the plaintiff resigned from employment and “cashed out” after initiating a suit under ERISA. Peter Crawford was employed by Arthur D. Little, Inc. (ADL) when he filed a suit against the trustees of the Employee Stock Ownership Plan and Trust (ESOP), a type of retirement benefits plan.<sup>126</sup> He alleged that the defendants’ conduct during his employment constituted a breach of fiduciary duty, remediable under § 1132(a)(2).<sup>127</sup> After filing the lawsuit, however, he resigned from the company and then elected to collect his vested benefits.<sup>128</sup> As a result, the defendants brought a motion for summary judgment on the grounds that Crawford lacked standing to continue the suit.<sup>129</sup>

In resolving the motion, the court in *Crawford v. Lamantia* invoked the principle that “standing, since it goes to the very power of the court to act, must exist at *all stages* of the proceeding, and not merely when the action is initiated or during an initial appeal.”<sup>130</sup> The court did not dispute that Crawford had been a participant when he filed the suit. This was unsurprising in light of the first prong of the *Firestone* test: a current employee who is eligible to receive benefits is a participant within the meaning of § 1002(7).<sup>131</sup> At the time of the filing the suit, Crawford was a current employee of ADL who was eligible to receive benefits from the ESOP.<sup>132</sup> However, the court held that it was necessary for Crawford to have standing at the time of the appeal, so it was insufficient that he had been a participant at the time of filing

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125. 34 F.3d 28 (1st Cir. 1994).

126. *Id.* at 30-31. Crawford was technically on an unpaid leave of absence from the company when he filed the suit, and he resigned almost immediately after filing the suit, but these facts were irrelevant to the disposition of the case. *Id.* at 30. Crawford is not the most sympathetic plaintiff of the “cashed out former employee” cases, but his loss is nonetheless worth scrutinizing for analytic purposes.

127. *Id.* at 31.

128. *Id.* at 30-31.

129. *Id.* at 31.

130. *Id.* at 32 (internal quotations and brackets omitted).

131. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989).

132. The fact that he was on an unpaid leave of absence, see *supra* note 126, did not alter this conclusion.

the suit.<sup>133</sup> To determine whether Crawford was a participant at the time of the appeal, the court turned to the second prong of *Firestone* (the “former employee” prong): Crawford would be a participant if he had a colorable claim for benefits.<sup>134</sup> The court rejected Crawford’s argument that he had a colorable claim that he would prevail in a suit for benefits because Crawford could not show that, but for the defendants’ breach of fiduciary duty, he would have received greater benefits (more money) when he cashed out.<sup>135</sup>

The problem of what to do with a plaintiff who is no longer actively receiving benefits under a health care or retirement plan is not limited to plaintiffs who have elected to collect all of their vested retirement benefits. In the health care context, termination of employment will result in lack of coverage. In *Nechis v. Oxford Health Plans, Inc.*,<sup>136</sup> Doris Mady sued her health plan and an affiliated company for benefits that she alleged should have been provided when she was still covered by the plan. Mady received chiropractic care while she was covered by employer-provided health care.<sup>137</sup> The chiropractic care had been covered in the past,<sup>138</sup> but the health plan began to deny coverage after hiring a new company to review claims. Mady alleged that she attempted to utilize the health plan’s procedures to request additional information about the denial of coverage, but she was unable to ever contact the health plan or the claim review company.<sup>139</sup> As a result, Mady (and another member of the health plan, Alexis Nechis) sued the health plan, alleging that it had violated ERISA by failing to disclose new criteria for reviewing chiropractic claims, failing to reveal that the company reviewing those claims was receiving financial incentives for denying such claims, failing to provide benefits due under the health insurance plan, and failing to fulfill its fiduciary duty.<sup>140</sup> Mady and Nechis proceeded under § 1132(a)(3),<sup>141</sup> and the complaint was filed after Mady’s COBRA coverage had been

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133. *Crawford*, 34 F.3d at 32 (“Therefore, although plaintiff may have had standing as a current employee when he brought this action, by the time he filed his amended complaint, he lost this standing on account of having terminated all vested benefits then due him from the ESOP.”).

134. *Id.*

135. *Id.* at 33.

136. 421 F.3d 96 (2d Cir. 2005).

137. The disputed chiropractic claims were for care received while Mady was covered by a COBRA plan. *Id.* at 99 (explaining that Mady’s job was eliminated in March 2002, she elected to continue her coverage under the employer-provided health care plan through COBRA until April 30, 2003, and she received chiropractic care in November 2002).

138. *Id.*

139. *Id.*

140. *Id.* (describing the complaint).

141. *Id.* at 100.

terminated.<sup>142</sup> Defendants brought a motion to dismiss the case, arguing that Mady was not permitted to initiate a lawsuit under § 1132(a).<sup>143</sup>

In resolving the defendants' motion to dismiss, the court in *Nechis* focused on whether Mady was a participant when she filed the suit. It ultimately held that Mady lacked standing because she was not a participant at the time of filing.<sup>144</sup> The court explained that Mady was not a participant because her COBRA coverage had been terminated by the time she filed the complaint.<sup>145</sup> Nor could she demonstrate that she would have any future eligibility for benefits because she had been terminated as part of downsizing.<sup>146</sup> The court did not consider whether Mady might have been able to satisfy the second prong of *Firestone* because her suit sought reimbursement for benefits that she should have been provided when she was covered and hence constituted a "colorable claim for vested benefits."<sup>147</sup>

The opinions in *Crawford* and *Nechis* are problematic not necessarily for the results they reach, but rather because of the reasoning employed by the courts. A court might reasonably conclude, as a matter of statutory interpretation, that a plaintiff must be a participant at every stage of the lawsuit, or only at the time of filing, or only at the time of the alleged wrongdoing. That is, there are at least three reasonable conclusions regarding the participant timing issue. But the concept of standing has interfered with the lower courts' ability to take a sufficiently thoughtful and thorough approach in analyzing that question. Some courts, like the court in *Crawford v. Lamantia*, insist that standing must exist at every stage of the lawsuit.<sup>148</sup> They arrive at this conclusion because they identify the question of the plaintiff's status as a participant as a question of statutory standing, and they invoke the rule that standing must exist at every stage of the lawsuit.<sup>149</sup> For these courts, a plaintiff who cashes out of a retirement plan during a lawsuit will lose the ability to pursue the suit. And a plaintiff who has cashed out before initiating the suit will be immediately thrown out of court.

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142. *Id.* at 99 ("On September 22, 2003, the plaintiffs brought this action against Oxford and Triad on behalf of themselves and similarly situated participants.").

143. *Id.* Defendants brought a motion to dismiss under Rule 12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted). FED. R. CIV. P. 12(b).

144. *Nechis*, 421 F.3d at 101 (holding that Mady was not a participant "when her complaint was filed").

145. *Id.*

146. *Id.*

147. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989).

148. *See, e.g.*, 34 F.3d 28, 32 (1st Cir. 1994).

149. *E.g., id.*



These courts may invoke the second prong of *Firestone* to permit certain plaintiffs to sue and thus to avoid apparently harsh results in some instances, but that approach generates its own difficulties. The second prong of *Firestone* forces courts to scrutinize whether the claim is genuinely one “for benefits.” Because courts have to determine whether the plaintiff’s lawsuit is seeking “benefits,” they may be forced to deny standing to plaintiffs who appear to be seeking something that cannot easily be characterized as the benefits they should have received earlier. This may be unobjectionable, but courts frequently struggle with the question of whether a claim is “for benefits”; the answer is not an obvious one. Moreover, the second prong of *Firestone* forces the court to consider the merits of the case as part of the standing inquiry: the court must confirm that the plaintiff’s claim is “colorable” before it can conclude that the plaintiff is a participant.

Other courts, like the court in *Nechis*, only require the plaintiff to be a participant at the time of filing the lawsuit.<sup>150</sup> Some may believe that this is the best interpretation of § 1132(a) from a strictly textualist approach. This is not to say that it is the interpretation of § 1132 that courts should adopt, because an alternative interpretation may be more appropriate in light of the purpose of ERISA. However, the “participant at the time of filing” rule would be difficult to criticize as entirely unreasonable. Unfortunately, courts that adopt this interpretation also speak in terms of standing. It is unfortunate because it is incongruous to require standing to exist only at the time of filing the lawsuit; standing should exist at every stage of the lawsuit. If a plaintiff ceases to be able to satisfy one of the requirements of standing, it is common to conclude that the case is moot.<sup>151</sup> It is arguably an end-run around the ordinary conception of standing to conclude that a plaintiff has standing by virtue of the fact that he or she satisfied the conditions of standing at the time of filing the suit but could no longer satisfy those conditions if the suit were initiated later.

More importantly, couching the rule in terms of standing prevents a more elegant and doctrinally sound approach to the problem. A court could explain that the text of § 1132(a) demonstrates that Congress intended the cause of action to be available to only those plaintiffs who are participants at the time

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150. *E.g.*, *Miller v. Rite-Aid Corp.*, 504 F.3d 1102, 1106 (9th Cir. 2007) (“We have repeatedly held that whether a living party is a ‘participant’ or ‘beneficiary’ is determined as of the time the lawsuit is filed.”); *Nechis*, 421 F.3d at 101.

151. Mootness is often described as “the doctrine of standing set in a time frame: [t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs.*, 528 U.S. 167, 189-90 (2000). The Court in *Laidlaw* clarified that “the description of mootness as ‘standing set in a time frame’ is not comprehensive,” *id.* at 190, but the Court’s opinion should not be read to mean that a plaintiff who ceases to be able to satisfy standing requirements should be permitted to continue with his or her lawsuit.

of filing the suit, and ceasing to be a participant during the pendency of the suit does not take the plaintiff out of the class of persons to whom Congress intended to grant the private right of action. Such a requirement is like any other element of the cause of the action, which may be satisfied by the existence of certain facts in the past. For example, the requirement that the defendant was a fiduciary at the time of the alleged wrongdoing<sup>152</sup> focuses only on the defendant's status at a certain time in the past, and it is of no moment if the defendant is no longer a fiduciary at the time of the lawsuit. Similarly, there is nothing facially problematic about the conclusion that one of the elements of the cause of action is that the plaintiff is a participant at the time of filing the suit. Moreover, when the conclusion is framed in this way, rather than in terms of standing, it is sound as a matter of legal reasoning and should not suffer the impediment to acceptance that a strained application of standing may create.

Moreover, framing the issue of participant status at the time of filing as an element of the cause of action leaves room for courts to conclude that the element is jurisdictional. As discussed in Part II.B, courts should be wary of reaching such a conclusion, and it should be justified solely as a matter of statutory interpretation, not "standing." A court may conduct a rigorous analysis, however, and conclude that Congress's intent was to make the plaintiff's status as a participant at the time of filing the suit a jurisdictional issue. Subsequent events do not divest the court of subject-matter jurisdiction, so if the plaintiff is a participant when the suit is filed (and other jurisdictional elements are satisfied), then the court has subject-matter jurisdiction and any change in the plaintiff's status will not strip the court of jurisdiction any more than a plaintiff's change in citizenship after filing the complaint would divest the court of diversity jurisdiction over the suit.

Thus, courts that rely on "standing" to analyze the participant timing issue fail to meaningfully grapple with the question of statutory interpretation with which they should be concerned. The best reading of § 1132(a) is arguably one in which the plaintiff is required only to have been a participant at the time of the alleged wrongdoing by the defendant. This is not to say that all lower courts fail to reach this conclusion. *Graden v. Conexant Systems, Inc.*<sup>153</sup> is an example of a case in which a "cashed out" former employee initiated a suit under ERISA, thereby prompting defendants to file a motion to dismiss for lack of standing. In that case, Howard Graden was an employee of Conexant until 2002 and enrolled in a Conexant 401(k) plan until October 2004.<sup>154</sup>

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152. 29 U.S.C. §§ 1109, 1132(a)(2) (2006); *see supra* note 92.

153. 496 F.3d 291 (3d Cir. 2007).

154. *Id.* at 294.

Graden had elected to invest all of his retirement funds in company stock. Unfortunately, the stock started to drop precipitously in value in March 2004, and Graden “cashed out”—elected to take his money out of the Conexant 401(k) plan—in October 2004.<sup>155</sup> He subsequently sued Conexant, its officers, and individual members of the committee that administered the Conexant plan<sup>156</sup> for breach of fiduciary duty under § 1132(a)(2), alleging that Conexant should not have offered company stock as an investment option in the first place and that Conexant had fraudulently induced him to invest his money in company stock.<sup>157</sup> The defendants argued that Graden should not be allowed to initiate the suit because he no longer had funds invested in the Conexant plan.<sup>158</sup> The court expressly noted that it may have been sufficient for Graden to have been a participant at the time of the alleged wrongdoing.<sup>159</sup> (It did not so hold because Graden did not rely on that argument.<sup>160</sup>) Unfortunately, the court in *Graden* also spoke in terms of standing—it framed the question as “when statutory standing must attach”<sup>161</sup> and stated that “statutory standing is an issue of subject matter jurisdiction.”<sup>162</sup> As a result, the court’s recognition that a plaintiff need only prove that he or she was a participant within the meaning of ERISA at the time of the defendant’s alleged wrongdoing is unlikely to be persuasive, because other courts will seize on the label of “standing” and then insist that a plaintiff must have standing either at the time of the filing or throughout the entire lawsuit. If the Third Circuit were to abandon the standing framework entirely, it could conclude that Congress intended to permit suit by any plaintiff who was a participant at the time of the defendant’s alleged violation of ERISA. Unfortunately, such an abandonment of the standing framework has not occurred. Even the most insightful opinion about the analytic weaknesses that are currently plaguing lower courts dealing with the participant timing issue (and others)—that of the Seventh Circuit in *Harzewski v. Guidant Corporation*<sup>163</sup>—holds onto the concept of standing. In so doing, it perpetuates the basic problems in this area.

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155. *Id.*

156. *Id.* at 294 n.1.

157. *Id.* at 294.

158. *Graden v. Conexant Sys., Inc.*, No. 05-0695, 2006 WL 1098233, at \*1 (D.N.J. Mar. 31, 2006). The defendants brought a motion to dismiss under Rule 12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted). *Id.*

159. *Graden*, 496 F.3d at 296 n.7.

160. *Id.*

161. *Id.*

162. *Id.* at 294.

163. 489 F.3d 799 (7th Cir. 2007).

### Conclusion

This article focuses attention on the term “statutory standing” to provide a framework for understanding the different ways in which the term is used and to urge that one meaning of the term, commonly employed by the lower courts, be abandoned. “Statutory standing” may innocuously be used as shorthand for the *question* of whether Congress has chosen to make a cause of action available to a particular plaintiff or class of plaintiffs. It can also be used harmlessly as shorthand for the answer to that question; that is, the term can be used to describe *the fact* of Congress having made a private right of action available to a particular plaintiff or class of plaintiffs. When the term statutory standing is used to describe more than the particular question identified above or the answer to that question, however, the negative effects of that label necessarily outweigh its benefits.

Statutory standing *could* be used to refer to the uncontroversial legal rule that a plaintiff must fall within the class of plaintiffs to whom Congress has made the cause of action available in order to recover. Used in such a way, the term can continue to serve as useful shorthand. It is not as useful as it might be, however, because there are many requirements for the plaintiff to recover. And it can be difficult to identify which of them should fall within the category of statutory standing. Nonetheless, the term may serve a purpose.

Unfortunately, the term is too often used by lower courts to refer to a set of legal rules that are not justified by either history or policy. In particular, the term “statutory standing” in many courts has come to mean not only that the plaintiff must fall within the class of persons to whom Congress granted the private right of action in order to recover, but also that such a requirement is a threshold question, to be treated separately from the merits of the case and, in some instances, also as a jurisdictional question. Such a view of statutory standing should be rejected as unsound and unwise.