Standing Alone: Standing under the Fair Housing Act

Michael E. Rosman

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.
Standing Alone: Standing Under The Fair Housing Act

Michael E. Rosman*

In 1980, one of the leading authorities on housing law noted that the Supreme Court had been "especially active" in the 1970's in addressing standing problems in cases with allegations of housing discrimination; indeed, he wrote that "standing problems in fair housing cases seem to have grown out of all proportion to their proper place in this field." The Supreme Court returned to standing a few years later, but has since fallen silent and left the development of standing law in housing cases to the lower courts. However, a recent decision of the Supreme Court has suggested to some scholars that the validity of the Court's prior precedents on housing law standing may be in doubt.

This article examines some of that development, particularly under the Fair Housing Act. Recent decisions of the circuit courts have produced some results that many may consider counterintuitive. For example, the Second Circuit has recently ruled that anyone who reads an advertisement that violates Section 3604(c) of the Fair Housing Act has standing to sue.

---

* Associate General Counsel, Center for Individual Rights. J.D., 1984, Yale Law School; B.A., 1981, University of Rochester. I would like to thank Akhil Amar, Gary Lawson, and Michael Greve for their suggestions (particularly the ones related to this article). I am nonetheless possessive about my mistakes and errors.

1. Robert G. Schwemm, Standing To Sue In Fair Housing Cases, 41 OHIO ST. L.J. 1, 3 (1980).
2. Id.
6. Section 3604(e) provides that it shall be unlawful: to make, print, or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation or discrimination.
irrespective of whether the reader has any interest in housing.\(^7\) At the same time, several different circuit courts have held that organizations that spend money in seeking to uncover illegal discriminatory housing practices have standing by virtue of that fact alone, creating, in essence, "citizen standing" without any provision in the statute authorizing such standing.\(^8\)

In this article, I argue that these decisions result from several causes, including some questionable readings of leading Supreme Court decisions. Primarily, however, I believe the courts, including the Supreme Court, have not focused with any care on interpretative rules for statutes; that is, rules that identify what statutory language, or other criteria, suggests broad standing and what statutory language suggests narrow standing. In the last part of this article, I take a few cautious steps in this direction.

Most academic work on standing has focused on its constitutional status. Some excellent articles, including a fairly recent and thorough article by Professor Cass Sunstein,\(^9\) argue that the Supreme Court decisions elevating standing to a constitutional doctrine are ahistorical, and that the focus in any standing questions should be whether the substantive law (be it constitutional or statutory) creates a cause of action for the plaintiff. I take no issue with this position because, in the context of the Fair Housing Act, there seems little doubt that the Courts are doing nothing more than trying, at least, to interpret the statute.\(^10\) But once it is decided that an examination of substantive law (as opposed to ostensibly immutable Article III requirements) is required, the next step, it seems, is to look for language in the substantive law that will tell us something about standing. The commentators have not explored this

---


8. See, e.g., Harry Macklowe, 6 F.3d at 905; Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990). See also infra notes 206-209 and accompanying text.


10. See, e.g., Schwemmm, supra note 1, at 8, 12-13, 18, and 49 (Supreme Court has conflated "standing" determination and "merits" determination; "standing" is a matter of statutory construction and "standing" cases hold essentially that plaintiffs have a cause of action). Cf. Paul A. LeBel, Standing After Havens Realty: A Critique And An Alternative Framework For Analysis, 1982 DUKE L.J. 1013, 1018-19 & n.37 (criticizing holding in Havens Realty v. Coleman that "white tester" did not have standing on ground that holding was an improper look at the merits).
question in any depth. This Article suggests that the courts are having some difficulty doing that as well, and begins to take that next step.

The problem the courts are having, unfortunately, is traceable to the same constitutional requirements that have vexed cogent analysis under Article III. Because of the constitutional and prudential structure the Court has used to analyze standing, the Court has focused upon two questions related to that structure in interpreting statutes. Did Congress intend to "remove the prudential barriers"? Did Congress create a "right," the violation of which constitutes an "injury-in-fact" for Article III purposes? Moreover, the focus on these odd questions has deflected attention from the question the Court should be asking, viz., whom did Congress want to enforce the duties imposed upon the defendant by this statute? In short, the distortions of the constitutional analysis have had ripple effects, such that even if the constitutional analysis is somehow repaired by the commentators, it is not clear that statutory analysis will also improve.

Part I of this article reviews the general principles of standing as they have been enunciated in the last few decades by the Supreme Court. I focus on several specific problems in the doctrine which are of interest in the interpretation of statutes generally, and the interpretation of the FHA in particular. Specifically, I note the Supreme Court holdings that certain language in statutory standing provisions requires the removal of the so-called "prudential rules"—and the lower courts’ resistance to that instruction and their application of those rules in spite of it.

Part I then focuses on what I refer to as the "statutory rights gambit," that is, the ability of Congress to create a "right," the violation of which constitutes an "injury-in-fact" for purposes of Article III. I suggest that the Supreme Court has given us two rather different theories of this gambit: one theory holding that any "real" injury qualifies under Article III regardless of any congressional assistance and that Congress can make anything it wants ("real" or otherwise) an "injury"; and the other theory limiting both the injuries that qualify under Article III without congressional assistance and the ones that Congress can create by passing a statute. (I also argue that the latter theory did not come into existence full blown and without precedent in Lujan v. Defenders).

11. See, e.g., Sunstein, supra note 9, at 182 n.94 ("I will not discuss here the question how to interpret statutes that are ambiguous on the existence of a private cause of action"). But see Cass R. Sunstein, Standing Injuries, 1993 Sup. Ct. Rev. 37, 53-61 (comparing the "common law model" and "public law model" for statutory interpretation when confronted with statutory silence on the question of standing). Professor Sunstein’s focus, though, is on statutes that regulate governmental entities and suits which purport to remedy an agency’s failure to enforce the law. Id. See discussion infra notes 236-241 and accompanying text.
Part II examines the analysis of the "injury" requirement in *Ragin v. Harry Macklowe*,\(^{12}\) and points out that similar statutory language has been given quite different interpretations in other statutes. Part III examines those circuit court decisions which have ruled on standing for organizational plaintiffs under the Fair Housing Act, and argues that the circuits, unwittingly or otherwise, have created a "citizens standing" provision in the Fair Housing Act.

Finally, in Part IV, I suggest that both the so-called Article III requirements and the prudential rules identified by the Court are fairly good standing rules that can be used as a baseline in interpreting statutes. More particularly, I argue that in an era in which "plain meaning" interpretations of statutes are in ascendency, only a clear and unambiguous message from Congress that those rules are not applicable should lead to their elimination.

I

It is hard to read any significant number of cases or articles about standing without coming to the conclusion that few hold the internal coherence of that doctrine in high regard. The Supreme Court itself has declared that "[g]eneralizations about standing . . . are largely worthless as such"\(^{13}\) and that the various required elements enumerated by the Court are "not susceptible of precise definition."\(^{14}\) Commentators have been no more generous.\(^{15}\) These criticisms and concerns aside, the Court plainly has set forth what it believes are the basic elements of standing.

There are two elements in current standing doctrine, the constitutional and the prudential. The constitutional elements are said to derive from the "case or controversy"\(^{16}\) provision of Article III,\(^{17}\) and the Court has stated

---

12. 6 F.3d 898 (2d Cir. 1993).
15. William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 221 (1988) (gathering various quotes from others describing the incoherence of standing); LeBel, supra note 10, at 1015 (referring to the "Supreme Court's snarled line of standing decisions"); Gene R. Nichol, Jr., Abusing Standing: A Comment On Allen v. Wright, 133 U. PA. L. REV. 635, 650 (1985) (not difficult to argue that current law is dissatisfying); Schwemm, supra note 1, at 4-5 n.16 (collecting authorities and noting that "[t]he Supreme Court's numerous efforts to clarify the subject in the past decade . . . have been notably unsuccessful").
17. Article III of the United States Constitution provides that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the
that standing is the most important concept in Article III. There are three constitutional elements: (1) injury "in fact," i.e., an injury that is concrete, particularized and, if not already inflicted, imminent; (2) causation, between the allegedly illegal acts of the defendant and the injury "in fact;" and (3) redressability of the claimed injury. These are said to be constitutional minima, required to be present in every case. Prudential rules, on the other hand, are judge-made rules which the Court has devised to remove cases which are inconsistent with the limited role of the courts in a democracy. Although the Court has never claimed to set forth a complete list of these prudential rules, it frequently mentions three: (1) litigants should not assert the rights of third parties; (2) litigants should not assert "generalized grievances"; and (3) the injury claimed should be in the "zone of interests" of the statute or provision in question.

It would be difficult (and more than a little arrogant) to quickly summarize the major criticisms of current standing doctrine, but a number of elements have been stated often enough to outline. First, as a historical matter, injury "in fact" has not been a requirement of our jurisprudence. Various forms of actions have been long accepted in this country—the qui tam action, the "informer" action, the "relator" action, and various forms of writs—which could be brought by an individual citizen who was not damaged in any way by the acts of the defendant, but who sought nonetheless to bring those acts to the attention of a court. These were, say the commentators,

Laws of the United States, and Treaties made, or which shall be made, under their Authority ... to Controversies to which the United States shall be a Party;—to Controversies between two or more States ...."  
18. Allen, 468 U.S. at 750.  
20. Allen, 468 U.S. at 751; Valley Forge, 454 U.S. at 474-75.  
22. E.g., Sunstein, supra note 9, at 171-72. Whether qui tam actions are still viable after Lujan v. Defenders of Wildlife is a matter of debate. The Court specifically tried to distinguish the situation where "Congress has created a concrete private interest in the outcome of a suit ... by providing a cash bounty," but the sine qua non of standing under the decision was an injury, not an interest. Defenders of Wildlife, 504 U.S. at 573. See infra text accompanying notes 147-167. Compare James T. Blanch, Note, The Constitutionality Of The False Claims Act's Qui Tam Provision, 16 Harv. J.L. & Pub. Pol'y 701, 703 (1993) (qui tam unconstitutional)
the equivalent of the modern "citizen" suit which has been the victim of the Court's modern standing decisions.

The commentators generally ascribe the beginning of the development of standing law to the combination of two somewhat inconsistent judicial themes: conservative judges using it to uphold the distinction between regulatory objects and regulatory beneficiaries (and thus upholding traditional common-law notions of property rights), and judges like Justices Frankfurter and Brandeis using it to limit the attacks on New Deal legislation and the delegation of authority to the administrative state (along with similar doctrines like ripeness and reviewability). But at its outset, standing doctrine employed a "legal injury" test, which, more or less, asked whether the interest claimed by the plaintiff was one protected by the statute or common law principle in question, or whether the statute intended plaintiff to have standing. In this sense, early "standing" cases were analogous to the

and John G. Roberts, Jr., Article III Limits On Statutory Standing, 42 DUKE L.J. 1219, 1221-22 n.20 (1993) (questioning constitutionality) with Sunstein, supra note 9, at 232-34 and Pierce, supra note 4, at 1182 (suggesting the use of cash bounties to circumvent the broad scope of Lujan v. Defenders of Wildlife), and with Marshall J. Breger, Defending Defenders: Remarks On Nichol And Pierce, 42 DUKE L.J. 1202, 1209 (1993) (the interest in the money is the injury).

23. E.g., Winter, supra note 21, at 1455; Sunstein, supra note 9, at 179-86; Sunstein, supra note 21, at 1434-45. It should be noted that Professor Sunstein apparently revised his organization of the history of standing between the first and second articles, and neither one is completely satisfactory. For example, in his first article, Professor Sunstein refers to the development of the private law model of standing, and asserts that it was "abandoned" in "two basic steps" (viz., the recognition of statutory interests and the rise of surrogate standing). Sunstein, supra note 21, at 1438-39. But the authorities he mentions indicate that it is too simple to state that there was a time period of "development" and a time period of "abandonment." Sunstein, supra note 21, at 1438 n.27 & 1439 n.30 (citing The Chicago Junction Case, 264 U.S. 258 (1924) and FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940)); see also Sunstein, supra note 9, at 182 nn.94, 96. So, too, Sunstein's later article refers to the era following the passage of the Administrative Procedure Act in 1946 as a separate period of development, but, as he recognizes himself, all the categories invoked in the APA were "well-established under previous law." Sunstein, supra note 9, at 181. See also Fletcher, supra note 15, at 226 ("Both before and after the enactment of the [APA], standing determinations were based on an amalgam of statutory interpretation and common law assumptions").

24. Fletcher, supra, note 15, at 226-27; Sunstein, supra note 21, at 1438-39. Sunstein distinguishes between those suffering "legal wrong" and those adversely affected by a relevant statute, which Sunstein calls "surrogate standing." Id. at 1439; Sunstein, supra note 9, at 181-82. Cf. Fletcher, supra note 15, at 227. In both cases, however, it would appear that Congress had implicitly suggested that plaintiffs in that category should have standing.
analyses of Judges Cardozo and Andrews in *Palsgraf* and the modern cases considering whether a statute grants a "private right of action."

The "legal injury" test was expanded in the post World War II era, until it was abandoned in *ADPSO* where the Court, depending upon one's perspective, either adopted or created from whole cloth the injury "in fact" test. The logical correlations of "causation" and "redressability" came shortly thereafter. While the injury "in fact" test was created to further expand "standing," the commentators argue that it was subsequently employed by the Burger and Rehnquist Courts to resurrect the distinction between regulatory objects and regulatory beneficiaries and to deny standing to plaintiffs bringing certain kinds of "public value" litigation.

The critics of modern standing doctrine, for the most part, seem to agree that the "legal interest" test had more going for it than current doctrine. In any standing case, they say, the question should really be whether the positive

---


26. Compare *Sunstein*, *supra* note 21, at 1440 ("there was in this period a close association between the existence of an implied cause of action and the existence of standing") and *Sunstein*, *supra* note 9, at 182 (the "principal question [after passage of the APA] . . . was whether the law had conferred a cause of action") with *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 401 n.16 (1987) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)) (suggesting that "private right of action" analysis, where the Court examines whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted," requires more from would-be plaintiff than modern "zone of interests" test).


28. *E.g.*, *Sunstein*, *supra* note 9, at 166 (describing modern standing law after *ADPSO* as "essentially an invention of federal judges, and recent ones at that"); *id.* at 185 ("What was the source of the injury-in-fact test? Did the Supreme Court just make it up? The answer is basically yes"); *id.* at 222 ("the real source of current difficulty is *ADPSO*"); *Sunstein*, *supra* note 11, at 37 ("revolutionized the law of standing"); *Fletcher*, *supra* note 15, at 229 ("More damage to the intellectual structure of the law of standing can be traced to *ADPSO* than to any other single decision") & n.48 (collecting authorities critical of *ADPSO*).

29. *Sunstein*, *supra* note 21, at 1452 ("Understood in the abstract and properly applied, the requirements [of causation and redressability] are natural and entirely unobjectionable corollaries of the injury-in-fact requirement of *ADPSO*.")

30. *E.g.*, *Winter*, *supra* note 21, at 1372 n.7; *Sunstein*, *supra* note 9, at 185 (continuation of the expansion of the "legal interest" test); *Nichol*, *supra* note 4, at 1154; *Gene R. Nichol, Jr.*, *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1921 (1986).

31. *E.g.*, *Sunstein*, *supra* note 9, at 195-97; *Sunstein*, *supra* note 21, at 1452; *Nichol*, *supra* note 30, at 1923.
law upon which the plaintiff bases his or her claim grants *that plaintiff* the right to sue. 32 It is not sufficient that the defendant violated the law; it must also be the case that the plaintiff is someone who has the right to bring a lawsuit. 33 To ascertain this, one should simply examine the substantive law upon which plaintiffs bring their claims. In this regard, the prudential "zone of interests" test—which essentially asks the "merits"—like question of whether the injury suffered by the plaintiff was within the "zone" of injuries against which Congress (or any other law-creating entity) wanted to protect—is one that the commentators believe should be deployed more frequently, and with more bite, than it has in the past. 34 (In its current form,

32. See, e.g., Fletcher, supra note 15, at 223 & n.18 (identifying academic and judicial roots of theory that standing is just a merits-related question); Sunstein, supra note 9, at 166 n.15 (identifying additional academic authorities supporting that theory); Sunstein, supra note 11, at 51 ("the question of standing is the same as the question whether the plaintiff has a cause of action"). Dean Nichol would add the requirement that an interest must be "capped" by society and "judicially cognizable" in order to be sufficient to support standing, but he also believes that legislative enactment should be sufficient to meet those requirements. Nichol, supra note 30, at 1946-47.

33. Professor Fletcher notes that Louisiana law distinguishes between a "cause of action," which is defendant's duty, and a "right of action," which is plaintiff's ability to enforce that duty. Fletcher, supra note 15, at 238.

34. See, e.g., Sunstein, supra note 9, at 183 n.107 (suggesting that the "zone of interests" test may be a return to the "legal interest" test); Sunstein, supra note 21, at 1445 (zone of interests test was like "legal interest" test in that it "called for a degree of entanglement between standing and the merits," although it was more liberally applied than the "legal interests" test); Fletcher, supra note 15, at 234-35 ("zone of interests" test is really a first look at the merits) and 263-64 (noting possible rehabilitation of the "zone of interests" test in Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987)); Winter, supra note 21, at 1466 n.538 (in ADPSO, the "Court first rejected the 'legal interest' test because it went to the merits, and then adopted the 'zone-of-interest' test, which is only a more pragmatic, Realist's version of the same thing").

One of the difficulties with the "zone of interests" test is its origins in the Administrative Procedure Act, which apparently makes courts more comfortable in applying it to statutes that give instructions to governmental agencies. See American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal Sys. of Am., Inc., 481 F.2d 90, 92 (6th Cir. 1973) (zone of interests test "has relevance only where the action under attack is that of a governmental agency, whereas the present suit is one between private parties"). Nonetheless, the appeal of a standing test designed to assess congressional intent has led to consideration of the "zone of interests" test outside that context. In *Clarke v. Securities Industry Ass'n*, the Court suggested that the application of the "zone of interests" test might be narrower—albeit not nonexistent—outside the context of the APA. *Clarke*, 479 U.S. at 400-01 n.16. Cf. Fletcher, supra note 15, at 258 n.169 (noting the *Clarke* court's statement that the test has been used infrequently outside the APA). As the discussion of decisions under
the "zone of interests" test asks only if a particular plaintiff is "arguably" within the zone of interests that Congress wanted to protect). The degree and extent to which the Court is willing to transform the "zone of interests" test into a significant substantive limit on those who can bring a cause of action—that is, into something like the "legal injury" test looked back upon with such nostalgia by the commentators—remains to be seen.

The critics of modern standing law also seem fairly united in their conclusion that, whatever role notions of standing might have in suits against government agents seeking to force them to conduct themselves in accordance with law, it has absolutely no purpose or role in suits between two private

---

Title VII suggests (see discussion infra accompanying notes 66-75), the lower courts have applied the test to statutes governing private conduct, even when the Supreme Court has instructed them not to.

35. Professor Fletcher has suggested that Clarke tried to, or did, transform the "arguably within the zone of interests" test into something with more bite. Fletcher, supra note 15, at 264. Without additional bite, it is unclear whether a "zone of interests" test would have any affect on standing under the FHA. See Schwemm, supra note 1, at 19 n.83 (suggesting that it would not).

36. In Professor Sunstein's first article, he noted that "[t]he Supreme Court has never denied standing for failure to meet the 'arguably within the zone' test." Sunstein, supra note 21, at 1445 n.56. He described it as a "lenient" test. Id. at 1445 ("quite lenient"), 1466 n.174. See also Schwemm, supra note 1, at 19 n.83. In his second article, Professor Sunstein noted the Supreme Court had denied standing on "zone of interests" grounds for the first time in 1991, and characterized it as a "recent rebirth in the zone-of-interest test" which might "presag[e] a partial return to the legal interest test." Sunstein, supra note 9, at 185 n.107 (citing Air Courier Conference of Am. v. American Postal Workers Union, 111 S. Ct. 913 (1991)). See also Sunstein, supra note 11, at 37 n.2.
actors. In such cases, the question of standing should be entirely subsumed in the question of whether the plaintiff has a cause of action under the statute.

Indeed, in the Fair Housing Act context, a separate "standing" inquiry can only lead to mischief since if a plaintiff's case is dismissed only on "standing" grounds, she could presumably pursue the claim in a forum in which Article III is inapplicable. But if the "standing" decision was really a determination that the Fair Housing Act does not provide relief for a particular kind of plaintiff, it is a merits-based decision which should have res judicata effect. The attempt by the courts to create a separate "standing" law within a statutory framework has left the law more than a little confused.

With this in mind, then, I now explore the dilemma of standing in cases brought pursuant to the Fair Housing Act.

A. Eliminating Prudence

A statute can modify standing principles in two different ways. First, a law can identify a "right" the violation of which constitutes an injury "in fact." Second, Congress can, in passing a statute, instruct the courts to

37. E.g., Sunstein, supra note 21, at 1434-35 (in private law, "the issues of standing, cause of action, and the merits are closely intertwined . . . At private law, there is no need for a distinctive set of principles to govern standing"); Schwemmm, supra note 1, at 23 (citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)) (stating that "standing" and "merits" were functional equivalents), 49, 66-67 (all standing questions in housing cases are reduced to matters of statutory interpretation) and 57 (Gladstone conflates merits and standing); Winter, supra note 21, at 1461 ("[I]n the private rights context, the concept of standing is entirely unnecessary").

In cases involving suits against representatives of the executive branch of the federal government, the Supreme Court has said that permitting "citizens" (i.e., individuals who have not suffered any injury in fact) to sue violates the "take care" clause of Article II and principles of separation of powers. Allen, 468 U.S. at 761; Lujan, 112 S. Ct. at 2144-45. Whether provisions of the Constitution other than Article III limit standing in such cases lies beyond the scope of this article. See Sunstein, supra note 9, at 231 & n.300 (Article II concerns entirely irrelevant, or at least obviously non-constitutional, in action where the executive is not a party).

38. Schwemmm, supra note 1, at 12-13. Article III, of course, is not applicable in state courts, which are free (unless constrained by a separate state law or policy) to issue advisory opinions on questions of federal law. Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

39. Schwemmm, supra note 1, at 13; Fletcher, supra note 15, at 229 n.46 (standing determination should determine "whether a plaintiff has a right to judicial relief in any court, state or federal").

40. See infra text accompanying notes 105-167.
ignore any prudential limitations on standing, and to consider any case brought by a plaintiff who can meet the Article III minimum requirements. This subsection identifies this second phenomenon and notes the lower courts’ resistance to it.

The notion that Congress can eliminate "prudential" standing rules has received remarkably little notice or criticism from the commentators. Included among the "prudential" rules is the "zone of interests" test, favored among the commentators (particularly in its stricter applications) because it asks a question similar to the question involved in the "legal injury" test, viz., did Congress intend a particular plaintiff or class of plaintiffs to be able to bring a claim? It is rather odd to say that Congress intended to eliminate the "prudential" tests. With respect to the zone of interests test, this means that Congress meant to eliminate any inquiry into its own intent as to who should have standing. Moreover, as discussed below, Congress’ intent to ignore its own intent is apparently gleaned by examining its intent.

1. Trafficante and Gladstone

The Supreme Court first found that Congress had eliminated prudential barriers to standing in interpreting Section 3610(a) of the Fair Housing Act in Trafficante v. Metropolitan Life Insurance Co. In that case, two plaintiffs, one black and one white, claimed that the defendants had discriminated against non-whites on the basis of race in the rental of apartments, and that they, tenants at the apartment building at which such discrimination was taking place, had been injured in that (1) they had lost the

41. See supra text accompanying notes 34-36.
42. 42 U.S.C. § 3610(a) (1982). At the time, Section 3610(a) provided for complaints about discriminatory housing practices to be made to the Secretary of Housing and Urban Development and authorized the Secretary to engage in "informal methods of conference, conciliation, and persuasion" to eliminate the alleged housing discrimination practice. Section 3610(d) authorized a complainant to commence a private action if these informal procedures (or any applicable state procedures) were unsuccessful. In its original form, the Fair Housing Act provided two separate procedures for a private complainant to follow: the complaint-mediation-lawsuit procedure of Section 3610 and the direct private lawsuit authorized under Section 3612. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 104 (1979). Under the Fair Housing Act Amendments of 1988 (Pub. L. No. 100-430, 102 Stat. 1619), the complaint procedure of Section 3610 is supplemented by both administrative proceedings, 42 U.S.C.A. § 3612 (West 1995), and private civil actions, 42 U.S.C.A. § 3613 (West 1995). As with the pre-1988 law, a private civil action can be commenced regardless of whether a complaint was filed with the Secretary. 42 U.S.C.A. § 3613(a)(2) (West 1995).
43. 409 U.S. 205 (1972).
social benefits of living in an integrated community; (2) they had missed business and professional advantages that would have accrued if they had lived with members of minority groups; and (3) they had been stigmatized from being residents of a "white ghetto." Relying primarily on the fact that suits by private persons were the main method of enforcement under the Fair Housing Act, and the fact that Section 3610 permitted its provisions to be utilized by any "person aggrieved," a phrase defined as "[a]ny person who claims to have been injured by a discriminatory housing practice," the Court concluded that Congress intended to define standing under Section 3610 "as broadly as is permitted by Article III of the Constitution." In that last-cited phrase, the Court quoted Hackett v. McGuire Bros., a case in which the Third Circuit had held that the standing provisions of Title VII were as broad as Article III permitted. In Trafficante, the Court went on to quote various pieces of legislative history from the Fair Housing Act—specifically broad statements by Senators Javits and Mondale to the effect that the purpose of the Act was to replace ghettos with integrated living patterns and that discrimination hurts "the whole community"—despite the fact that it conceded that "[t]he legislative history of the Act is not too helpful." Since the plaintiffs in Trafficante had alleged injury "with particularity," the Court held that they had standing to proceed.

At first glance, the Court in Trafficante appears to be stating that the "injuries" suffered by the various plaintiffs were, and had always been, injuries "in fact" for Article III purposes. The only work that the Fair Housing Act performed, under this view, is to remove the prudential barriers that prohibited individuals suffering such injuries from suing. This view is tempered, however, by the cryptic concurring opinion of Justice White.

44. Id. at 206-08.
45. Id. at 208-09.
47. Trafficante, 409 U.S. at 211. See also id. at 210 ("the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing as they too suffered").
48. Id. at 210.
49. Id. at 211. The Court specifically mentioned "the loss of important benefits from interracial associations" as an injury that would be sufficient to meet the standards of Article III. Id. at 210.
50. Trafficante, 409 U.S. at 212 (White, J., concurring). Justice White’s brief, one paragraph concurrence was joined by Justices Powell and Blackmun. While ordinarily we might pay little attention to such concurrences, Justice White’s concurrence was cited several times thereafter by the Court and relied upon in Warth v. Seldin, 422 U.S. 490 (1975). See infra note 51, and the text accompanying notes 112-120.
claimed that the injuries suffered by the plaintiffs in Trafficante would not have met Article III requirements without the Fair Housing Act. But since the FHA gave those authorized to complain to the agency the "right" to sue in court, the concurring Justices also concluded that they had standing. In doing so, they begged a rather significant question, one which has haunted Article III jurisprudence ever since: Why were the injuries in Trafficante insufficient under Article III without the FHA?

Since the Court had identified the existence of the injury "in fact" requirement only a few years before Trafficante, in ADPSO, the precise meaning of a standing definition extended to Article III limits was not particularly clear at the time. To some degree, this was rectified in Gladstone, Realtors v. Village of Bellwood, a case that considered the scope of standing under what was then Section 3612 of the Fair Housing Act. In Gladstone, the Court laid out both the Article III requirements and various prudential requirements of standing and noted that Congress had the authority to remove the latter, but not the former. Since the rule against the assertion

51. Trafficante, 409 U.S. at 212 (White, J., concurring). Under Justice White's view, the phrase "persons aggrieved" not only went up to the limits of Article III "injury" standing, but also went beyond those limits. Professor Schwemm supports this view, and suggests that Justice White believed that the Court had the authority to do so under Section 5 of the 14th Amendment as interpreted in Katzenbach v. Morgan, 384 U.S. 641 (1966). Schwemm, supra note 1, at 18 n.81 and 46-47. See also Christopher J. Sprigman, Comment, Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis, 59 U. Chi. L. Rev. 1645, 1663-66 (1992) (citing analogy to Section 5 of the Fourteenth Amendment and the Commerce Clause, and arguing that Congressional findings of fact should be given deference with respect to all standing issues, causation and redressability, as well as injury-in-fact).

Justice White's view of the Fair Housing Act is echoed in the Court's opinion in Warth v. Seldin, 422 U.S. 490 (1975), where the Court, citing the Trafficante concurrence, held that the injuries suffered by the plaintiffs there—the same deprivation of the benefits of living in a racially and ethnically integrated community found sufficient in Trafficante—were insufficient to meet Article III requirements. The Court viewed the Fair Housing Act as a statute where Congress "had given residents . . . an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." Id. at 513. See infra text accompanying notes 112-120. The notion that "aggrieved" was intended by Congress to go beyond "injured" is not exactly intuitive. Indeed, the Fair Housing Act always (that is, both before and after the 1988 amendments) has defined the word "aggrieved" in terms of the word "injured." 42 U.S.C.A. § 3602(i) (West 1995).

52. 441 U.S. 91 (1979).


of the rights of third parties and the application of the "zones of interest" test were identified as prudential barriers, it became clear that those tests were amongst those scuttled by the holding in Trafficante that Congress had eliminated the prudential barriers in passing the FHA.

The specific question in Gladstone was whether the somewhat differently-worded provision of Section 3612 also eliminated prudential barriers. The Court, relying significantly on the structure of the Fair Housing Act and its legislative history, concluded that Sections 3610 and 3612 were designed to provide alternative remedies to the same class of plaintiffs, and thus held that standing under Section 3612 should be determined without consideration of prudential barriers. In ascertaining whether the plaintiffs had alleged an injury "in fact" sufficient to satisfy the requirements of Article III, the Court held that (1) one plaintiff, the Village of Bellwood (in a part of which, it was alleged, that blacks, but not whites, were shown apartments), had standing because the alleged racial steering of the defendants could have reduced the demand for housing within the village, and lowered property prices and the concomitant tax base, and (2) other plaintiffs who lived within the area that was the object of the alleged racial steering had standing because they had been deprived, like the plaintiffs in Trafficante upon whose injury the Gladstone allegations were obviously modeled, of the social and professional benefits of living in an integrated community. These latter plaintiffs were

and had endowed that test with constitutional status in Warth v. Seldin, 422 U.S. 490 (1975). See Winter, supra note 21, at 1470 n.560.

55. Gladstone, 441 U.S. at 100 & n.6. As Professor Schwemm points out, the Supreme Court in Trafficante never mentioned the "zone of interests" test. Schwemm, supra note 1, at 18. However, the Ninth Circuit in Trafficante had held that the plaintiffs were not "arguably within the zone of interests" to be protected by the Fair Housing Act. Trafficante v. Metropolitan Life Ins. Co., 446 F.2d 1158, 1162-64 (9th Cir. 1971), rev'd, 409 U.S. 205 (1972). Thus, the Supreme Court reversal in Trafficante strongly suggested what was later confirmed in Gladstone, i.e., that the "zone of interests" test was a prudential one that Congress could eliminate.

56. Specifically, then § 3612 provided that the "rights granted by [various provisions of the Fair Housing Act] may be enforced by civil actions in appropriate United States district courts." 42 U.S.C.A. § 3612 (West 1977). As noted previously, supra note 42, § 3612 has been replaced in the current version of the Fair Housing Act by § 3613, which, in its standing provision (and like the standing provisions of §§ 3610 and 3612), authorizes a private action on behalf of "any person aggrieved." 42 U.S.C. § 3613 (West 1995). Thus, under the scheme implemented by the Fair Housing Act Amendments of 1988, the specific interpretive question posed in Gladstone was eliminated.

57. Gladstone, 441 U.S. at 102-09.
58. Id. at 110-11.
59. Id. at 111-14.
also deemed to have alleged that the value of their homes had gone down, and the Court held that this allegation as well was sufficient to meet the standing requirement.\textsuperscript{60}

Much of the key to understanding Fair Housing Act standing lies in footnote 9 of the \textit{Gladstone} opinion.\textsuperscript{61} Because the Court held that "prudential barriers" had been eliminated, it rejected the defendants' argument that because the Fair Housing Act granted no "right" to the plaintiffs to have one's community protected from the evils of segregation, the plaintiffs lacked standing under Section 3612. Of some importance here is the fact that the Court seemed to accept the premise of defendants' argument (\textit{i.e.}, that the Fair Housing Act granted no "right" to interracial associations or a particular value for homes).\textsuperscript{62} It was sufficient for the Court that \textit{someone}'s Fair Housing Act rights were being violated (or that a violation had taken place), and that plaintiffs suffered some real "injury" as a consequence of that violation.\textsuperscript{63}

Footnote 9, when combined with the "statutory rights gambit" discussed later,\textsuperscript{64} demonstrates that the Court distinguishes between two different forms of congressional modification to the standing rules: \textit{viz.}, the creation of a right (the violation of which constitutes an injury for purposes of Article III) and the elimination of the prudential rules. It also, I believe, undercuts the view espoused in both Justice White's concurrence in \textit{Trafficante} and \textit{Warth v. Seldin} that the Fair Housing Act granted a "right" to be free from the consequences of racial discrimination. If that were so, then the plaintiffs in \textit{Gladstone} really did have their own rights violated, and footnote 9 makes very little sense.\textsuperscript{65}

\textsuperscript{60} \textit{Id.} at 115.

\textsuperscript{61} \textit{Id.} at 103 n.9. The analysis in footnote 9 appears to remain the predominant analytic framework for federal housing and employment discrimination claims. \textit{E.g.}, Fair Employment Council of Greater Washington, Inc. \textit{v.} BMC Mktg. Corp., 28 F.3d 1268, 1278 (D.C. Cir. 1994).

\textsuperscript{62} \textit{Gladstone}, 441 U.S. at 103 n.9 ("That respondents themselves are not granted substantive rights by § [36]04, however, hardly determines whether they may sue . . . ").

\textsuperscript{63} \textit{Id.} \textit{See also} Schwemm, \textit{supra} note 1, at 58 ("Direct victims were those homeseekers whom the defendants had actually steered, and, according to the \textit{Bellwood} opinion, it was their substantive rights under section 3604 that were being enforced . . . [T]he \textit{Gladstone} plaintiffs were permitted to assert these 'rights of others'. . . ").

\textsuperscript{64} \textit{See infra} notes 105-167 and accompanying text.

\textsuperscript{65} Footnote 9 also casts doubt upon Professor Fletcher's contention that the Court has gone from using "third-party standing" in housing cases, as in \textit{Barrows v. Jackson}, 346 U.S. 249 (1953) (white seller of realty had standing to challenge racially restrictive covenant which precluded him from selling to black buyer), to "first-party standing" where plaintiffs are deemed to be asserting their own rights. Fletcher, \textit{supra} note 15, at 246 (in \textit{Trafficante}, "the Court was willing to assume that the white
2. Title VII And The ADEA

Given the Supreme Court’s unambiguous elimination of prudential barriers in Trafficante and Gladstone, it is somewhat surprising to examine some of the subsequent decisions of the lower courts interpreting the very similar standing language of Title VII.66 It seems plain that many of the lower courts like the prudential barriers and are reluctant to give them up.

Because the Court in Trafficante cited the Third Circuit decision of Hacker v. McGuire Bros., a case involving Title VII, the circuit courts have repeatedly said that Congress intended standing under Title VII, like the Fair Housing Act, to extend to all who can meet the Article III requirements.67 Moreover, when faced with a plaintiff alleging a loss of benefits from interracial association, the injury "in fact" specifically identified by the Supreme Court in Trafficante and one of the ones from Gladstone, courts dutifully have granted standing.68

resident was asserting his own right to live in an integrated environment”). See also Schwemmm, supra note 1, at 43 (making similar erroneous argument with respect to Arlington Heights v. Metro Housing Dev., 429 U.S. 252 (1977)); Winter, supra note 21, at 1483 (Court found "'personal,' congressionally created rights" in Trafficante). Footnote 9 demonstrates that the Court, at least as a conceptual matter, views plaintiffs asserting the "neighborhood injury," as in Trafficante and Gladstone, to have a type of third-party standing similar to that in Barrows.

66. Title VII permits an administrative charge with the EEOC to be filed by "a person claiming to be aggrieved." 42 U.S.C.A § 2000e-5(b) (West 1995). It also authorizes such an individual to bring a civil suit. 42 U.S.C.A § 2000e-5(f)(1) (West 1995) ("a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved"). Compare text accompanying supra note 45, and supra note 56.

67. See, e.g., Stewart v. Hannon, 675 F.2d 846, 849 (7th Cir. 1982) ("A similar analysis of standing should hold true under Title VII [as the analysis of the Fair Housing Act in Trafficante]"); EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980) ("the phrase 'a person claiming to be aggrieved' in § 706 of Title VII must be construed in the same manner that Trafficante construed the term 'aggrieved person' in § [36]04 of the Fair Housing Act"); EEOC v. Bailey, 563 F.2d 439, 452 (6th Cir. 1977) ("Trafficante requires us to hold that the definition of 'a person claiming to be aggrieved' under Title VII includes a white person . . . who may have suffered from the loss of benefits from the lack of association with racial minorities at work"); Waters v. Heublein, 547 F.2d 466, 469 (9th Cir. 1976) ("That analysis of the standing question [in Trafficante] applies with equal force to actions brought under Title VII"); Gray v. Greyhound Lines East, 545 F.2d 169, 176 (D.C. Cir. 1976) ("Congress has itself determined [in Title VII] that standing should be granted to anyone who satisfies the constitutional requirements").

68. See, e.g., Stewart, 675 F.2d at 850; Mississippi College, 626 F.2d at 483; Bailey, 563 F.2d at 452-54; Waters, 547 F.2d at 469-70.
Yet, the lower courts seem reluctant to jettison all of the prudential barriers. Despite the fact that the Supreme Court has made clear that the "zone of interests" test is a prudential barrier, 69 and not part of the Article III requirements, the Eighth Circuit has specifically applied, 70 and the Second Circuit has affirmed, 71 precisely that test in assessing Title VII standing. 72 Of equal importance, the courts have ruled as if various prudential barriers impeded the standing of Title VII plaintiffs. The Ninth Circuit has ruled that a shareholder cannot bring a derivative suit against the corporation's directors for the waste of assets caused by a discriminatory hiring policy, although it would seem that corporate directors that fail to maximize the quality of a corporation's workforce by pursuing a non-discriminatory policy have injured

69. Allen v. Wright, 468 U.S. 737, 751 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474-75 (1982); Gladstone, 441 U.S. at 100 n.6. A few courts, it should be noted, have recognized that the "zone of interests" test ought not to be applied to Title VII after Trafficante. See Gray, 545 F.2d at 175-76; Senter v. General Motors Corp., 532 F.2d 511, 517 n.6 (5th Cir. 1976).

70. Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679 (8th Cir. 1989) (standing under Title VII is a two-part standard consisting of injury "in fact" and an injury within the zone of interests of the statute).

71. Pecorella v. Oak Orchard Community Health Ctr., Inc., 559 F. Supp. 147, 149 (W.D.N.Y. 1982) (male plaintiff who received a higher wage than his female counterparts, on the condition that he not disclose his higher wage to his co-workers, was not within the "zone of interests" of Title VII and thus did not have standing), aff'd, 722 F.2d 728 (2d Cir. 1983).

72. See also American Fed'n of State, County and Mun. Employees, AFL-CIO v. Nassau County, 664 F. Supp. 64, 66 (E.D.N.Y. 1987) (hereinafter AFSCME v. Nassau County) (men who were paid less because they held "traditional female jobs" had no standing because "these injuries and rights do not place them within the Title VII zone of interests"); Feng v. Sandrik, 636 F. Supp. 77, 82 (N.D. Ill. 1986) (husband of assistant professor allegedly discriminated against by university, and who made "broad allegations regarding injuries he has suffered," was outside the "zone of interests" of Title VII and lacked standing). For some reason, courts have seemed hostile to Title VII claims by family members of those against whom the discrimination was directed, although it would seem that such individuals, given the economic structure of most families, are no doubt "injured" by such discrimination, perhaps even as much as those who have been deprived of the benefits of an integrated neighborhood because of discrimination to others. See also Mosley v. Clarksville Memorial Hosp., 574 F. Supp. 224, 234 (M.D. Tenn. 1983) (woman did not have standing to sue based upon discrimination against either her son or daughter). In Mosley, the court stated that "standing is not granted to vindicate the rights of third parties," id., precisely the sort of prudential concern that would be ignored if Trafficante and Gladstone were taken seriously.
the corporation.73 Courts have also rejected claims by male employees who claim that their salary is lower because they are in a "job group" which is discriminated against because it is predominantly female.74 The obvious rejoinder that a lower salary is indeed an injury—perhaps even as important as the loss of benefits from interracial association—has been ignored (or perhaps worse).75 The lower courts, it seems, like the prudential barriers and are

73. Foust v. Safeway Stores, Inc., 556 F.2d 946, 947 (9th Cir. 1977). The court's decision in Foust is less than clear. The court held that it is not "tenable to permit a corporate employer to maintain a Title VII suit against itself," id., although the suit was also against the corporate directors who implemented the policy. The Court also said that it was not deciding whether a derivative suit could be maintained under state law for failure to comply with Title VII, id. at 948 n.1, although that statement seems to refer to the potential harm from having exposed the corporation to liability, not the actual harm from having failed to hire workers with the best skills.

74. Patee v. Pacific Northwest Bell Telephone Co., 803 F.2d 476, 479 (9th Cir. 1986); Spaulding v. University of Washington, 740 F.2d 686, 709 (9th Cir. 1984); AFSCME v. County of Nassau, 664 F. Supp. 64, 66 (E.D.N.Y. 1987). See also Siegel v. Board of Educ. of the City of New York, 713 F. Supp. 54, 56 (E.D.N.Y. 1989) (Weinstein, J.) ("Men have not been permitted to assert a claim that they themselves have been victimized inadvertently by sex discrimination against women").

75. In AFSCME, Judge Glasser tried to deal with the anomaly that the loss of benefits from interracial association constituted a sufficient injury, but that the loss of money did not. He claimed that "Title VII . . . focuses on whether the plaintiff suffers discrimination because of who he is" and that the loss of benefits from interracial association was considered a sufficient injury in certain cases because, in such cases, "those plaintiffs were white." AFSCME, 664 F. Supp. at 67 (emphasis in original). Since male plaintiffs losing money because they are trapped with a low-paying female work group are not losing money because they are male, according to Judge Glasser, they have no standing.

The factual premise of Judge Glasser's argument—that only white plaintiffs (and not minority plaintiffs) are injured when the work force is not integrated with minorities—is rather counterintuitive. One would think that the few minorities hired in a predominantly white workplace would feel the absence of more minorities even more keenly than whites. In any event, Judge Glasser's legal premise, that a plaintiff must have experienced some injury related to that plaintiff's sex or race or nationality, is completely inconsistent with case law. Trafficante involved both a black tenant and a white tenant, and the Court held that each one's loss of the benefits of interracial association was sufficient to constitute the necessary injury. See also Gray, 545 F.2d at 173 (black employees could challenge discriminatory hiring policies given their allegation that each suffered a "feeling of isolation" in being one of the few hired blacks); Washington v. City of Evanston, 535 F. Supp. 638, 640 n.3 (N.D. Ill. 1982) (allegation that black employee was forced to endure an "adverse job environment" as a consequence of defendant's discriminatory hiring policies sufficient). Cf. EEOC Dec. No. 71-969, ¶6193 (CCH) (Dec. 24, 1970) (white employee "aggrieved" by supervisor's use of racial epithets in referring to blacks). In Gladstone, the Village of
reluctant to permit a whole slew of cases to proceed where the plaintiffs are essentially asserting other people’s rights.

The courts are not alone. Perhaps the leading treatise on employment discrimination,76 in listing the three elements of Article III standing, includes the prudential "zone of interests" test,77 and throughout its brief discussion on standing, repeatedly refers unquestioningly to cases that applied the "zone of interests" test.78

A similar phenomenon can be seen with the Age Discrimination and Employment Act (the "ADEA"). The ADEA, like the Fair Housing Act and Title VII, provides that a civil action may be brought by "[a]ny person aggrieved."79

Perhaps the most interesting situation is created by an employment policy which discriminates against everyone over 30 or 35.80 Under Trafficante, a 36 year old would presumably have standing because (1) the policy violates the rights of those over 40, who are protected by the ADEA; and (2) the plaintiff is injured by the policy.81 The cases have ignored the application of Trafficante and ruled against such plaintiffs.82

Bellwood, an entity which obviously has no race (see Missouri v. Jenkins, 115 S. Ct. 2038, 2072-73 (1995) (Thomas, J., concurring) ("a school district cannot be discriminated against on the basis of its race, because a school district has no race"); was granted standing. Gladstone, 441 U.S. at 115.

76. ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION (1993) (hereinafter "LARSON & LARSON").

77. 2 LARSON & LARSON, supra note 76, § 49.12(a) at 9B-25.

78. 2 LARSON & LARSON, supra note 76, § 49.12(a).

79. 29 U.S.C.A. § 626(c)(1) (West 1985). Although Trafficante would suggest that any individual deprived of the benefits of "interage associations" would have standing, I have not read any reported cases to that effect.

80. The ADEA limits its protection against age discrimination to those "at least 40 years of age." 29 U.S.C.A. § 631(a) (West Supp. 1993). That is, the ADEA does not prohibit discrimination based upon age against those under 40. Compare N.Y. EXEC. LAW § 296(3-a)(a) (McKinney 1993) (prohibiting age discrimination against anyone over 18).

81. One could argue, I suppose, that the discriminatory act is the application of the policy to those over 40, and that this act does not injure the 36 year old. This narrower interpretation of the discriminatory act would preclude standing for the 36 year old, and, under Trafficante, the question could be considered close. The analysis of the courts that have denied standing to such plaintiffs has not relied on such subtleties.

82. See Hahn v. City of Buffalo, 770 F.2d 12, 14 (2d Cir. 1985) (only those over 40 had standing to challenge state hiring policy that precluded hiring individuals over 29 for police officer positions); Crane v. Schneider, 635 F. Supp. 1430, 1434 (E.D.N.Y. 1986) (where candidates had to be between 20 and 35 to take written exam
One case, *Allen v. American Home Foods, Inc.*,\(^{83}\) did hold that individuals under 40 can bring a lawsuit when a plant that included many workers over 40 was closed because of the age of those older workers. Consistent with their erroneous belief that the employment discrimination statutes should use a "zone of interests" test in determining standing, the Larsons have concluded that this case was wrongly decided, arguing that, were it otherwise, "there would seem to be few limits on who can sue for ADEA violations, so long as the employer action affects at least someone in the protected class."\(^{84}\) Of course, that was indeed the point of *Trafficante* and *Gladstone*—that so long as someone's rights were violated, anyone injured by the act which violated those rights could sue.\(^{85}\)

**B. Defining Injury**

The historic validity (or lack thereof) notwithstanding, the first of the three constitutionally required elements of standing is injury "in fact." The Court uses words like "distinct," "palpable" and "not abstract" to describe the required injury, but it concedes that there is no "precise definition" to the term and that "[i]n many cases standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases."\(^{86}\)

That is what I intend to do in this section. Before attempting that, though, I set forth a baseline definition of "injury"—one which the Court certainly does not employ—to use as a basis of comparison: the utilitarian injury. A utilitarian injury is one which leaves a person worse off than he was previously, *i.e.*, one which reduces his or her "utility." Simply put, a utilitarian injury is one which makes an individual feel worse.\(^{87}\)

---

84. 3A LARSON & LARSON, supra note 76, § 98.54 at 21-63.
87. A simple example of a utilitarian injury is presented by Professor Fletcher when he suggests that a child whose sibling receives a bicycle from his parents, but
In using Supreme Court decisions to answer certain questions about standing, I will focus on questions that are particularly relevant to cases under the Fair Housing Act. First, is mental distress an injury "in fact?" Second, what types of injury "in fact" are "judicially cognizable," and how can Congress "define" an injury through the "statutory rights gambit?" In answering that last question, I will also consider the relatively recent case of Lujan v. Defenders of Wildlife.\textsuperscript{88}

1. Injury and Mental Distress

At first glance, the answer to the question of whether "mental distress"\textsuperscript{89} is an appropriate Article III injury is obvious. Intentional infliction of emotional distress is a fairly well established tort under most states' laws, and nothing the Supreme Court has ever said has suggested that such claims cannot be heard in federal court. Indeed, the Court has analogized Fair Housing Act claims to precisely such torts.\textsuperscript{90}

But the requirement that an injury be "particularized" has led in some instances to conclude that not every form of mental distress will be recognized by the Court as a sufficient injury "in fact." Mental distress caused by acts which have only a remote connection to the plaintiff (and which, thus, could be asserted by a large number of people) do not meet the "particularity"

\textsuperscript{88} 504 U.S. 555 (1992).

\textsuperscript{89} I use the phrase "mental distress" here to encompass all forms of psychological injury, whether denominated as emotional distress, dignity harm, stigmatic injury or any other term.

\textsuperscript{90} Curtis v. Loether, 415 U.S. 189, 195-96 n.10 (1974) ("[a]n action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress . . . 'under the logic of the common law development of a law of insult and indignity, racial discrimination may be treated as a dignitary tort'"). See also Schwemmer, supra note 1, at 69. Two administrative law judges who hear housing discrimination claims (pursuant to Sections 3610 and 3612 of the Fair Housing Act) note that such "intangible" damages are usually much larger than any out-of-pocket damages. Alan W. Heifetz & Thomas C. Heinz, Separating The Objective, The Subjective And The Speculative: Assessing Compensatory Damages In Fair Housing Adjudications, 26 J. MARSHALL L. REV. 3, 9 (1992).
requirement of Article III.\textsuperscript{91} For example, the Court has held that the stigma attached from being treated unequally is a sufficient injury to meet Article III.\textsuperscript{92} But the unequal treatment must be personal. In Allen \textit{v.} Wright,\textsuperscript{93} the Court held that merely being part of a group which is being treated unequally, without a showing that the individual bringing suit was somehow personally treated in an unequal way, is not enough.\textsuperscript{94}

\textsuperscript{91} One of the various prudential requirements identified by the Court is that litigants should not be heard to assert "generalized grievances more appropriately addressed in the representative branches[]." Allen \textit{v.} Wright, 468 U.S. 737, 751 (1984). As the text suggests, it is not altogether clear how this differs from the Constitutional requirement of a "particularized" injury. \textit{See} Blanch, \textit{supra} note 22, at 711 ("The problem with this distinction between prudential standing and Article III standing is that is does not seem to exist in practice. In case after case, the Supreme Court has stated that generalized injuries cannot constitute sufficient injury in fact to satisfy Article III's essential requirements"); Patti A. Meeks, \textit{Justice Scalia And The Demise Of Environmental Law Standing}, 8 J. LAND USE & ENVTL. L. 343, 364 (1993) ("Scalia has apparently used [Lujan \textit{v.} Defenders of Wildlife] as a stepping stone towards constitutionalizing the generalized grievance standing limitation"). \textit{See also} Craig R. Gottlieb, Comment, \textit{How Standing Has Fallen: The Need To Separate Constitutional And Prudential Concerns}, 142 U. PA. L. REV. 1063, 1082 & n.114 (1994) (purporting to explain the difference between a "generalized grievance" and one common to a whole population). I think the cases discussed in this section (\textit{see infra} text accompanying notes 93-101) undermine Meeks' theory that the similarity between the prudential and constitutional requirement is somehow a new phenomenon created by Justice Scalia.

\textsuperscript{92} Heckler \textit{v.} Mathews, 465 U.S. 728, 739-40 (1984) (individual being denied equal treatment has standing even where congressionally mandated remedy for inequality will be to take benefits away from those being favored rather than granting any benefits to plaintiff). Curiously, in Heckler, the Court said that a violation of the right to equal treatment "\textit{can} cause serious noneconomic injury to those persons denied equal treatment solely because of their membership in the disfavored group", \textit{id}. at 729,—as opposed to saying that it \textit{did} cause (or that plaintiff alleges such) noneconomic injury.

\textsuperscript{93} 468 U.S. 737 (1984) (plaintiffs lacked standing to challenge the manner in which the IRS determined if private schools discriminated on the basis of race and thus should be denied tax-exempt status).

\textsuperscript{94} \textit{But cf.} Smith \textit{v.} City of Cleveland Heights, 760 F.2d 720, 722 (6th Cir. 1985) (granting standing to black resident of city that allegedly engaged in steering practices in order to keep its integration level at proportions that would prevent white flight; even though resident "was not himself subject to any steering practices when he purchased his home [two years prior to the implementation of the steering policy] . . . he is forced to interact on a daily basis within the Cleveland Heights community under the weight of this imposed badge of inferiority"), \textit{cert. denied}, 474 U.S. 1056 (1986). Could Smith have alleged that he was being deprived of the benefits of the \textit{less} integrated community that would have resulted had the city not consciously
Similarly, the Supreme Court has not permitted citizens to sue when they perceive the government acting in an unconstitutional fashion. In *Schlesinger v. Reservists Committed To Stop The War*, the Court held that citizens could not sue merely because they believed that the government was violating the Incompatibility Clause of the Constitution by allowing members of Congress to remain in the armed forces reserves, characterizing it as an abstract interest. In a suit to have the CIA Act declared unconstitutional because it permitted the CIA to receive funds without providing a detailed statement of account in violation of the Constitution, the Court held that the plaintiff's injury as a citizen in being unable to intelligently follow the actions of his government did not qualify under Article III. And in *Valley Forge Christian College v. Americans United For Separation Of Church And State*, the Court rejected a challenge by a group of citizens dedicated to the separation of church and state to the grant of land to a religious-educational organization, holding that individuals did not have a personal right to a separationist government or a spiritual stake in the Establishment Clause.

No doubt each of the plaintiffs in *Schlesinger, Richardson*, and *Valley Forge* suffered some kind of utilitarian injury. They objected to the governmental violation of law (as well, no doubt, as the policies those violations seemed to be implementing), and no doubt probably suffered some form of mental distress. But *impersonal* mental distress does not do the trick under Article III. The Supreme Court, concerned about an avalanche of lawsuits that might result, has limited standing to those who suffered mental distress as a consequence of some "personal" treatment.

discriminated to prevent white flight? Could a black nationalist or racist have made that allegation?


96. U.S. CONST. art. I, § 6, cl. 2 ("no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office").


98. Article I, § 9, cl. 7 of the Constitution states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."


100. 454 U.S. 464 (1982).

101. *Id.* at 487 n.22. The Court added that an allegation of a violation of the Establishment Clause does not provide organizations "a special license to roam the country in search of governmental wrongdoing to reveal their discoveries in federal court," *id.* at 487, a notion that seems to have been forgotten in the interpretation of organizational standing under the Fair Housing Act. See *infra* text accompanying notes 206-209.
One can understand the Court's concern. The "particularity" requirement is weak enough as it is.102 As Justice O'Connor noted in Allen, a contrary holding with respect to the stigma of inequality would give standing to members of the disfavored group in Hawaii to challenge policies in Maine.103 But the result is that the measure of whether the injury meets constitutional standards has very little to do with the injury itself, but rather with the way the injury was inflicted. My mental distress, after all, may be just as strong when I see someone else being mistreated as it is when I am mistreated. The difference between what is and what is not an injury "in fact" sufficient for Article III purposes must depend on something other than the injury itself.104

2. The Statutory Rights Gambit

To distinguish between mental distress that the law will recognize as an injury "in fact," and that which it will not, the Court sometimes uses the term "cognizable" injury in fact. Thus, in Allen v. Wright, the Court stated that the "stigmatic" injury suffered by the plaintiffs was not "judicially cognizable"—an expression that, in that instance, merely referred to the fact that it was not an injury that met the Article III "particularity" requirement. But the Court has used the word "cognizable" in another sense as well, referring to the fact that injuries can become "judicially cognizable" because a law has been passed which provides for redress for that injury.106 This is what I have characterized as the "statutory rights gambit."

102. Indeed, as Professor Winter has noted, it is not altogether easy to characterize a deprivation of "the benefits of interracial living," which can be claimed by an entire geographic neighborhood, as a particularized injury. Winter, supra note 21, at 1381. Compare Schwemmel, supra note 1, at 20 & n.90 (Senator Javits' remarks concerning discrimination hurting "the whole community" suggest that everyone in San Francisco should have had standing to sue based upon the harm in Trafficante). See also United States v. SCRAP, 412 U.S. 669 (1972) (injuries included a detriment to air quality).


104. More generally, a number of different commentators have noticed the difficulties in defining injury "in fact" and conclude that the Court's determinations are not fact based, but value laden. E.g., Sunstein, supra note 9, at 188-89; Fletcher, supra note 15, at 231-33.


106. Cf. Nichol, supra note 4, at 1155 (word "cognizable" is "an obviously loaded term").
The Court has repeatedly said that the injury "in fact" requirement can be met by the invasion of a legal right created by law.\textsuperscript{107} Although the Court seems usually to be referring to a federal statute passed by Congress, the Court has also indicated that the "legal right" might be created by a judicial decree\textsuperscript{108} or a state statute.\textsuperscript{109}

But in defining a "legal right" the invasion of which can constitute an injury for Article III purposes, is Congress limited at all? Is the doctrine needed (or appropriate) only for "injuries" that are not real injuries at all, or do some "real" (\textit{i.e.}, particularized, palpable and not abstract) injuries still require congressional assistance before they qualify under Article III? And if certain particularized and concrete "injuries" need congressional assistance before they become "cognizable," what is it that distinguishes those injuries from the injuries that need no congressional assistance? In other words, why are these injuries not Article III injuries to begin with?

As we shall see, the Court has not given consistent answers to these questions over time. Case law has, in fact, given us two different visions of the "statutory rights gambit." The first holds that there are some actual (or \textit{de facto}) injuries that do not make the grade as Article III injuries without statutory assistance, and that need a congressional boost. This vision, in the version recently revived in \textit{Defenders of Wildlife}, also limits Congress to \textit{de facto} injuries when defining rights.\textsuperscript{110} The second vision, the one primarily employed in Fair Housing Act cases, holds that Congress can create any right it chooses regardless of whether we would consider the invasion of that right an "injury" in any true sense. Under this vision, if Congress gives us a right not to see the color purple, we have standing to sue when we see that color regardless of whether our seeing the color purple has injured us in any meaningful sense.

\textsuperscript{107} Warth v. Seldin, 422 U.S. 490, 500 (1975) (an actual or threatened injury sufficient to meet Article III standards may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing"); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (in the absence of a statute, plaintiff must show an actual injury); O'Shea v. Littleton, 414 U.S. 488, 493 n.2 (1974); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

\textsuperscript{108} Allen, 468 U.S. at 763 (in distinguishing earlier case of Norwood v. Harrison, 413 U.S. 455 (1973), the court states that the plaintiffs in \textit{Norwood} had rights created by a school desegregation decree and were thus "injured" by a violation of the decree).

\textsuperscript{109} Diamond v. Charles, 476 U.S. 54, 66 n.17 (1986) (suggesting that the Illinois legislature could create rights the violation of which might constitute "injury" for Article III purposes).

\textsuperscript{110} \textit{E.g.}, Nichol, supra note 4, at 1158 (under \textit{Lujan v. Defenders} methodology, there is a limited pool of \textit{de facto} injuries that Congress can use in defining new statutory injuries).
a. The Early Years

The first vision has roots in Justice White's concurrence in Trafficante and in Warth v. Seldin. In Warth, the Court rejected a claim that certain plaintiffs had standing to sue for violations of the Equal Protection Clause of the Fourteenth Amendment because they had been deprived of the benefits of interracial association—precisely the kind of injury upheld in Trafficante. The Court stated that there was no Fair Housing Act claim involved and therefore the injury caused by the deprivation of the benefits of interracial association was not a "judicially cognizable injury." Warth relied upon Justice White's concurrence in Trafficante for its holding, specifically citing it for the proposition that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of a statute." While this marks the embryonic development of the statutory rights gambit, it started out its life in a rather confused state (a state it has never quite outgrown). The Warth Court found that the Fair Housing Act had granted residents of housing facilities a "right to be free from the adverse consequences" of discrimination. This sounds very much like a right to be free from an injury, which seems like a rather odd definition for a "right." Moreover, it naturally begs the question: what is the difference between an "adverse consequence" (which to the uninitiated sounds very much like an injury) and an "injury-in-fact"? If they are the same, of course, then the creation of a "right" not to be injured serves the

111. 409 U.S. 205, 212 (1972) (White, J., concurring). See supra notes 50-51 and accompanying text.
112. 422 U.S. 490 (1975) (plaintiffs lack standing under equal protection clause to challenge zoning decisions). Warth is similar to the majority decision in Defenders of Wildlife (see infra discussion in subsection "c") in that both suggest that there are actual injuries, like the detriment from living in a racially monotone neighborhood, which simply do not qualify as Article III injuries without the assistance of a statute. Justice Scalia's opinion in Defenders goes further and suggests that it is only such "de facto-but-not-enough-on-their-own" injuries which Congress can protect under the statutory rights gambit. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).
114. Warth, 422 U.S. at 512-14.
115. Id.
116. Id. The Court had twice before, in dicta, cited Justice White's concurrence for the proposition that Congress could create a right the invasion of which could confer standing. Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (in the absence of a statute, plaintiff must show an actual injury); O'Shea v. Littleton, 414 U.S. 488, 493 n.2 (1974).
117. Warth, 422 U.S. at 513.
same purpose as expanding standing to the Article III limits (and casts doubt upon my suggestion that there are two distinct ways in which Congress can affect standing). 118

The underlying supposition of Warth is that there are actual, particularized injuries which simply do not cut it as Article III injuries—in-fact without the assistance of a statute. So too, injuries that can be recognized without a statute are a subset of all possible Article III injuries. (Thus, Justice White’s assertion in Trafficante that the injuries there would not have met Article III requirements without the existence of the Fair Housing statute). The injuries that can be recognized by a statute may be real and particular injuries, just like the injuries in Trafficante, but they need that statutory assistance to qualify under Article III. The statutory assistance is to create a "right" not to be injured in ways that the Constitution and/or the common law do not recognize.

As discussed in somewhat greater detail in the discussion of Lujan, this vision of the statutory rights gambit runs into several problems (not the least of which is the case law supporting a different vision). For the moment, one might note that there is nothing in the reported cases which tells us what injuries make it as Article III injuries without statutory assistance, and why they do and others do not. 119 Indeed, as far as I am aware, those who espouse this vision of the statutory rights gambit have never explained this distinction.

Even more curiously, Warth states that the substantive law involved will affect the viability of an injury "in fact." Indeed, while insisting that standing was an issue apart from the merits, the Court specifically held that it will often turn on the nature and source of the claim asserted 120—statements that seem to conflict with one another and that require us to strain language ("apart from the merits"?) to make sense of the opinion. 121

Consider, for example, a woman denied housing because of her sex in 1967 (one year prior to the passage of the Fair Housing Act). 122 It seems

118. See infra note 155.
119. Cf. Nichol, supra note 30, at 1930 n.100 (noting that Warth made no such explanation, although that clearly was its holding).
120. Warth, 422 U.S. at 500. As Dean Nichol correctly notes, the "distinct" and "palpable" aspects of the "interracial association" injury cannot change depending upon what law is being cited. Nichol, supra note 30, at 1931 n.101.
121. See Schwemm, supra note 1, at 7 ("The inability of the Supreme Court to distinguish [existence of a cause of action from existence of standing] is one of the principal sources of confusion in fair housing cases"); Winter, supra note 21, at 1466 & n.528. But cf. Gottlieb, supra note 91, at 1093-94 (difference between Warth and Trafficante was Court’s improper use of separation of powers analysis in Warth).
122. Professor Sunstein uses the example of a "tester" being falsely told that
bizarre to say that the woman lacked standing because she had not suffered a "cognizable" injury;\textsuperscript{123} our intuition would suggest that she simply lacked a cause of action. And if the word "cognizable" is intended to mean nothing more than that the plaintiff has no cause of action, it really makes no sense to characterize it as a standing issue. That, of course, is precisely the point that the critics of modern standing doctrine make, \textit{i.e.}, that "standing" really \textit{is} a question on the merits, and should be treated as such.\textsuperscript{124}

housing was unavailable (for an impermissibly discriminatory reason) prior to the Fair Housing Act being passed. Sunstein, \textit{supra} note 9, at 189-90. I use the example in the text because it is much less clear to me (as I think it is to others) that the "tester" has suffered an injury "in fact" either before or after passage of the Fair Housing Act. \textit{E.g.}, Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990) (Posner, J.) ("The standing of the testers is, as an original matter, dubious . . . they suffer no harm other than that which they invite in order to make a case against the persons investigated"). \textit{Compare} United States v. Balistrieri, 981 F.2d 916, 933 (7th Cir. 1992). \textit{See infra} the discussion in the text accompanying notes 133-135. If one assumes, as Professor Sunstein apparently does, that an actual injury has occurred to the testers, then his example serves the same purpose as mine.

123. \textit{See} Sunstein, \textit{supra} note 9, at 190 n.129 (in discussing \textit{Trafficante}, Professor Sunstein asks if it is "even plausible to think that there was no 'injury in fact' before the statute, and thus that the California plaintiffs came to experience an injury ('in fact!') the day that Congress passed a law in the District of Columbia").

124. Sunstein, \textit{supra} note 11, at 40 ("There can be no law-free inquiry into the subject of injury"). In International Primate Protection League v. Administrators of Tulane Educ. Fund, 111 S. Ct. 1700 (1991), the Court seemed to edge closer to adopting the merits-based view of standing. Citing Professor Fletcher's article, the Court held that "[s]tanding does not refer to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." \textit{Id.} at 1704. The Court held that plaintiffs had standing to challenge the removal of their claim to federal court even though they had no Article III standing to pursue the substantive claims themselves (relating to the preservation of primates). \textit{Id.} It reasoned that plaintiffs were being injured by the removal because they were being precluded from pursuing their claim in state court. \textit{Id.} \textit{See also} United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1980) (even though plaintiff's substantive claim was moot, he was still injured by the decision of the court below that he could not represent a class, under \textit{FED. R. CIV. PRO.} 23, and thus had standing to pursue that claim over mootness objections). \textit{But cf.} Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) ("The Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action").
b. A Different View Develops

As noted earlier, the Warth vision of the Fair Housing Act as providing a "right" for those who had suffered "adverse consequences" of discrimination appears to have been abandoned in footnote 9 of Gladstone. There, as we have seen, the Court seems to have rejected the premise that those suffering from the denial of the benefits of interracial neighborhoods had had their "rights" violated, and returned to the Trafficante majority theme that all those "injured" (for Article III purposes) had standing to sue even without a violation of a "right." But this reversal did not affect the viability of the statutory rights gambit in general, which continued to be cited.

Indeed, shortly after Gladstone, the Court decided Havens Realty Corp. v. Coleman, in which a different vision of the statutory rights gambit is first applied. In Havens Realty, two of the plaintiffs were "testers," i.e., individuals "who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." The complaint alleged that a white tester was told that certain apartments were available, but that the black tester was not told of their availability. In considering whether those plaintiffs had standing, the Court found that in passing Section 3604(d)—which makes it illegal to make a misrepresentation about the availability of housing "to any person because of race, color, religion, sex or national origin"—"Congress . . . conferred on all 'persons' a legal right to truthful information about available housing." Because the black tester alleged that he had received

125. See supra notes 52-65.
127. Id. at 373.
128. Id. at 369.
129. 42 U.S.C. § 3604(d) (1982). After the 1988 Amendments, which added the existence of a handicap and familial status as additional impermissible criteria of discrimination, Section 3604(d) reads as follows:

[I]t shall be unlawful . . . [t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

130. Havens Realty, 455 U.S. at 373. Clearly, the Court somewhat overstated the case in suggesting that Section 3604(d) created a "legal right to truthful information." Section 3604(d) is not some all-purpose anti-fraud or full disclosure statute, and it does not require anyone to provide truthful information. It only precludes people from giving false information (or withholding truthful information) for an impermissible reason (i.e., because of race, color, sex, and the like). Providing false information for some other reason (e.g., because it is late and a broker wants to
false information because of his race, he was deemed to have standing.\textsuperscript{131} Since the white tester did not allege that he had been given false information, he did not have standing.\textsuperscript{132}

A few notes about \textit{Havens Realty} and the second vision of the statutory rights gambit are in order. First, the Court did not look for any utilitarian injury. It did not look for any "adverse consequence" or injury, as in \textit{Trafficante}. It made no effort to determine whether the testers were worse off in some factual sense, \textit{i.e.}, whether they had suffered some economic or non-economic injury "in fact." To the contrary, it held that if "the tester ... approached the real estate agent fully expecting that he would receive false information," it would not "negate the simple fact of injury within the meaning of § [36]04(d)."\textsuperscript{133} Under common law claims like fraudulent inducement, we normally require plaintiffs to show that they relied on the false information because, without such a showing, it seems unlikely that the plaintiff suffered any injury. As interpreted in \textit{Havens Realty}, § 3604(d) eliminates that requirement.

Judge Posner and several commentators have noted that the idea that such an individual has suffered a factual injury is difficult to swallow.\textsuperscript{134} I would go further and state that, in at least some instances, the tester might be better off after having received the false information. The tester, in general, is an individual committed to eradicating discrimination from the field of housing, and may truly believe that the persons being "tested" engage in illegal discrimination but have yet to be detected. It is not altogether unreasonable to assume that a tester might be elated or receive some other form of "mental joy"—or whatever the name for the opposite of mental distress is—upon

\begin{flushleft}
\textsuperscript{131} \textit{Havens Realty}, 455 U.S. at 374.
\textsuperscript{132} \textit{Id.} at 375.
\textsuperscript{133} \textit{Id.} at 374.
\textsuperscript{134} Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990) (Posner, J.) ("The standing of the testers is, as an original matter, dubious ... they suffer no harm other than that which they invite in order to make a case against the persons investigated"). \textit{See, e.g.}, Winter, \textit{supra} note 21, at 1483 ("Neither [white nor black tester] has suffered an injury in fact"); Fletcher, \textit{supra} note 15, at 253 ("when the Court has decided ... cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself"); Sprigman, \textit{supra} note 51, at 1649-50.
\end{flushleft}
learning that his or her efforts have contributed to the ferreting out of evil.\textsuperscript{135}

Second, by using the statute to assume an injury "in fact," the Court sidestepped the analysis in Trafficante and Gladstone, in which the Court discerned various actual injuries to the plaintiffs (the loss of the benefits of interracial association, a diminished tax base, etc.). It would not have been impossible to fit Havens Realty into that scheme if the plaintiffs alleged an injury like mental distress or the stigma from having been treated unequally—the kind of "dignity tort" that the Court will recognize as an injury "in fact."\textsuperscript{136} But that, of course, would have required that the plaintiffs to allege and prove that they did suffer mental distress,\textsuperscript{137} a step that this second vision of the statutory rights gambit avoids.\textsuperscript{138}

\textsuperscript{135} See United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992) ("In fact, a tester who helps expose discrimination could conceivably experience certain satisfaction in helping to correct wrongful conduct. Some testers could even be pleased with the success of their undercover operations").

\textsuperscript{136} I assume here that "testers" with no interest in housing could still allege that they were "personally" treated in an unequal manner, fitting themselves under Heckler v. Mathews rather than Allen v. Wright. See supra text accompanying notes 92-103. I also assume that the "testers" would not be disqualified by reason of the fact that they had invited the injury by participating as testers or because their mental distress might not occur until they heard the results of the other tests (assuming they did not know them in advance). See Balistrieri, 981 F.2d at 933 (fact that testers did not suffer emotional distress immediately through contact with defendants, but rather later upon learning of results of other testers, did not break the causal chain).

\textsuperscript{137} The plaintiffs in Balistrieri were successful in making precisely such a claim. Balistrieri, 981 F.2d at 930-33 (upholding jury award of $2000 in emotional distress damages for each tester).

\textsuperscript{138} Professor LeBel makes this point somewhat differently when he constructs an argument that the Court erred in denying standing to the white tester in Havens Realty. According to LeBel, the fact that the white tester did not have his right to truthful information violated should not have been dispositive because, under Trafficante and Gladstone, any injury should have been sufficient, and the Court made no effort to determine if the white tester was injured in any other way. LeBel, supra note 10, at 1018-19. LeBel argues that everyone to whom a "total package of information" which violated the Act was directed should have standing; an "informational injury" is inflicted on all who are part of a group in which some of them were steered. Id. at 1021-22 & n.45. Compare Winter, supra note 21, at 1483-84 (white and black testers "had the same relationship to the case and the same purely representational relationship to the real beneficiaries of the statute").

LeBel's assertion that the white tester in Havens Realty suffered an "informational injury" is less than convincing. (It is, for example, not the least bit clear that white people, who had not been given any false information, were being "steered" anywhere.) His point that the Court made no effort to ascertain whether the
Third, *Havens Realty*, when read with *Gladstone*, makes clear that Congress has two different methods of modifying the standing rules, each one independent of the other. Footnote 9 of *Gladstone* makes plain that Congress can remove prudential barriers without creating any "legal rights" the violation of which would constitute an injury for Article III purposes.139 And *Havens Realty* makes clear that Congress can create a "legal right" regardless of whether the "prudential barriers" have been removed.140

Recognition of the fact that Congress has two different means of modifying the rules of standing lends some perspective to the oft-quoted phrase that the "injury-causation-redressability" requirement is a constitutional minima that Congress cannot abrogate.141 When Congress wants to simply eliminate certain standing rules, it is so limited. It can only eliminate prudential barriers. But if Congress uses the statutory rights gambit, and creates a legal right the violation of which will meet the injury "in fact" requirement, it can indeed "abrogate" the Article III minima because the Court will not examine the "factual" existence of an "injury" beyond the violation of a legal right.142

---

Footnote 9 analysis, however, is well taken. One could argue that an individual who has been treated favorably for improper reasons may suffer some sort of "stigma" or mental distress, akin to embarrassment from being the recipient of unfair advantages. *Cf.* Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523, 4534, 1995 U.S. LEXIS 4037, *75* (U.S. June 12, 1995) (Thomas, J., concurring) ("benign" programs involving race discrimination "stamp minorities with a badge of inferiority and may cause them to develop dependencies. . ."). *See also* 63 U.S.L.W. at 4536 n. 5, 1995 U.S. LEXIS 4037, at *87* n. 5 (Stevens, J., dissenting).

139. *See supra* note 62.

140. Indeed, it would seem that when Congress creates a "legal right" the violation of which constitutes an injury for Article III purposes, the "prudential barriers" become irrelevant. If Congress gave someone a "legal right," that individual is in the "zone of interests" of the Congressional enactment, is not asserting the rights of a third person, and is not, at least in the usual case, asserting a "generalized grievance." *See* Antonin Scalia, *The Doctrine of Standing As An Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886 (1983) ("when the legislature explicitly says that a private right exists, this so-called 'prudential' inquiry is displaced") (emphasis in original).

141. *E.g.*, *Gladstone*, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself' . . . that is likely to be redressed if the requested relief is granted").

142. Professor Schwemm, writing prior to *Havens Realty*, suggests that some Fair Housing Act cases can be understood as the Court "deferring to Congress' interpretation of Article III, which renders such cases inconsistent with the notion that there is an Article III "minima" which Congress cannot abrogate. Schwemm, *supra*
Concededly both the Supreme Court and the lower courts\textsuperscript{143} have used fuzzy language on occasion which confuse the two methods of modifying the standing rules. Moreover, after \textit{Lujan v. Defenders of Wildlife}, the confusion has only increased.\textsuperscript{144} Nonetheless, the different methods of modifying the standing rules are particularly important for determining standing under the Fair Housing Act since the Court has applied both of them.

Finally, it deserves mention that the method of statutory interpretation in \textit{Havens Realty} was very much a "plain meaning" interpretation. It would not have been altogether unreasonable to interpret the word "person" in Section 3604(d) to mean a person with a real interest in housing. The Court did not go that way. Congress said "any person," it must have meant "any person," and more importantly for purposes of \textit{Havens Realty}, it must have wanted to confer the legal right in question upon "any person."

\* \* \*

In finding that the Fair Housing Act either has removed prudential barriers or has created a "legal right," the Court is presumably just interpreting the statute. That is, for a case of statutory standing, the Court is trying to do what the critics of modern standing doctrine want it to do: make a determination on the merits as to whom Congress wanted to give standing. Thus, critics argue that the entire enterprise of determining "standing" is of no particular use here, and the Court would be better off simply recognizing that it is making a "merits" determination.\textsuperscript{145} Moreover, by failing to comprehend the relationship between standing and the "merits," the Court has

\textsuperscript{143} The lower courts have sometimes cited with approval the EEOC position that Title VII grants all individuals a "right" to a workplace free from the burdens of discrimination. \textit{E.g.}, \textit{Gray v. Greyhound Lines}, East, 545 F.2d 169, 176 (D.C. Cir. 1976) ("EEOC . . . has consistently held that the statute grants an employee the right to a working environment free of racial intimidation"); \textit{E.E.O.C. v. Bailey}, 563 F.2d 439, 454 (6th Cir. 1977) ("the EEOC has interpreted Title VII to confer upon every employee the right to a working environment free from unlawful racial discrimination") (citing various EEOC opinions). It would seem more consistent with footnote 9 of \textit{Gladstone} to say that people injured in that way can sue regardless of whether they have a personal "right" to such a workplace.

\textsuperscript{144} \textit{See infra} text accompanying notes 147-167.

\textsuperscript{145} \textit{See} \textit{Schwemm, supra} note 1, at 23 (in \textit{Trafficante} "standing" and "merits" were functional equivalents), 49, 66-67 (all standing questions in housing cases are reduced to matters of statutory interpretation) and 57 (\textit{Gladstone} conflates merits and standing); \textit{Winter, supra} note 21, at 1461 ("[i]n the private rights context, the concept of standing is entirely unnecessary").
made some questionable calls, and has led the lower courts to even more questionable calls.

c. The Statutory Rights Gambit After Defenders

In 1992, the Court decided *Lujan v. Defenders of Wildlife*, a case that Professor Sunstein has said "may well be one of the most important standing cases since World War II" and, in terms of number of statutes apparently invalidated, "ranks among the most important in history." *Defenders* involved an interpretation of Endangered Species Act of 1973 by the Interior Department that limited the obligation which the statute imposed upon all federal agencies, viz., to consult with the Interior Secretary to insure that all agency actions were not likely to jeopardize the continued existence of any endangered species, to agency actions taken in the United States. Plaintiffs challenged that interpretation as inconsistent with the statute.

The Court first held that the plaintiffs did not have a specific, concrete, particularized injury "in fact," and a plurality further held that even if such an injury could be discerned, it was not redressable. In the part of the decision most relevant to the discussion here, the Court then considered a provision of the statute that permitted "any person" to commence a civil suit to enjoin anyone violating the statute. The Court held that Congress did not have the authority, under Article III, to grant standing to individuals who had suffered no injury in fact. Specifically, the Court held that in

146. *E.g.*, Winter, *supra* note 21, at 1488 (problem with cases like *Trafficante* and *Havens Realty* is that "the Court ascribes to Congress the creation of 'rights' that, doubtless, Congress never considered").


148. Sunstein, *supra* note 9, at 165.


150. The decision focused on the standing of the environmental organization Defenders of Wildlife. Defenders premised its standing as a representative of members who claimed various injuries to their aesthetic interests, as well as a right to sue under the provision permitting all citizens to sue. See infra note 199.

151. *Defenders*, 504 U.S. at 562-571.

152. The Endangered Species Act provides that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." 16 U.S.C.A. § 1540(g)(1)(A) (1985).

153. Thus, the Court ruled that the provision granting standing to "any person" was unconstitutional, although even this conclusion is not obvious from the decision and has been disputed. *Compare* Breger, *supra* note 22, at 1211-12 ("The Court . . . did not say that the statute was unconstitutional . . . One may read the Court's decision, therefore, as implicitly construing the phrase 'any person' who may seek
defining "injury," Congress was limited to creating Article III de jure injuries from previously existing de facto injuries.\textsuperscript{154}

The consequences of this decision would be particularly severe for the Fair Housing Act. As already noted, the Court in \textit{Havens Realty} did nothing to ascertain whether the false information suffered by the testers was a previously existing de facto injury, and it is far from clear that it was. As Dean Nichol has noted, it does not seem that black testers like those in \textit{Havens Realty} would have standing if Scalia's opinion in \textit{Defenders} becomes the standard analytic framework for statutory standing.\textsuperscript{155} If he is right, then Professor Schwemm's prediction in 1980—that the chances were slim that "the Court would ever hold that a plaintiff's injury is covered by Title VIII but that it is inadequate to meet article III requirements"\textsuperscript{156}—may be sorely tested.

In addition to being difficult to reconcile with the holding of \textit{Havens Realty}, the opinion in \textit{Defenders} appears to be inconsistent with language in certain earlier opinions as well. For example, in \textit{Linda R.S. v. Richard D.},\textsuperscript{157} the Court stated in dicta that the requirement of an actual injury was

judicial review under the Act to mean "any aggrieved person") with Sunstein, \textit{supra} note 9, at 200 ("the Court held in effect that this provision was unconstitutional as applied"). \textit{See also}, \textit{e.g.}, Roberts, \textit{supra} note 22, at 1221, 1227 (questioning the Court's conclusion that Congress wanted to grant standing to all persons).

The distinction between these two interpretations of \textit{Defenders} has some rather important consequences. If the Court held only that Congress only wanted "actually injured" persons to bring actions, then the plaintiffs in that case were out of court. If the Court held that Congress wanted to give "all citizens" standing, then the statute is "unconstitutional" only to the extent that the plaintiffs tried to sue in federal court, where Article III applies. There does not seem to any reason why the plaintiffs in \textit{Defenders} could not go into state court to pursue their claim. Indeed, the decision of the state court in such a case would be unreviewable by the Supreme Court. Doremus \textit{v.} Board of Education, 342 U.S. 429, 434 (1952). \textit{See} Schwemm, \textit{supra} note 1, at 12 n.49 and authorities cited therein.

\textsuperscript{154} \textit{Defenders}, 504 U.S. at 578 (Congress can "elevat[e] to the status of legally cognizable injuries concrete, \textit{de facto} injuries that were previously inadequate in law").

\textsuperscript{155} Nichol, \textit{supra} note 4, at 1158 n.125; Pierce, \textit{supra} note 4, at 1179. \textit{Cf.} Sunstein, \textit{supra} note 9, at 230 n.296 (suggesting that Congressionally-created property interest in \textit{Defenders} and \textit{Havens Realty} were similar). Indeed, the entire development of standing law under the Fair Housing Act cannot be reconciled with the vision of the statutory rights gambit described in \textit{Defenders}. If Congress can only recognize otherwise \textit{de facto} injuries as "legal right" injuries, there would have been no point in Congress creating any such legal rights in the Fair Housing Act. After all, as the Court recognized in \textit{Trafficante} and \textit{Gladstone}, it had already given anyone actually injured standing to sue. Why would it also create legal rights if that only authorized standing for those same "actually injured" people?

\textsuperscript{156} Schwemm, \textit{supra} note 1, at 53.

\textsuperscript{157} 410 U.S. 614 (1973).
needed "at least in the absence of a statute expressly conferring standing" and that the invasion of a statutorily-created right "creates standing, even though no injury would exist without the statute."\footnote{158}

Justice Scalia's decision is also difficult to reconcile with the Court's previous cases recognizing the propriety of nominal damages.\footnote{159} Nominal damages, after all, are a recognition of the fact that the plaintiff has not suffered an "injury," not even mental distress, for which we can provide damages. Rather, the violation of law is considered sufficiently important that a declaration of rights is deemed appropriate.\footnote{160}

I do not, however, view the \textit{Defenders} decision as quite the apocalypse that others do.\footnote{161} Although Justice Scalia's opinion was joined by five other Justices for its discussion of the "citizen standing" provision, Justice Kennedy (joined by Justice Souter) wrote separately to set forth his "interpretation" of the majority's decision. Whether or not the word "interpretation" accurately characterizes Justice Kennedy's opinion, his opinion obviously carries significant weight because without him and Justice Souter, Justice Scalia's opinion would have lacked a majority.\footnote{162} Justice Kennedy's concurrence saw the flaw in the statute in a somewhat more limited way. Justice Kennedy

\footnote{158. \textit{Id.} at 617 \& n.3. \textit{Linda R.S.} thus went a bit past Justice White's concurrence in \textit{Trafficante}, which stated only that the injuries identified by the majority would not be Article III injuries without the statute. \textit{Linda R.S.} strongly suggests that some "injuries" under a statute would not be injuries at all. \textit{Id.}}\footnote{159. \textit{E.g.}, Carey v. Piphus, 435 U.S. 247 (1978).} \footnote{160. In the Civil Rights Act of 1991, Congress specifically authorized plaintiffs to obtain declaratory and injunctive relief or nominal damages in an employment discrimination case, even where the defendant can prove that the plaintiff would not have obtained an employment benefit if the discrimination had not occurred and that the plaintiff has suffered no other injury. 42 U.S.C.A. \textsection 2000e-5(g)(2)(B) (West 1995). Taken to its logical conclusion, \textit{Defenders} would seem to cast doubt on plaintiffs' standing to obtain such relief.} \footnote{161. Several commentators have argued that Justice Scalia used the \textit{Defenders} decision to incorporate a radical view of standing that he had previously discussed in his Suffolk Law Review article. Scalia, \textit{supra} note 91, at 355-73; Nichol, \textit{supra} note 4, at 1147-48; Sunstein, \textit{supra} note 9, at 164-65, 168 (relationship between Scalia's 1983 article and \textit{Defenders} is "sharp and clear").} \footnote{162. Even the harshest critics of \textit{Defenders} usually note the importance of Justice Kennedy's opinion. \textit{See, e.g.}, Pierce, \textit{supra} note 4, at 1181 ("unlike the constitutional flaw identified in the majority opinion, the constitutional flaw identified by the concurring Justices is easy to correct"); Nichol, \textit{supra} note 4, at 1164-65 \& n.166 (noting that majority and concurs might reach different conclusions over hypothetical statute); Meeks, \textit{supra} note 91, at 363 n.200 (Kennedy "suspected" that Scalia was trying to elevate the "no generalized grievances" concern to constitutional status and reaffirmed that it does not matter how many people are harmed in the same way by the defendants' action).}

https://scholarship.law.missouri.edu/mlr/vol60/iss3/2

36
wrote that Congress could define any sort of "statutory injury," so long as it was "concrete,"\textsuperscript{163} but that it must "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."\textsuperscript{164} Congress can create a legal right not to see the color purple, this view seems to hold, but it must make it clear that that is the right whose invasion creates an injury affords standing. It cannot simply declare an aversion to the color purple and give all citizens the right to sue when someone violates its anti-purple law. In Kennedy's view, the flaw in the Endangered Species Act was that it did not identify the "injury" that was supposedly inflicted upon any persons by a violation of the Act.\textsuperscript{165}

In this regard, Justice Kennedy did not make a significant change in the statutory rights gambit. He did not, for example, limit the injuries that Congress could define to pre-existing \textit{de facto} injuries, he merely wanted a clear statement of what the injury is. From this view, Congress cannot merely grant individuals a right to standing without explaining why, and the decision is not inconsistent with prior precedent.\textsuperscript{166} Justice Kennedy may have an

\begin{flushleft}
\textsuperscript{163} \textit{Defenders}, 504 U.S. at 581 (Kennedy, J. concurring). Thus, Kennedy agreed with Scalia that Congress cannot "in the absence of any showing of concrete injury, [require the Court] to vindicate the public's nonconcrete interest in the proper administration of the laws." \textit{Id.} Kennedy did state, though, that the Court "must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition." \textit{Id.} at 580.

\textsuperscript{164} \textit{Id.} at 580 (Kennedy, J., concurring).

\textsuperscript{165} Thus, Dean Nichol believes that a statute that specifically stated that "[a]ll persons have a legally cognizable interest in reducing potential threats to the survival of endangered species" would pass constitutional muster under Kennedy's analysis. Nichol, \textit{supra} note 4, at 1164-65.

\textsuperscript{166} Indeed, contrary to the suggestions of Dean Nichol and Professor Pierce—see Nichol, \textit{supra} note 4, at 1146-47 ("The U.S. Supreme Court, for the first time in modern Article III analysis, concluded that even though a federal statute sought to bestow standing upon a potential plaintiff, such a grant of jurisdiction violated the strictures of the case or controversy requirement"); Pierce, \textit{supra} note 4, at 1178 ("The Court had never before held unconstitutional a statutory provision that authorized judicial review of an agency action at the behest of members of a statutorily specified class")—the Court's opinion in \textit{Defenders} was not without precedent. In \textit{McClure v. Carter}, the court affirmed a district court decision which had held unconstitutional a provision which allowed any member of Congress to bring a suit challenging the appointment of Judge Abner Mikva as a violation of the emoluments clause, Article I, § 6, cl. 2. McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981), \textit{aff'd}, McClure v. Reagan, 454 U.S. 1025 (1981). (Judge Mikva was a Congressman at the time of his appointment and there apparently had been a salary increase during the period he had served.) The district court found no injury to the plaintiff, Senator McClure of Idaho (a Senator who had opposed Mikva's appointment), and the Supreme Court affirmed.
\end{flushleft}
overly formalistic view of what Congress must do, but it is a formalism that, once known, is fairly easy to meet.167

While this interpretation addresses some of the concerns raised by the critics of Defenders, it must be conceded that Justice Kennedy’s view creates some anomalous results in statutory interpretation. Where Congress said very little about standing, as in Havens Realty, the Court was willing to interpret a law that prohibited a certain set of acts against "any person" as conferring a "right" on such individuals, the violation of which would constitute an injury for purposes of Article III, and which would thus give standing to those whose "rights" were violated. Yet where Congress made a specific statement about standing, as in Defenders, the Court was not willing to accept it because there was no discussion of "injury" or "rights." Thus, under Justice Kennedy’s concurrence, and perhaps in considering the Supreme Court’s jurisprudence as a whole, it appears that the best way for Congress to authorize broad standing is to say as little about it as possible.

C. Causation

The controversial decisions concerning the second element of Article III standing, causation, have involved actions challenging government action, where the Court expresses doubt that the illegal acts that the governmental defendants are allegedly perpetrating are causing the injury about which plaintiffs are complaining.168 Where damages against private parties are in-

---

167. Compare Defenders, 504 U.S. at 581 (Kennedy, J. concurring) ("This requirement is not just an empty formality").

168. E.g., Allen v. Wright, 468 U.S. 737, 756-66 (1984) (it is too speculative to assume that diminished ability of plaintiffs’ children to receive a desegregated education is being caused by improper and insufficient enforcement of IRS rule precluding tax-exempt status for private schools that racially discriminate); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 42-43 (1976) (too speculative to assume that the denial of hospital services to plaintiffs was a consequence of IRS rule that lowered threshold of medical services required to be provided to poor people in order to obtain tax-exempt status); Warth v. Seldin, 422 U.S. 490, 502-10 (1975) (too speculative to assume that failure of Town of Pennfield to enact program supporting building of housing for low-to-moderate income people affected low-to-moderate income people living in nearby city of Rochester, or taxpayers in Rochester); Linda R.S. v. Richard D., 410 U.S. 614, 617-18 (1973) (it is too speculative to assume that
volved, the concerns are far less substantial.  

Presumably, all that would be needed for causation in such cases is the same sort of showing involved in most tort cases: proximate cause, i.e., "but for" causation plus a limited causal chain.  In a private damages cases, the only damages that should be recovered are those caused by the defendants' acts (or those that are specifically authorized by statute or common law, like punitive damages or attorneys' fees).  If a plaintiff has some element of damages caused by defendants' acts, he or she has met Article III requirements.

II

In Ragin v. Harry Macklowe Real Estate Co., the Second Circuit took the Havens Realty paradigm and concluded that the Fair Housing Act granted all persons a right not to see advertising which indicates an illegal preference.  This section examines that decision, and compares its

prosecution of delinquent father for child support payments would result in payments being made.  Compare Duke Power Co. v. Carolina Envtl. Study, 438 U.S. 59, 78-81 (1978) (environmental group had standing based on claim that Price-Anderson Act encouraged development of nuclear power plants which injured its members by thermal pollution; argument by power company that Price-Anderson did not "cause" development because Congress would have taken other steps to ensure development of nuclear power industry deemed too speculative).

169. Cf. Sprigman, supra note 51, at 1663 (distinguishing causation and redressability in private law context from those same elements in public law context).

170. See Schwemm, supra note 1, at 8 n.29 (quoting PROSSER ON TORTS § 41 (4th ed. 1971)) ("With respect to causation [under Article III], it is well established that 'a[n essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered[.]'").

171. The third Article III element, redressability, has been said by the Court to be a variation on causation.  Allen, 468 U.S. at 753 n.19 ("causation" addresses relationship between plaintiff's injury and defendant's conduct; "redressability" focuses on the relationship between plaintiff's injury and requested relief); see also Gottlieb, supra note 91, at 1085 n.130.  Redressability is not an issue in a claim for damages against a private party, since damages will always redress an injury.  But cf. Sunstein, supra note 9, at 203 n.197 (asserting that the idea that there was redressability in Havens Realty and Trafficante was "odd").  Professor Sunstein is wrong in this instance.  Once you assume that the plaintiffs in Trafficante and Havens Realty suffered injuries, then damages are a perfectly appropriate remedy.  (And equitable relief is appropriate to the extent that there is a need to prevent future harm to the plaintiffs.)  It may, of course, be difficult to specify the precise amount of damages attributable to the loss of interracial associations, but difficulty of proving damages is a problem hardly unique to fair housing cases.

172. 6 F.3d 898 (2d Cir. 1993).
interpretation of the Fair Housing Act with the interpretation of similar statutes.

Harry Macklowe involved allegations that the defendant, a leasing and managing agent for two luxury apartments in Manhattan, placed advertisements in The New York Times. These advertisements depicted human models, most of whom were white, and were said to violate Section 3604(c) of the Fair Housing Act by indicating a preference in the sale or rental of housing on the basis of race. The plaintiffs were four black individuals who saw the advertisements and an organization whose mission was to eliminate discrimination from the New York housing market. For purposes of discussing the standing of the individual plaintiffs, the court assumed that they were not actively looking for apartments at the time that they viewed the advertisements placed by the defendants.

The court went through the Supreme Court’s analysis in Havens Realty and concluded that "[t]here is no significant difference between the statutorily recognized injury suffered by the tester in Havens Realty and the injury suffered by the [individual plaintiffs], who were confronted by advertisements indicating a preference based on race." The court concluded that the district court (which had reached the same conclusion) was "constrained to find that the individual plaintiffs had standing.

Even on its own terms, that is, as an interpretation of the decision in Havens Realty, the decision of the Second Circuit is hardly a tour de force. In Havens Realty, the Court emphasized that Section 3604(d) prohibited the provision of false information to "any person," and the Court relied on this language to conclude that Congress wanted to grant a "right" to precisely that class of people, i.e., persons. Section 3604(c) contains no

173. Harry Macklowe, 6 F.3d at 902.
174. Id.
175. See supra note 6.
176. I have previously described other aspects of the decision in Harry Macklowe, and the general problems raised by it and other cases based upon all-white model advertising. Michael E. Rosman, Ambiguity And The First Amendment: Some Thoughts On All-White Advertising, 61 TENN. L. REV. 289, 330-333 (1993).
177. Harry Macklowe, 6 F.3d at 901-02.
178. Id. at 904.
179. Id.
181. Harry Macklowe, 6 F.3d at 904. See also Katherine G. Stearns, Comment, Countering Implicit Discrimination in Real Estate Advertisements: A Call for the Issuance of Human Model Injunctions, 88 NW. U. L. REV. 1200, 1221 n.100 (1994).
182. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (italicizing the words "any person" in quoting the statute, and concluding that "Congress has thus
reference to "persons" or any subset thereof, and is, indeed, the only subsection of Section 3604 that has no such reference. The Court could conceivably have concluded that the absence of any specifically defined group to whom the duty of Section 3604(c) was owed distinguished that subsection from the other provisions of Section 3604, and required a different result as to standing.

Professor Winter has made a similar point in trying to explain certain Supreme Court decisions on standing. Professor Winter asks why the Supreme Court has found "informational rights" (the deprivation of which will give an individual standing) under the Fair Housing Act and the Freedom of Information Act, but, at the same time, has held that an individual deprived of information requested pursuant to the statement and account clause of the United States Constitution has no standing. Professor Winter suggests that the differing results might be explained by the fact that the statement and account clause, unlike the FHA and FOIA, only states what the government should do and does not address the problem of individual persons who ask for information. Similarly, Section 3604(c) only states what is unlawful. It does not state to whom the protection is afforded.

More importantly, by focusing on "rights" granted by the statute (as Havens Realty instructed), the analysis of the Second Circuit in Harry Macklowe seems to obscure the underlying goal of a statutory standing inquiry, viz., whom did Congress want to enforce the provision in question? In Havens Realty, the Court focused on the words "any person" (which specifically described those to whom improper statements could not be made) and concluded, without going past those words, that a "right" had been granted and that Congress wanted all such individuals to have standing. In Harry Macklowe, the Second Circuit reached a similar conclusion about congressional intent without the assistance of those words. But is it really a sensible conclusion that Congress wanted everyone who reads a newspaper to

---

184. Article I provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.
186. Winter, supra note 21, at 1495-96. Professor Winter, to be fair, believes that the differing results are a consequence of an "individualist metaphor" that improperly dominates our understanding of standing. Whatever the truth of that claim, the "metaphor" about which Professor Winter speaks is one he attributes to the Supreme Court, and thus should be binding upon the lower courts regardless of its inherent viability.
have standing? Should not a court want a significant amount of clarity in the statute or conclusive legislative history before reaching that conclusion?

Harry Macklowe is also intriguing, as was Havens Realty, for the road not taken. Each of the individual plaintiffs in Harry Macklowe alleged that he or she had suffered emotional damages, and were awarded $2500 in compensatory damages. If such emotional damage constituted an injury "in fact," then the court could have used simple Trafficante-Gladstone analysis, and avoided all mention of "rights." After all, even if the "right" not to see discriminatory advertisement is limited to those actually seeking housing, it seems safe to assume that someone's rights were violated by the discriminatory advertising at issue. Footnote 9 of Gladstone does the rest.

Along the same lines, it is curious that the Second Circuit, while citing Defenders for the proposition that an injury may exist solely by virtue of the violation of a right created by statute, made no mention of the suggestion in Defenders that only preexisting de facto injuries could be used in the creation of such rights. In Harry Macklowe, the better part of valor was to avoid any investigation of the amorphous contours the Supreme Court has given to "factual" injuries.

Given the statutory interpretation given to Section 3604(c) by the Second Circuit, it is once again instructive to examine the interpretations given to similar language in similar statutes. Both the Section 704(b) in Title VII

---

187. I have previously noted the First Amendment problems that might arise for a statute that provides for damages for improper advertising to an entire newspaper readership, with no required showing of intent, and no required proof of how the advertising is understood by the relevant audience. See Rosman, supra note 176, at 336-50.

188. Whether the emotional damage suffered by the plaintiffs in Harry Macklowe constituted injury "in fact" (apart from the statute) would depend upon whether the violation of Section 3604(c) would be considered unequal treatment personal to the plaintiff (as in Heckler v. Mathews) or a generalized grievance (as in Allen v. Wright). See text accompanying notes 92-103. The answer to that question is not obvious from the precedents, but it deserves mention that categorizing the "stigma" or mental distress suffered by the reader as "personal" would allow readers in Hawaii to sue for discriminatory advertisements published with respect to a Maine apartment complex, the sort of concern that seemed to animate the Court in Allen. See supra note 103 and accompanying text. Allen v. Wright, 468 U.S. 737, 756 (1984). Of course, precisely the same Hawaii-to-Maine result occurs by giving all readers the "right" to non-discriminatory advertisement, precisely the result reached in Harry Macklowe. Compare Sunstein, supra note 9, at 205 ("legal injury" concept "means . . . that a person in New York has no standing to challenge racial discrimination in Iowa, as no law treats distant discrimination as an injury").

189. Harry Macklowe, 6 F.3d at 904.

190. Section 704(b) makes it illegal for employers, employment agencies, and
and Section 4(e) of the ADEA\textsuperscript{191} prohibit discriminatory advertisements in language quite similar to that in Section 3604(c). Yet the lower courts—admittedly prior to \textit{Havens Realty}—have held that an individual must have an actual interest in the employment in question and be deterred by the advertisements in order to have standing under the discriminatory advertising provisions of the employment discrimination statutes.\textsuperscript{192} Perhaps more striking is the fact that the EEOC, hardly an organization that one would suspect of unduly narrowing plaintiffs' rights in the employment discrimination area,\textsuperscript{193} maintains the same position, and has maintained the same position both before and after \textit{Havens Realty}.\textsuperscript{194}

\textsuperscript{191}§ 

\textsuperscript{192}42 U.S.C.A. § 2000e-3(b) (West 1995).

\textsuperscript{193}It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.


Prior to \textit{Havens Realty}, the EEOC repeatedly held that an individual must have an actual interest in the job being advertised to have standing. \textit{See} EEOC Dec. No. 75-21 (Sept. 4, 1974), 16 Fair Empl. Pract. Cas. (BNA) 1806 (complainant lacked standing where she "has produced no evidence to indicate a real, present interest in the employment advertised"); EEOC Decision 75-6 (July 30, 1974), 11 Fair Empl. Pract. Cas. (BNA) 1498 (complainant lacked standing where there was no "claim or evidence that she had . . . an actual interest in any of the jobs advertised"); EEOC Decision 74-30 (Jan. 31, 1974), 8 Fair Empl. Pract. Cas. (BNA) 553 (complainant lacked standing when her basis for standing is merely her "status as a concerned citizen"). The EEOC Compliance Manual still maintains this position. \textit{See} 2 EEOC Compl. Man. pt. 1, § 605.3, p. 605-3 (1983); 2 EEOC Compl. Man. pt. 2, § 632.2(f), p. 632-8 (1986).
The Lanham Act provides an even more interesting contrast. Section 43(a) of the Lanham Act prohibits any person from "us[ing] . . . any . . . false or misleading description of fact, or false or misleading representation of fact, which—(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services, or commercial activities[.]"\(^{195}\) It further creates a private right of action for the benefit of "any person who believes that he or she is or is likely to be damaged by such act."\(^{196}\) That is, the Lanham Act is a law against false advertising, and specifically grants standing to "damaged" (as opposed to aggrieved or injured) persons. Yet not only have the courts not created a "right" to truthful advertising from the Lanham Act, a violation of which would give standing to any reader, most courts (with the Second Circuit leading the way) limit standing to competitors of the defendant, and do not even allow actual purchasers of the product standing.\(^{197}\)

\[\begin{align*}
* & * \\
\end{align*}\]

Once again, the statutory standing decisions in the Fair Housing Act seem to reach peculiar results which are significantly different from the interpretation of similar or nearly identical language in other statutes. In the last section of this article, I will briefly explore some suggested rules for interpreting standing provisions of statutes that would result in more sensible (or, at least, more uniform) decisions. Prior to that, however, I examine one other area of Fair Housing Act standing: the standing granted to organizational plaintiffs, where the "citizen standing" ostensibly killed by _Defenders of Wildlife_ has snuck in the back door.

III

Fair Housing Act litigation frequently has been brought by "fair housing organizations," private organizations dedicated to the principle of non-


\(^{196}\) Id.

discriminatory housing.\(^\text{198}\) In general, organizations are permitted standing on two different grounds: as a representative of its members (third-party standing) or based upon an injury to itself (first-party standing). For several reasons, fair housing organizations usually seek standing on the latter ground.\(^\text{199}\)

The standard for first-party standing was set forth in *Havens Realty*. There the Court ruled that "first-party" standing for organizations involves "the same inquiry as in the case of an individual,"\(^\text{200}\) presumably the tri-partite inquiry required by Article III. Since the subsequent analysis of the Court has been used (or, in my opinion, misused) extensively, it deserves full quotation:

> In the instant case, [plaintiff]'s complaint contained the following claims of injury to the organization:
>
> "Plaintiff . . . has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff . . . has had to devote significant resources to identify and counteract the defendant's racially discriminatory [policy]."
>
> If, as broadly alleged, [defendants'] steering practices have perceptibly impaired [plaintiff]'s ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable

\(^{198}\) See Heifetz & Heinz, *supra* note 90, at 14 (the typical fair housing organization has four functions: educating the general public, counseling individuals, investigating discriminatory complaints, and pursuing legal remedies); Robert G. Schwemml, *Private Enforcement And The Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 381 (1988) (local fair housing organizations "have become absolutely essential to the effective enforcement of the Fair Housing Act").

\(^{199}\) There are three primary reasons why fair housing organizations do not employ "representational" standing. First, to use this form of standing, organizations must be either membership organizations or have a membership-like structure. American Legal Found. v. FCC, 808 F.2d 84, 89-90 (D.C. Cir. 1987); Hope, Inc. v. County of DuPage, Ill., 738 F.2d 797, 814 (7th Cir. 1984). Most fair housing organizations, like other civil rights groups, are non-profit corporations that have no members. Cf. Fair Employment Council v. BMC Mktg. Corp., 28 F.3d 1268, 1276 (D.C. Cir. 1994) (plaintiff that used employment discrimination testers "is not a membership organization"). Second, "representational" standing is permitted only if individual participation by the members being represented is not needed, a requirement that is usually deemed to preclude a claim for damages. Warth v. Seldin, 422 U.S. 490, 515-16 (1975). Since damages are an important element of most fair housing claims against private defendants, "representational" standing is not used. Third, and as described in the text, the courts have made it so easy to meet the "requirements" of first-party standing, that it simply is not necessary to employ third-party standing.

\(^{200}\) *Havens Realty*, 455 U.S. at 378.
injury to the organization’s activities, with the consequent drain on the organization’s resources, constitutes far more than simply a setback to the organization’s abstract social interests.\footnote{It is unclear whether the Court’s opinion is referring to only one way or both.}

It would be best to concede at the outset that neither the complaint quoted by the Court, or the Court’s opinion, is a model of clarity.\footnote{There are at least the following four interpretations of the former:} 1. Because of the defendants’ discriminatory policies, people were confused about their rights under the Fair Housing Act. Plaintiff-organization was obligated to spend more money educating and counselling those individuals than it otherwise would have.

2. Not only was plaintiff obligated to spend more money educating and counselling its confused patrons, but plaintiff, wanting to halt this additional expenditure of its funds, spent money trying to ascertain either who was causing this confusion and/or in investigative efforts that would lead ultimately to the halting of defendants’ acts and the drain on plaintiff’s resources.

3. Plaintiff referred people to defendants prior to learning of their discriminatory behavior. Upon learning of defendants’ discriminatory policies, they refused to refer clients to defendants, thus limiting the available choices it could provide for its clients.

4. Upon hearing rumors of defendants’ illegal practices, plaintiff spent time and effort organizing "testers" to investigate whether defendants were violating the law. The time and effort expended in this project took resources away from the counseling and referral services that plaintiff provides.

While each of the four interpretations is plausible, only the first three (and probably only the first two) can be reconciled with previous (and subsequent) Supreme Court decisions, all of which require a "traceable causal connection" between the defendants’ acts and the injuries suffered by the plaintiffs. For several reasons, the last interpretation cannot.

First, in the fourth interpretation, defendants’ acts did not "cause" plaintiff to "test" them, in any usual sense of the word. Rather, plaintiff has made an independent decision to "test" defendants, which, under normal tort principles, breaks the chain of causation.\footnote{Second, the resources spent to "test" defen-}
dants would have been spent regardless of what the result of the "test" was. If the same amount of resources would have been expended regardless of whether defendants were violating the law, then the violation cannot be said to "cause" the expenditure of resources. Finally, the fourth interpretation would allow anyone to have standing. The Court was setting forth a standard for first-party standing, which it stated was the same for organizations as for persons. Any organization—the National Rifle Association, IBM, the National Basketball Association—which expended resources on a "test" of potential violators of the Fair Housing Act would have standing. So too would any individual.

Naturally, the fourth interpretation is precisely the one adopted by the lower courts in the years following Havens Realty. The Seventh, Second and Sixth Circuits have decided that the resources that a fair housing organization spends in obtaining evidence that it subsequently uses in a lawsuit against the objects of its investigation can constitute the "injury" which gives it standing. In Village of Bellwood v. Dwivedi, Judge Posner wrote that a fair housing organization suing a broker for illegal steering in violation of Sections 3604(a) and 3604(d) of the Fair Housing Act could rely on the resources it spent sending testers to the broker in order to gain evidence in support of its steering allegations. Specifically, the Court held that Havens Realty "makes clear . . . that the only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination." In Harry Macklowe, the

party).

204. Third-party or representational standing requires that the organization have a purpose germane to the interests it seeks to protect in the lawsuit. E.g., Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). First-party standing has no such requirement. Havens Realty, 455 U.S. at 378 (involves same inquiry as with an individual).

205. See supra note 202. Indeed, one fairly good piece of evidence that the fourth interpretation is incorrect is the Court's denial of standing to the white tester. The white tester expended time and effort in the "test" process just as surely as the organizational plaintiff did. His expenditure of time and/or money also no doubt "diverted" resources from other things he wanted to do in his life. If that was the only criteria for standing, then the white tester met it.

206. 895 F.2d 1521 (7th Cir. 1990)

207. Id. at 1526. Prior to Dwivedi, the Seventh Circuit had reached the opposite conclusion. South Suburban Housing Ctr. v. Santefort Real Estate, Inc., Appeal No. 87-1859, slip op. (7th Cir. August 17, 1988). Since the decision in Santefort was not published, Judge Posner felt free to ignore it. Dwivedi, 895 F.2d at 1526. The Seventh Circuit has continued to follow Dwivedi on this point. See City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1095 (7th Cir. 1992); United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992).
Second Circuit held that the time spent by a fair housing organization trying to remedy the all-white advertising that was the gravamen of its complaint, including the time it spent pursuing administrative remedies required by the FHA, diverted resources from its other activities and was sufficient to grant it standing.\(^{208}\) Similarly, the Sixth Circuit has held that a fair housing organization which alleged that it "devoted resources to investigating the defendants' practices and alleges that it has confirmed that defendants do discriminate on the basis of familial status" had standing.\(^{209}\)

So, too, the administrative law judges who conduct the administrative hearings created by the Fair Housing Act Amendments of 1988 appear to be taking the most expansive interpretation of Havens Realty. While, of course, systematic assessments of these decisions are more difficult, two ALJs have recently written an article describing the kinds of damages they apparently consider in such cases.\(^{210}\) They cite with approval the decision of the district court in Saunders v. General Services Corp.,\(^{211}\) awarding a nonprofit organization $2,300 for "diversion of resources measured by the time and overhead costs attributable to pursuing its Fair Housing Act claim" and $10,000 for the frustration of its equal housing mission.\(^{212}\) Citing other dis-

---

208. Ragin v. Harry Macklowe, 6 F.3d 898, 905 (2d Cir. 1993). Again, the Court's reasoning, such as it is, deserves full quotation:

' Spiro [of the fair housing organization the Open Housing Center, Inc. ("OHC")]] testified that she and her small staff devoted substantial blocks of time to investigating and attempting to remedy the defendants' advertisements. For example, Spiro detailed the steps she took to file the administrative complaint with the [State Division of Human Rights], including identifying the buildings' developers, the marketing agent and the advertising agent, as well as attending a conciliation conference. Spiro also testified that the time she and her coworkers spent on matters related to this case prevented them from devoting their time and energies to other OHC matters.


210. Heifetz & Heinz, supra note 90.

211. 659 F. Supp. 1042 (E.D. Va. 1987). Saunders involved claims similar to that in Harry Macklowe, i.e., a claim that § 3604(c) was violated by a brochure that used pictures of white people.

212. Heifetz & Heinz, supra note 90, at 15 (citing Saunders, 659 F. Supp. at 1061). The "frustration of mission" damages seem particularly odd. Contrary to the assertion of the ALJs, the court in Saunders did not base the $10,000 award on the ground that defendants' actions "forced" the organization to spend money to identify and counteract the objectionable advertising. Compare Heifetz & Heinz, supra note 90, at 15, with Saunders, 659 F. Supp. at 1060-61. To the contrary, that was the rationale behind the $2300 "diversion of resources" award.
strict court opinions, they assert that a fair housing organization can recover "opportunity costs" by showing that the defendants' conduct "caused" the organization "to divert its resources from fulfilling some of its usual functions" to do such things as "seeking redress for the defendant's discriminatory conduct." Fair housing organizations apparently can also recover "damages" for the costs of monitoring defendants' activities in the future.

This depressingly simplistic analysis of Havens Realty was, until very recently, the only interpretation of the circuit courts. Recently, however, the Fifth and D.C. Circuits have rejected the Dwivedi interpretation of Havens Realty, the D.C. Circuit quite explicitly. It nonetheless remains

In Sierra Club v. Morton, 405 U.S. 727 (1972), the Court held that an organization did not have standing merely because its organizational purpose was being frustrated. It is hard to understand how the "frustration of mission" award in Saunders, or any similar award in an administrative proceeding, can be reconciled with the holding in Sierra Club. See also infra note 215.

The ALJs do allow that if "frustration of mission" or "impairment of purpose" damages duplicate "diversion of resources" damages, that the fair housing organizations should not be permitted a double recovery. Heifetz & Heinz, supra note 90, at 16 ("Damages should not be awarded twice for the same injuries").

213. Heifetz & Heinz, supra at 90, at 15.

214. Id. at 16.

215. In Jones v. Deutsch, 715 F. Supp. 1237, 1247 (S.D.N.Y. 1989), Judge Goettel did reject a claim by an institutional plaintiff claiming that it had diverted institutional resources in an effort to prevent a village incorporation process (which plaintiffs asserted was motivated by an improper, racially-discriminatory purpose) from continuing. The court held that Havens Realty could not be read to authorize standing whenever organizations "have injected themselves into [the] matter in the interest of furthering their societal goals." Id. The court quite properly noted that the organizational plaintiff in Sierra Club v. Morton, 405 U.S. 727 (1972) (no standing based upon interference with environmental organization's objectives) had no doubt spent institutional resources in support of its goals, and found Sierra Club, rather than Havens Realty, controlling. Id.

216. Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241, 244 (5th Cir. 1994) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization. [Organization's] argument implies that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another"). Curiously, the Fifth Circuit cited Dwivedi with a "cf." introductory signal, id., which means that the case cited supports an analogous proposition. A Uniform System of Citation 23 (15th ed. 1991). Dwivedi, of course, does not.


218. Id. at 1277 ("We disagree with the Seventh Circuit that Havens would
the case that fair housing organizations have the ability, in at least some courts, and apparently in any administrative proceedings, to simply decide that a suit is warranted and to bring one based upon an injury over which they have total control. This is "citizens standing" writ large and without statutory authority.

IV

Let us assume that in the very near future the critics of modern standing law have their way: the Supreme Court junks the "injury-in-fact" test, and the law recognizes that standing is simply part of determining whether a good cause of action exists. Courts will look only to congressional intent to determine if a plaintiff has standing under a federal statute. In this article, I have tried to suggest that this concededly large step would not end all of the inconsistencies and irrationalities of standing law because, even where courts have been trying to do just that, their conclusions have been strangely inconsistent and irrational nonetheless. The problem, I have suggested, is that the constitutional dimension has obscured the statutory interpretation so that questions relating to the constitutional standard, about removing the "prudential barriers," and determining if Congress granted a "right," have stymied the growth of standards in interpreting the standing provisions of statutes.

It is easier to identify the problem than to fix it, and this article will be no exception to that rule. Nonetheless, in this section, I do articulate several baseline rules for the interpretation of standing provisions that I believe can be helpful. Specifically, I suggest that both the Article III "minima" and the prudential rules be considered baseline standards for interpreting standing provisions, and that only the clearest congressional statement to the contrary should be used to eliminate one or more of them. I also propose that more attention be given to the kinds of relief that are available in a given statute when making standing determinations.

A. *Trafficante Revisited: An Exercise In Standing Interpretations*

Before examining what standards ought to be applied, a quick review of *Trafficante*, which I believe, reflects an approach that has little merit, should support such a purely self-referential injury.") The D.C. Circuit also explicitly rejected the argument (which had been adopted by the lower court) that even if the first "test" of the defendant could not provide a basis for standing, that the subsequent tests (*i.e.*, tests conducted after learning that the defendants were violating the law and thus arguably "caused" by the violations) could. The court focused its attention on the voluntary nature of the plaintiff’s decision to run subsequent tests. *Id.* at 1277 n.3.
prove worthwhile.\textsuperscript{219} In \textit{Trafficante}, the Court concluded that Congress intended to eliminate the prudential barriers to standing relying on three pieces of evidence: (1) the language of the standing provision of Section 3610, (2) the legislative history, and (3) the enforcement mechanisms of the statute.\textsuperscript{220}

The language of Section 3610 refers to a "person aggrieved," which was defined as a person who "claims to be injured." If there is something about either of the words "aggrieved" or "injured" which would require a conclusion that standing should be broad, the Court has never identified what it is. The Lanham Act gives standing to those who are "damaged" (or who are likely to be "damaged"). Why does that word not connote standing just as broad?\textsuperscript{221} Particularly in light of the fact that a clear dichotomy between constitutional and "prudential" standing concepts did not exist before 1970, it seems particularly hard to grasp the argument that Congress intended to eliminate "prudential" standing requirements in passing the FHA, Title VII, or the ADEA (all of which were passed in the 1960's) by using the words "injured" or "aggrieved."

\textsuperscript{219} See supra notes 42-51 and accompanying text.

\textsuperscript{220} The Court also relied upon the interpretation of the statute by the Department of Housing and Urban Development (an interpretation that apparently had never been set forth in a regulation). \textit{Trafficante} v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972). That interpretation only focused upon whether the injury suffered by the specific plaintiffs before the Court was sufficient to support standing, and did not purport to be a general interpretation of the standing provisions vis-a-vis Article III and the prudential standing rules.

\textsuperscript{221} The antitrust laws and the Racketeering Influenced and Corrupt Organizations ("RICO") Act also provide an interesting contrast. Standing under those statutes is granted to those "injured in [their] business or property by reason of" a violation of underlying law. 18 U.S.C.A. § 1964(c) (West 1984); 15 U.S.C.A. § 15 (West 1973). The Court specifically has rejected the contention that all those injured in their property or business by a violation have standing, i.e., that "but for" causation is sufficient, and has imported common-law suppositions into the standing provisions. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266 (1992) ("unlikel[y] that Congress intended to allow all factually injured plaintiffs to recover"); Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529-31 (1983). Moreover, in the antitrust field, a plaintiff "must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent . . . ." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (emphasis in original). Finally, the Court has limited consumer standing in the antitrust area to preclude suits by "indirect" consumers. Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977). See generally Burns, supra note 197, at 58-63.
While the Court in *Trafficante* stated that the legislative history was "not too helpful," it nonetheless mentioned that the proponents of the legislation emphasized that those who were not the direct objects of discrimination "had an interest" in ensuring fair housing. The first problem such reliance presents is that the degree and extent to which legislative history is used in interpreting statutes in general has diminished over time. The Court today gives more weight to the "plain meaning" of a statute, and far less weight to the thoughts and statements of individual legislators. If this trend continues (as it appears it will), it will require a change in our thinking about statutory standing provisions as well. Thus, Professor Burns' recent analysis of standing under the Lanham Act and the antitrust laws recognizes that the statutory language and legislative history of the two statutes are "remarkably similar," but she nonetheless contends that differences "in the two settings" support different standing rules. The degree and extent to which the Court will consider differences in "settings" (as Professor Burns uses that term) in interpreting statutes seems very much in doubt.

223. Id.
225. This concern over the usefulness of legislative history seems particularly appropriate in reviewing *Trafficante*. In stating that "the proponents of the legislation" had indicated that those who were not direct objects of discrimination also suffered, the Court cited subcommittee hearings that had taken place the year before on different bills. *Trafficante*, 409 U.S. at 210 n.10.
227. Id. at 89. Professor Burns does support reducing the considerable differences in the standing rules of the two laws in an effort to better reflect the similar language of their standing provisions and legislative history. Id. at 88-102.
228. To be sure, the Court will (and should) go beyond statutory language "to the design of the statute as a whole and to its object and policy." Crandon v. United States, 494 U.S. 152, 158 (1990). But Professor Burns goes further, and considers background assumptions about the nature of the marketplace and related legal rules to be part of the "setting." For example, she considers whether consumers have options other than the Lanham Act in attacking false advertising, a question on which, as her own citations demonstrate, reasonable people can disagree. See Burns, *supra* note 197, at 74-75 & nn.116-18 (citing authorities that other options are adequate) and at 97-99 & nn.219-26 (citing authorities that they are not). The ability to redraw the "background" facts so as to reach a particular conclusion may be one reason why the Court is increasing its reliance on statutory language in interpreting statutes.
With respect specifically to the use of legislative history, like that described in Trafficante, one wonders how much weight really should be given to a statement that "we all benefit" from a reduction in discrimination, crime, antitrust conspiracies, or securities fraud. One would presume that there are very few proposed bills of any significant scope, in Congress or any other legislative body, that are touted as serving the special interests of a narrowly-defined group. The "we all benefit" argument is likely made quite frequently, and with no real intention to modify fundamental standing assumptions.

Finally, the Court relied upon the "design of the Act" and the fact that HUD had no powers of enforcement. But, of course, that situation changed with the passage of the Fair Housing Act Amendments of 1988. Now that HUD has enforcement powers, and can hear complaints of housing discrimination itself, should that affect who has standing? If it does not, then should we conclude that the "design" of the Act was really rather unimportant all along?

To be fair, the Court in Trafficante had little to go on in the way of language or history or design or anything else. Moreover, modern standing law was still in its infancy, and thus it may not have been altogether clear what standards to apply in the absence of evidence. I suggest now, however, that this dearth of evidence of Congress' intent should lead the Court to impose both the injury-causation-redressability requirement and the prudential rules on standing as a baseline of statutory interpretation. Congress may eliminate those rules if it chooses, and would not be in violation of Article III. But a clear, unambiguous statement to that effect should be required.

B. Some Rules For Interpretation of Standing Provisions

At the outset, it must be conceded that determining who Congress wanted to give the right to enforce a particular statute will be, in many cases, difficult. Frequently, as in the FHA, statutory standing provisions will be less than clear, and some sort of background assumptions to interpret those provisions will be needed. I argue here that the injury-causation-redressability and prudential requirements are adequate background assumptions, particularly for laws that primarily produce cases involving only private parties.

In assailing the constitutional analysis of the Court in recent standing cases, the critics of modern standing law concede that the results in any given case may be correct because the substantive law at issue may limit standing

229. See supra note 42.
230. See Sunstein, supra note 21, at 1462 ("In many standing cases, however, the question whether Congress has created a cause of action cannot be answered simply"); Sunstein, supra note 11, at 53 ("frequently, it is not easy to make inferences from statutory text, structure, and history").
to certain groups. Justice Scalia, in an article written prior to his ascension to the Court, characterized the "prudential" factors as "a set of presumptions derived from the common-law."²³¹ Professor Fletcher agrees that at least some of the standing rules promulgated are "useful as presumptions or aids for construction, often providing important interpretive context."²³² Even Professor Sunstein has suggested, at times, that the "injury-in-fact" requirement may be an interpretation of the APA that "promotes autonomy and self-determination on the part of litigants" and "that does relatively little violence to the underlying purpose of the statute."²³³

I agree with these sentiments, and perhaps would go a bit further. In general, Congress is deemed to legislate against the backdrop of common-law rules, which are abrogated only based upon a clear statement from Congress or when a plain statutory purpose to the contrary is evident.²³⁴ In cases involving suits between two private parties, no reason exists why this rule should not be applied to standing provisions. The Article III and prudential rules were developed over an extensive period of time in common-law actions and have proven (or, at least, were at one time) of some assistance in keeping courts to a limited role in a democratic society. (This is true, I believe, even of the injury-in-fact requirement which, although only made a constitutional requirement in recent years, has always been an aspect of common-law and

²³¹ Scalia, supra note 140, at 886. See also id. at 896 (in interpreting statutes, "courts should bear in mind the object of the exercise, and should not be inclined to assume congressional designation of a 'minority group' so broad that it embraces virtually the entire population." (emphasis in original)). Although Justice Scalia was referring only to the "prudential" rules as derived from the common law, I will refer to both the Article III requirements and the prudential rules as the "common-law" rules. Cf. Sunstein, supra note 11, at 55-57.

²³² Fletcher, supra note 15, at 239. See also id. at 252 ("When the Court says that Congress may create standing when prudential factors lead the Court not to find standing, the Court says nothing more complicated than that it will not infer a cause of action absent a clear statutory directive") and 265 (in cases where the statute is unclear, "the Court may properly invoke background assumptions about the functions of judicial review in certain areas, and about traditional categories of recognized injuries and permissible plaintiffs in those areas.")

²³³ Sunstein, supra note 21, at 1462. See also Nichol, supra note 30, at 1927 (identifying benefits of injury-in-fact requirement, including that it "fosters self-determination") and Nichol, supra note 4, at 1161 (if Sunstein were attempting to determine a cause of action in a wide array of cases where Congressional intent is unclear, he might rely on substance of the "injury-in-fact" test). But cf. Sunstein, supra note 9, at 186 (imposing injury-in-fact test "was a misreading of the APA").

statutory claims throughout our history.) We should not so easily, and certainly not as easily as the Court did in *Trafficante*, abandon any of them without some clear message from Congress.\footnote{235}{Cf. Scalia, *supra* note 140, at 886 ("federal courts have displayed a great readiness in recent years to discern a congressional elimination of traditional 'prudential' standing barriers with regard to challenges of federal executive action"). *Compare* LeBel, *supra* note 10, at 1038 ("practical" approach espoused by LeBel "would avoid the need to characterize congressional action as sweeping aside all prudential limitations on standing.")}

In his most recent article, Professor Sunstein lays out two "models" to be used in interpreting standing provisions when Congress has been silent, viz., the "common law" model and the "public law" model.\footnote{236}{Sunstein, *supra* note 11, at 55-62.} While noting that the common law model may better explain the cases,\footnote{237}{*Id.* at 62.} Professor Sunstein expresses his own preference for the public law model.\footnote{238}{*Id.* at 64 (although there is much to be said in its favor, common-law model is "ultimately unsound"). Some of the favorable aspects of the common-law model mentioned by Professor Sunstein are (1) the availability of political remedies for large groups "injured" by agency action; (2) the need to prevent the private conscription of public resources and agency discretion, and (3) the model's superior ability to explain past Supreme Court precedents. *Id.* at 55-57.} But Sunstein's discussion makes plain that the typical lawsuit he is considering is a lawsuit against the government for improperly regulating private behavior.\footnote{239}{Thus, for example, Professor Sunstein begins his discussion of the common law model by stating that, under that model, the "objects of regulation" should have standing. *Id.* at 55. In most discrimination lawsuits, of course, the "objects of regulation" are defendants, for whom notions of standing are irrelevant. *See also id.* (common law "understanding calls for judicial caution when numerous beneficiaries ask the government to initiate enforcement proceedings"); *id.* at 56 (there are "good reasons to be concerned about private conscription of public resources").} He states very little about private suits, or discrimination law, and what he does say is inconsistent with our current understanding of how discrimination law works.\footnote{240}{In his only mention of discrimination law in his discussion of the two models, Professor Sunstein asserts: When Congress says that schools receiving federal funds may not discriminate on the basis of sex, it is creating an incentive for sex equality, rather than imposing particular results on particular schools with respect to particular students. *Id.* at 58. Sunstein quickly moves on to other topics. But it deserves mention that in equating Title IX (20 U.S.C. §§ 1681-1688) with other regulatory statutes, Sunstein seems to suggest that our entire notion of how that statute works is misguided. Under current law, victims of discrimination can bring lawsuits directly against those who.} Whatever merit Professor Sunstein's arguments for the public law
model have in the context of statutes which require governmental agencies to apply broad statutory directives for the benefit of significant segments of our population, they seem to have much less effect when considering statutes in which Congress has simply permitted one citizen to sue another for a wrong not previously recognized under the common law. In short, Professor Sunstein's arguments should not affect the interpretive presumption described above (that Congress legislates with the common law in mind) for statutes that provide for private causes of action.

Applying this presumption to the first means of congressional manipulation of the basic standing rules, viz., the elimination of the "prudential rules," a relatively explicit message from Congress should be required. At the very least, using words like "aggrieved" or "injured" (as opposed to "damaged") in the statute ought not to be deemed sufficient. This seems particularly true with respect to eliminating the "zones of interest" test, which, as we have seen, is intended to be nothing more than an exploration of congressional intent as to standing.

The "statutory rights" gambit is somewhat more difficult to address, but I would argue that a similar rule should apply. Congress can indeed create an "injury" that did not exist before; modern discrimination law is a testament to that. But saying that does not answer the next question, viz., who has the right in question. A law that states "do not lie to anyone" should not necessarily lead to the conclusion that "anyone" to whom a lie is made has standing, regardless of whether the specific "anyone" suffered any other injury. Again, such a result seems counterintuitive, and is certainly inconsistent with

receive federal funds and who have discriminated against them. Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Franklin v. Gwinnett County Pub. Schools, 503 U.S. 60 (1992) (suit for damages based upon teacher's sexual harassment permitted). They cannot bring a lawsuit against the federal agency providing federal funds and responsible for ensuring that those who receive its funds are not discriminating. Washington Legal Found. v. Alexander, 984 F.2d 483 (D.C. Cir. 1993). If Title IX is merely a creator of incentives, like other regulatory statutes, as Sunstein suggests, it would seem that the law should be just the opposite.

241. As Sunstein himself notes, "regulatory statutes"—the kind which he seems to be using as a model—"are enacted not to prevent discrete harms by discrete actors, but to restructure incentives or to ensure against what we might describe as probable or systemic harms." Id. at 57. The discrimination laws, on the other hand, are designed to prevent discrete harms by discrete actors.

242. In describing the differences in language between the Lanham Act standing provision and the analogous provision in the Clayton Act, Professor Burns omits any mention of the fact that the former uses the word "damaged" and the latter uses the word "injured." See Burns, supra note 197, at 56-57 (most notable differences in language are that Lanham Act has no reference to "business or property" and permits standing to those who "believe" they are "likely" to be damaged).
our common-law traditions.\textsuperscript{243} Congress can change the common-law traditions if it chooses, but an assumption that they apply without a clear statement from Congress to the contrary would lead, in my opinion, to more rational results than those that we have seen in the discrimination field. Certainly, a statutory prohibition ("do not x") should not be interpreted as granting a "right" not to see "x" being done, as the court did in \textit{Harry Macklowe}.

The trend in fair housing cases has been to treat standing as some kind of positive economic good; the more standing we have, the better.\textsuperscript{244} But like ice cream, too much "standing" can create problems. For one thing, courts can become clogged with essentially ideological litigation. Further, there are some instances in which broadened standing can actually undercut the rights of those most directly involved.\textsuperscript{245} It may be appropriate in some instances for Congress to determine that the benefits of such litigation nonetheless outweigh the societal and individual costs. But one would hope that Congress at least will have considered the matter before drawing that conclusion. Modern standing law in the fair housing area attributes that intent to Congress without, I think, an overwhelming amount of evidence.

The second rule I would propose for the scope of statutory standing is to consider the remedies permitted by the statute in determining the breadth of the standing provision. The Supreme Court has carefully distinguished between having (1) standing, (2) a cause of action, and (3) the right to obtain

\textsuperscript{243} Indeed, the courts are split on whether all kinds of actual damages can be recovered in a common-law fraud action. A number of jurisdictions preclude a plaintiff from recovering for emotional distress damages in a fraud action. \textit{See Kilduff v. Adams, Inc.}, 593 A.2d 478, 484 (Conn. 1991) (noting split of authority).

\textsuperscript{244} Or, as one student commentator has put it in describing the kind of discriminatory advertising suit at issue in \textit{Harry Macklowe}, "[w]hile some courts have cautioned that expansive standing under [Section 3604(c)] will lead to frivolous lawsuits, the [FHA's] goals of nondiscrimination and integration clearly override such concerns." \textit{See Stearns, supra} note 181, at 1222. Perhaps they do, but I would have preferred Congress to say so somewhat more explicitly before standing was granted to an entire newspaper reading population.

\textsuperscript{245} Fletcher, \textit{supra} note 15, at 278; Sunstein, \textit{supra} note 9, at 205. For example, I have previously written how a proscription against using predominantly white models in real estate advertisements might lead some owners of luxury hi-rise buildings to publish advertisements that may be misleading. Rosman, \textit{supra} note 176, at 334-35. If standing were limited to individuals actually harmed, a comparison of the number of lawsuits alleging discriminatory advertising with the number alleging fraudulent advertising might give both potential defendants and policymakers some idea of which problem was more serious for those most intimately involved. With standing for discriminatory advertising as broad as the court found it in \textit{Harry Macklowe}, the results are going to be skewed.
relief. But if it makes no sense to say that a plaintiff has standing but no cause of action, then it is equally senseless to say that "[a] plaintiff may have a cause of action even though he be entitled to no relief at all." For what does he have a cause of action?

The recent decision of the D.C. Circuit in *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.* makes this point quite well. In *BMC Marketing*, the individual plaintiffs were employment discrimination testers who, much like the individual black plaintiff in *Havens Realty*, alleged that they sought referrals from the defendant employment agency, and that they had not been provided with employment opportunities because of their race. They sued under both 42 U.S.C. § 1981 and Title VII. The defendant employment agency moved to dismiss the claim for "want of standing."

With respect to the Title VII claim, the court took the opportunity of a so-called "standing" motion to consider whether plaintiffs could obtain any relief specified under that statute. The court concluded that (1) the individual plaintiffs were not entitled to damages because the acts in question

246. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("standing is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction . . . ; cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and relief is a question of the various remedies a federal court may make available" (emphasis in original)). The Court reiterated the distinction between an implied cause of action, and what that cause of action permits in the way of remedy, in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65-66 (1992).

247. *Davis*, 442 U.S. at 239 n.18. The example that the Court gave—a plaintiff that sues for declaratory or injunctive relief but does not meet the conditions for such equitable remedies, *id.*,—is just the kind of situation that was present in *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994). See discussion *infra* notes 248-254. *See also* Schwemm, *supra* note 1, at 8 (under Supreme Court precedents, "the term 'standing' may be used to describe two distinct concepts: (1) standing to sue, that is, standing to invoke the court's jurisdiction; and (2) standing to make particular claims or arguments once it has been determined that the suit has been brought by a proper party").

248. 28 F.3d 1268 (D.C. Cir. 1994). The analysis of the standing of the organizational plaintiff is described in *supra* note 218.

249. *Id.* In fact, the complaint alleged that the defendant employment agency had refused to accept the application of one of the black employment testers. *Id.*

250. *Id.* See also 42 U.S.C. § 2000e-2(b) (1988) (prohibiting an employment agency from "refus[ing] to refer for employment" because of an applicant's race).

251. *BMC Marketing.*, 28 F.3d at 1270.

252. The Court specifically refused to determine whether the individual plaintiffs lacked "any cause of action under § 2000e-2(b)." *Id.* at 1272 n.1.
occurred prior to the enactment of the Civil Rights Act of 1991, and (2) the individual plaintiffs "lacked standing" to seek injunctive or declaratory relief because they were not threatened with any future illegality.

As already noted, the courts have universally held (based upon the Supreme Court's citation in Trafficante of Hackett v. McGuire Bros.) that standing under Title VII extends to the full extent of Article III. But how much sense does it make to say that a statute that simply cannot remedy certain injuries reaches the constitutional limits? I would conclude just the opposite, that the limited set of remedies available under a statute (meaning not all injuries can be remedied) suggests that those injured should be injured in a particular way. Suppose, for example, that a court concluded that the provision in the ADEA prohibiting discriminatory advertising, like the analogous provision in the FHA, grants standing to anyone who sees a discriminatory advertisement. Because the ADEA is generally interpreted as precluding compensatory damage claims, the claims of those not actually interested in the employment will revolve around whether the defendants will publish such advertisements in the future, an inherently diffi-

253. Id. at 1272.

254. Id. at 1272-74. Professor Winter anticipated the result in BMC Marketing. Winter, supra note 21, at 1489 (under City of Los Angeles v. Lyons, 461 U.S. 95 (1983), "the tester will not have standing to obtain an injunction . . .").

Curiously, in determining that the organizational plaintiff did have standing and a cause of action under Title VII, the court in BMC Marketing did not address whether there was any likelihood of future harm to the organization, but simply relied upon the "drain of resources" injury that already had been inflicted. As noted earlier, see supra note 218, the court in BMC Marketing rejected the self-inflicted "drain of resources" injury espoused in other circuits, but held that, at the pleading stage, the organization had properly pled a direct impairment of their programs.


256. One could consider the problem identified in the text as a "redressability" problem under Article III, that is, if the statute does not permit the relief requested, then the claim is not "redressable" and does not meet Article III minima. Compare Sunstein, supra note 9, at 209 ("we should think of redressability as a crude device for determining whether Congress intended to confer a cause of action"). Unfortunately, the Court has indicated that "redressability" is determined not by the relief available but rather by the relief requested. See Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (redressability addresses causal connection between "the alleged injury and the judicial relief requested" (emphasis added)). If this is true, then plaintiffs who ask for the unattainable are said to have standing, but to lack a valid legal claim for the relief requested.

257. See discussion supra in text accompanying notes 190-194.

258. E.g., Espinueva v. Garrett, 895 F.2d 1164, 1165 (7th Cir. 1990).
cult factual issue. The absence of a damage remedy for such plaintiffs should militate in favor of allowing only those with an actual interest in the employment to enforce the discriminatory advertising provision.

Similarly, it seems less likely that organizations promoting non-discriminatory principles should have standing under the ADEA. If their past injury is the typical "drain-of-resources" claim, their future injury would seem to be preventable in most instances (by, for example, educating clients now that the acts undertaken by the defendants are illegal, and thus precluding the need for such expenditures in the future). Again, I do not suggest that this is the only conclusion one can draw. I only suggest that a standing analysis based upon an attempt to determine to whom Congress wanted to give a right to sue should take a limited remedial scheme into account.

CONCLUSION

When any set of results seem conflicting, and distinctions appear irrational, there is a natural tendency to look for a cause. Most academic work on standing issues begins with the confusion in the constitutional law cases and concludes that the guiding principal needed to restore rationality to the area is to jettison a separate idea of "standing" and consider the issue normally addressed in "standing" cases (i.e., is this the right plaintiff?) as part of the merits of the claim, just as is done in third-party contract cases.

This article began with a different set of confused results, all of which resulted after beginning with the premise that "standing" issues should turn on the substantive claim being made. When the courts hold that everyone who reads a newspaper has standing, or that groups which independently spend their own funds in an effort to ferret out wrongdoing have been "injured," however, one is prompted to continue looking for additional sources of confusion. This article has analyzed such inconsistencies (and some leaps in logic), and has tried to understand their source. While it is easy to attribute unusual results to slipshod judicial analysis, I have tried to suggest here that something more may be going on. Specifically, I believe that by focusing on the statutory interpretation issues—viz., whether Congress has repealed the prudential rules of standing or whether it has statutorily created a "right" the violation of which constitutes a legal injury—the Court has obscured the primary question that should be the focus in standing cases: Did those who created the law want someone like this plaintiff enforcing the statutory obligations against someone like this defendant? Starting with that question, and using the traditional presumptions of our jurisprudence, I believe, will begin to provide us with a more sensible law of standing under the Fair Housing Act and elsewhere.