Standing to Invoke Original Supreme Court Jurisdiction - Maryland v. Louisiana

Nancy E. Shiavone

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STANDING TO INVOKING ORIGINAL SUPREME COURT JURISDICTION—MARYLAND V. LOUISIANA

Litigants seeking to adjudicate constitutional controversies in the federal courts must establish that they have standing to sue. Standing is a threshold requirement that a litigant must satisfy by demonstrating a personal stake in the outcome of the controversy. In determining the requisite personal stake, courts focus upon two questions. A court must determine whether the litigant has suffered actual injury and whether there is a causal connection between the claimed injury and the challenged conduct.

1. The doctrine of standing involves the litigant's relationship to the subject matter of the controversy. The underlying policies of the standing doctrine were summarized by Professors Hart and Wechsler as follows:

   [T]he question of standing in this sense is the question whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons, to warrant giving him the relief, if he establishes the illegality alleged—and, by the same token, to warrant recognizing him as entitled to invoke the court's decision on the issue of illegality.


3. The essence of the standing doctrine is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).


In some cases, however, it appears that the standing determination is made without consistent application of this two-pronged analysis. When this occurs, principled application of the standing doctrine becomes more difficult. A recent example of inaccurate application of the standing doctrine occurred in *Maryland v. Louisiana.* In *Maryland,* the Supreme Court manipulated the standing doctrine to invalidate Louisiana's suspect "First-Use Tax" imposed on natural gas brought into Louisiana. Because the

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6. See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74-75 (1978). In *Duke Power,* the substantive issue was whether the Price-Anderson Act, 42 U.S.C. § 2210(c), (e) (1976), a federal statute limiting the recovery available to victims of a nuclear disaster, violated the fifth amendment due process rights of potential victims to whom the Act might apply. Neither an actual or a threatened disaster had triggered the suit, nor was there any prospect that the statutory limitation would soon, if ever, be applied. Yet a federal district court declared the statutory limitation unconstitutional. On appeal, the Supreme Court reversed on the merits, affirming the constitutionality of the Act. For an in-depth analysis of *Duke Power's* implications on the doctrine of standing, see Varat, *Variable Justiciability and the Duke Power Case,* 58 Tex. L. Rev. 273 (1980) [hereinafter cited as Varat].

Commentators concur that the Court often considers factors beyond the injury/causation analysis in deciding standing questions. These commentators, however, divide sharply over the nature of variable standing analyses. Id. at 308. For example, Professor Bickel approved of the Supreme Court's inconsistent and discretionary use of standing principles. Bickel contended that the Court maintains integrity by utilizing a flexible standing analysis because this judicial mechanism allows the Court to withhold judgment on the merits. A. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962). In response to Bickel's analysis, Professor Gunther warned of the dangers to our judicial system created by variable standing determinations. Because a denial of standing allows the Supreme Court to avoid a judgment on the merits without explicit explanation, the doctrine is easily manipulated. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 Colum. L. Rev. 1, 9-16, 18-20 (1964). Professor Varat articulated that not only may the Supreme Court *avoid* constitutional decision through variable standing analysis, but also the Court may *embrace* constitutional decisions. He suggests, however, that this wide range of judicial discretion spoils the Court's appearance of neutrality. Varat, *supra,* at 316, 319 (emphasis in original).

7. Compare *Warth v. Seldin,* 422 U.S. 490 (1975) (no standing to sue because plaintiffs failed to show that injury was fairly attributable to the challenged ordinance rather than to other factors) and *Linda R.S. v. Richard D.,* 410 U.S. 614 (1973) (mother of illegitimate child denied standing because injury due to criminal statute requiring child support from fathers of legitimate children but not from fathers of illegitimate children was only speculative) *with* United States v. *Students Challenging Regulatory Agency Procedure,* 412 U.S. 669 (1973) (environmental group had standing to challenge administrative action because it would cause serious environmental damage).

8. See *Davis,* Standing, 1976, 72 Nw. L. Rev. 69, 69-70 (1977) [hereinafter cited as *Standing,* 1976]. Because the law of standing is often decisive of litigation it is vital that lower courts and practitioners receive Supreme Court guidance. The Court, however, has decided the major standing decisions with differing analyses. These inconsistent decisions, taken together, confuse future standing determinations. Id.


Maryland Court's standing analysis was inaccurate, the decision aggravates the confusion already surrounding the standing doctrine.\textsuperscript{11}

In addition, the seriousness of the Maryland Court's vague standing decision is compounded because the plaintiff was a state seeking to sue another state.\textsuperscript{12} Suits between states are within the Supreme Court's exclusive original jurisdiction.\textsuperscript{13} Because this jurisdiction is exclusive, the Supreme Court is required to adjudicate suits between states if the claim represents a justiciable controversy.\textsuperscript{14} The Maryland Court's reasoning, however, intimated that exclusive original jurisdiction may not be obligatory.

A critical examination of the Maryland decision exposes significant weaknesses in the Court's opinion. These deficiencies result from the Court's inconsistent application of the standing causation component and from its unwarranted discretionary analysis to invoke exclusive original jurisdiction. In view of these deficiencies, the Maryland decision may exacerbate the already confused application of the standing doctrine and may result in arbitrary invocation of the Court's exclusive original jurisdiction.

\section*{BACKGROUND}

\textit{Standing to Sue}

Standing, a component of the justiciability doctrine,\textsuperscript{15} permits courts to
consider only concrete cases or controversies. The law of standing is designed to ensure that only litigants with a genuine interest can participate in a proceeding. The threshold standing issue requires a court to determine whether the litigant has suffered actual injury, and whether a causal connection exists between the wrongful act and the claimed injury.

The essential element of the standing determination, therefore, is whether actual injury has been sustained. Although proof of actual injury does not usually present difficulties, the analysis is problematic when a state is a litigant. A state, because of its dual role as a sovereign and a proprietor, can allege injury-in-fact under two theories. Usually, a state seeking to file case or controversy doctrine. The doctrine's limitations are illustrated by various concepts. For example, a controversy is nonjusticiable when the parties seek to adjudicate a political question, when the parties ask for an advisory opinion, when the parties do not have standing to maintain an action, or when the question sought to be adjudicated has been mooted by subsequent developments. Id. at 95 (footnotes omitted).

In Warth v. Seldin, 422 U.S. 490 (1975), Justice Powell's majority opinion stated that there are two components of justiciability. There is the constitutional component which is grounded in the article III case or controversy provision. See note 16 infra. The second aspect is the prudential component which is not mandated by the Constitution, but is a discretionary element established by the Court as a matter of judicial self-governance. Warth v. Seldin, 422 U.S. 490, 498-502 (1975).

Professor Tribe observed that the "[j]usticiability doctrine is peculiarly self-regarding," and is "in an important sense the description of an institutional psychology: an account of how the federal courts, or more accurately the Justices of the Supreme Court, view their own role." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-7, at 53 (1978) [hereinafter cited as TRIBE].

16. U.S. CONST. art. III, § 2. The article III case or controversy requirement dictates the manner in which constitutional issues must arise if they are to be addressed by the federal courts. Article III provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between Citizens of different States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.


In terms of article III, the standing determination is essential to ensure that the action is instituted by the proper party, thus assuring an adversary proceeding. An adversary interest ensures full and proper presentation of the issues facing the court. Jenkins v. McKeithen, 395 U.S. 411, 423 (1969). For a comprehensive analysis of the doctrine of standing, see HART & WECHSLER, supra note 1, at 150-214.

17. See notes 2-5 and accompanying text supra.


19. The burden on a state as a litigant is greater than that required of a plaintiff in private litigation. The Supreme Court has required that states must show by "clear and convincing
an action sues to protect its own interests in its capacity as proprietor. The actual injury inquiry is whether the state can prove injury to its economy, financial obligations, property, or other sovereign concerns.

A state may also sue in its capacity as parens patriae. A state satisfies this requirement by proving that the suit is to protect the general health, comfort, and welfare of its citizens. Accordingly, parens patriae standing

evidence" that the injuries are of "serious magnitude." California v. Texas, 437 U.S. 601, 614 (1978) (citing Missouri v. Illinois, 200 U.S. 496, 521 (1906)).

20. Proprietary capacity standing is a settled doctrine that grants a state standing to sue only when it is the real party in interest. HART & WECHSLER, supra note 1, at 270. See Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (state allowed standing to sue for an injury to its economy attributable to a violation of an antitrust law); Maryland v. Wirtz, 392 U.S. 183 (1968) (state allowed to bring an action challenging the Fair Labor Standards Act as applied to its schools and hospitals). But see Pennsylvania v. New Jersey, 426 U.S. 660 (1976) (state denied standing because there was no showing that defendant state's tax plan caused plaintiff state any injury); Massachusetts v. Missouri, 308 U.S. 1 (1939) (complaining state did not suffer a wrong due to the action of the other state, thus standing did not exist). See also TRIBE, supra note 25, § 3-24, at 101-02.

21. See Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (state allowed to seek redress for damage to economy due to an antitrust violation); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (state allowed to bring an action for wrong suffered by the state as the owner of a railroad).

22. See Virginia v. West Virginia, 246 U.S. 565 (1918) (state granted standing to recover a debt due from another state); South Dakota v. North Carolina, 192 U.S. 286 (1904) (state had standing to secure nonpayment of bonds by the other debtor state).


24. See Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (state initiated suit to enjoin enforcement of another state's statute threatening to cut off supply of natural gas); Missouri v. Illinois, 180 U.S. 208 (1901) (state had standing to challenge discharge of sewage into Mississippi River).


The expansion of the parens patriae concept developed through a series of cases involving the Supreme Court's original jurisdiction. In deciding these suits, the Supreme Court acted as an arbiter between quasi-sovereign interests. See Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (state protecting citizens from continuing economic wrong); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (state protecting citizens from the discharge of noxious gas); Missouri v. Illinois, 180 U.S. 208 (1901) (state protecting citizens from the discharge of sewage into the Mississippi River). For a general discussion of the parens patriae concept, see Curtis, The Checkered Career of Parens Patriae: The State as Parent or Tyrant?, 25 DePaul L. Rev. 895 (1976). For a discussion of parens patriae as it relates to state party original jurisdiction, see Original Jurisdiction, supra note 14, at 671-80.

26. See Louisiana v. Texas, 176 U.S. 1, 19 (1900) (Louisiana, in its capacity as parens patriae, presented a claim as trustee, guardian, and representative of all its citizens). Cf. In re
focuses on the extent to which a state’s interests are commensurate with its citizens’ interests.\textsuperscript{27} Generally, a state invokes parens patriae standing when the extent of damages available to its citizens would be wholly inadequate or disproportionate in relation to litigation costs.\textsuperscript{28}

Although actual injury may be difficult to substantiate, an even greater burden is establishing a causal connection between the claimed injury and the challenged conduct. Because the causal connection determination has been confused by unsuccessful attempts to formulate a standard causation principle, it has been deemed the most difficult component of standing.\textsuperscript{29}

The first test delineated by the Supreme Court to explain the causation element of standing was the "legal interest" test.\textsuperscript{30} This test prescribed that direct injury was not recognizable unless the right invaded was "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."\textsuperscript{31} The legal interest test was later specifically rejected by the Court because the test focused on the merits of the case instead of the threshold standing considerations.\textsuperscript{32}

After discarding the "legal interest" test, the Court formulated a more liberal "zone of interest" test to determine whether a sufficient nexus between the claimed injury and the challenged conduct existed.\textsuperscript{33} This test required that the litigant’s interest be arguably within the zone of interest to be protected by the statutory or constitutional provision from which the

Debs, 158 U.S. 564 (1895). In \textit{Debs}, the Court stated that "the obligations which [the government] is under to promote interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." \textit{Id.} at 584.

\textsuperscript{27} \textit{Original Jurisdiction}, \textit{supra} note 14, at 671.

\textsuperscript{28} \textit{See} Missouri v. Illinois, 180 U.S. 208, 241 (1901) (substantial impairment of health and prosperity of state's general population without the citizens being able to seek adequate judicial relief is basis for state to invoke parens patriae standing).

\textsuperscript{29} \textit{See} Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1978) (compared to the requirement of actual injury the requirement of establishing a causal connection is the more difficult standing inquiry).

\textsuperscript{30} Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939). This early causation inquiry was restrictive because it required interference with a legal interest as a prerequisite to adjudication. \textit{See} \textit{Liberalized Law}, \textit{supra} note 18, at 452-53. Professor Wright expressed criticism for the legal interest test: "Such an approach is demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected." \textit{WRIGHT, supra} note 10, at 47.

\textsuperscript{31} Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939) (public utility companies' property and rights were not destroyed, they were held to have no legal interest to challenge the constitutionality of a TVA related program).


\textsuperscript{33} \textit{Id.} The Supreme Court formulated and applied the "zone of interest" test in \textit{Data Processing}. In \textit{Data Processing}, the issue was whether the petitioners, an organization of data processing services, had standing to challenge a ruling of the Comptroller of the Currency allowing national banks to sell data processing services to customers. A unanimous Court determined that the petitioners had standing to sue. \textit{Id.} at 153-58.
claim arose. The "zone of interest" test, however, has not been applied by the Court since its inception.

Although the "zone of interest" test was never explicitly rejected, the Supreme Court has articulated alternative tests to establish the causation element of standing. In *Simon v. Eastern Kentucky Welfare Rights Organization,* the Court formulated the "fair traceable" causal connection test. This test permits a court to hear only those suits where the alleged injury fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court. Unlike the "zone of interest" test, the fairly traceable causation analysis has been utilized by the Supreme Court in recent standing decisions.

In an effort to formulate a more exacting causation test, the Court, in *Duke Power Co. v. Carolina Environmental Study Group,* developed a "but for" test. The inquiry under this most recent causation analysis is whether there is a substantial likelihood that the challenged action is a "but for cause of the litigants' claimed injury." The precise application of the

34. *Id.* at 153 (protecting nonbank data processors from bank competition of data processing services was within the zone of interest of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864 (1976). See also Barlow v. Collins, 397 U.S. 159 (1970) (companion case to *Data Processing* in which the Court also applied the zone of interest test).

35. This benign neglect has caused some commentators to suggest that the zone of interest test has, in effect, been rejected. See *Standing, 1976, supra* note 8, at 81; *Scott, Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 662-69 (1973); *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 253, 260 (1978).


37. *Id.* at 41-42. In *Simon,* the plaintiffs were indigents who were denied hospital service because of their inability to pay immediately for the service. The plaintiffs challenged an IRS Revenue Ruling that discontinued a requirement that hospitals must provide below cost service to indigents. The Supreme Court held that the plaintiffs failed to show that the denial of service resulted from the revenue ruling. In examining the causal connection, the Court concluded that it was "speculative whether the denials of service specified in the complaint fairly can be traced to [the ruling] or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 41-42.

38. See, e.g., *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977) (complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions).


40. *Id.* at 72-81. In *Duke Power,* an action was brought by an environmental organization seeking a declaration of unconstitutionality of the Price-Anderson Act which placed a limitation on the maximum amount of liability for damages resulting from a nuclear accident involving atomic power plants. The Supreme Court held that residents near nuclear power plants had standing to challenge the Act's constitutionality. The Court reasoned that several immediate adverse effects of construction of the plants fulfilled the injury-in-fact requirement such as pollution of lakes and loss of aesthetic beauty. Further, the Court acknowledged that "but for" the Price-Anderson Act the nuclear power plants would not have been built, and thus a sufficient causal connection existed. *Id.* at 72-78.

41. *Id.* at 74-78. The district court that heard the *Duke Power* controversy developed the
"but for" test is unsettled because the Supreme Court delineated this new test without redefining the status of the fairly traceable test of causation.\(^4\)

In light of a state's dual capacity to bring a lawsuit, and the two-pronged standing inquiry, the issue of state standing is extremely complex. Once a state's standing to sue is established, however, the legal difficulties are not fully resolved. The issue of Supreme Court jurisdiction over the subject matter poses an additional problem because appropriate jurisdiction depends upon the status of the state's opponent.

**Original Supreme Court Jurisdiction**

Article III of the Constitution divides federal judicial authority between the Supreme Court and the lower federal courts.\(^4\) The Constitution further provides that the Supreme Court has original jurisdiction in all cases affecting ambassadors or other public ministers and in all cases in which a state is a party.\(^4\) The original jurisdiction of the Supreme Court, however, is not exclusive by virtue of article III. Within the categories enumerated in article III, Congress may provide for or deny exclusiveness of original actions.\(^5\) An action under nonexclusive original jurisdiction can be brought in either a lower federal court or in the Supreme Court because the Court's jurisdiction is concurrent with the lower federal court's jurisdiction.\(^6\)

\(^4\) 438 U.S. at 74.
\(^5\) U.S. CONST. art. III, § 1. Article III provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*
\(^6\) 449 U.S. at 66-69 (1884). In *Ames*, the Supreme Court stated: In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. *Id.* at 469.

46. From the enactment of the Judiciary Act of 1789, Congress has had the power to make the Supreme Court's original jurisdiction concurrent with the jurisdiction of the lower federal courts. See notes 48-49 and accompanying text *infra*. For examples of the exercise of nonexclusive original Supreme Court jurisdiction, see United States v. Nevada, 412 U.S. 534 (1973) (controversy between the United States and two states); Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (action by a state against citizens of another state).
exclusive original action, however, the Supreme Court is the only federal forum in which the parties can litigate the controversy.\textsuperscript{47}

Although the Constitution does not distinguish between exclusive and nonexclusive Supreme Court jurisdiction, the Judiciary Act of 1789 articulated the distinction.\textsuperscript{48} The 1789 Act provided that the Supreme Court shall have exclusive original jurisdiction over all controversies, of a civil nature, where a state is a party, except in cases between a state and its citizens or between a state and citizens of another state.\textsuperscript{49} In the latter cases the Court had nonexclusive original jurisdiction.\textsuperscript{50}

The current statute providing for original Supreme Court jurisdiction maintains the distinction between exclusive and nonexclusive original jurisdiction.\textsuperscript{51} Under this statute, however, the only remaining area of exclusive original actions involves suits between states.\textsuperscript{52} Consequently,

\textsuperscript{47} See United States v. Texas, 143 U.S. 621 (1892). In Texas, the Supreme Court stressed that cases under exclusive original jurisdiction should be determined in the highest tribunal of the nation to ensure that jurisdiction comports with the dignity of the parties.\textsuperscript{Id.} at 643. But see Arizona v. New Mexico, 425 U.S. 794 (1976). In Arizona, the Supreme Court declined to exercise exclusive original jurisdiction because a pending state court action provided an alternative forum for the litigation of the issues.\textsuperscript{Id.} at 797.


\textsuperscript{49} The Judiciary Act distinguished between those instances in which original jurisdiction was exclusive of other courts and those in which it was not exclusive. The Act provided:

That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. (b.) And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.


\textsuperscript{50} Id.

\textsuperscript{51} See 28 U.S.C. § 1251 (1976 & Supp. III 1979). The current statute regulating Supreme Court original jurisdiction presents the distinction between exclusive and nonexclusive original jurisdiction. The statute provides in full:

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

\textsuperscript{Id.}

\textsuperscript{52} The statute regulating original Supreme Court jurisdiction was amended in 1978 to grant concurrent power to the lower federal courts to hear suits involving ambassadors or
justiciable suits between states are adjudicated for the first time before the
Supreme Court. In these original actions the Supreme Court necessarily
assumes the role of a trial court. Because the Supreme Court is ill-
equipped to function as a trial court, the Court narrowed the scope of its
nonexclusive original jurisdiction by allowing discretionary review in con-
troversies that only have one state as a party. The discretionary limitation
is the availability of an alternative forum in which the controversy can be
adjudicated, thus allowing the Supreme Court to attend to its other func-
tions.

This discretionary element, however, historically was not applied to the
Supreme Court’s exercise of exclusive original actions. Instead, the Court
relied only upon the constitutional doctrine of justiciability which is
employed to give expression to the limitations placed upon federal courts by
other public ministers. The statute was amended so that the Supreme Court would not be
burdened with such litigation on its original docket. Id. Congress concluded that there was no
justification for continuing to vest original and exclusive jurisdiction in the Supreme Court in
those instances when foreign ambassadors, members of diplomatic missions, or members of
their families are subject to litigation. See Diplomatic Relations Act, Pub. L. No. 95-393, § 8(b),
92 Stat. 810 (amending 28 U.S.C. § 1251 (Supp. III 1979)). Thus, the only remaining category

The Supreme Court is both the first and final arbiter of controversies arising within its
the wisdom of the Supreme Court as the only forum available for a controversy between
states).

In original actions, the Supreme Court is liberal in allowing full development of the
facts because the controversies usually involve issues of great importance. United States v.
Texas, 339 U.S. 707, 715 (1950). Although the Supreme Court must assume the role of a trial
court, the Court can appoint a special master to alleviate some of the burden. FED. R. CIV. P.

Although the issues raised in original cases are of significance, the number of original cases
on the Supreme Court’s docket each term is comparatively small. Original Jurisdiction, supra
note 14, at 665.

See Massachusetts v. Missouri, 308 U.S. 1, 19 (1939) (nonexclusive action dismissed
because lower federal court had concurrent jurisdiction). In Massachusetts, the Supreme Court
recognized “the need [for] the exercise of a sound discretion in order to protect this Court
from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by
States of claims against citizens of other States.” Id.

role of the Supreme Court and the inappropriate structure of the Court for hearing original ac-
tions, the Wyandotte Court delineated limitations on nonexclusive original actions. The
Supreme Court acknowledged that it may decline to hear original nonexclusive cases only
when:

(1) declination of jurisdiction would not disserve any of the principal policies
underlying the Article III jurisdictional grant and (2) the reasons of practical
wisdom that persuade us that this Court is an inappropriate forum are consistent
with the proposition that our discretion is legitimated by its use to keep this aspect
of the Court’s functions attuned with its other responsibilities.

Id. at 499. See also Washington v. General Motors Corp., 406 U.S. 109 (1972). Citing Wyand-
dotte, the Washington Court emphasized that the grant of nonexclusive original jurisdiction
should be discretionary so that the Court’s ability to administer its appellate docket would not
be impaired. Id. at 113.
article III. Consequently, when an exclusive original action is before the Supreme Court, the Court is obligated to exercise jurisdiction if the matter is justiciable. Despite the Supreme Court's responsibility to hear justiciable exclusive original actions, the Court recently developed a discretionary analysis in an exclusive original action. Although such discretion is unwarranted, the Court utilized this discretionary analysis again in the *Maryland* decision.

**THE MARYLAND DECISION AND RATIONALE**

In 1978, the State of Louisiana imposed a tax upon certain first “uses” of natural gas within its borders. The First-Use Tax statute affixed a charge of seven cents per thousand cubic feet of natural gas. The statute taxed natural gas obtained from the Outer Continental Shelf that was piped into processing plants in Louisiana and eventually sold to out-of-state consumers. The tax was levied on the interstate pipeline companies because

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57. See notes 15-16 and accompanying text supra.

58. The Supreme Court has exclusive original jurisdiction to adjudicate a controversy so long as “the issue framed by the pleadings constitutes a justiciable ‘case’ or ‘controversy’ within the meaning of the Constitutional provisions.” Texas v. Florida, 306 U.S. 398, 405 (1939). To constitute a justiciable controversy, “it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress . . . .” Massachusetts v. Missouri, 308 U.S. 1, 15 (1939). See, e.g., Idaho ex rel. Evans v. Oregon, 444 U.S. 380 (1980) (Idaho claim seeking equitable apportionment of various runs of migrating fish presented a justiciable controversy).

59. Arizona v. New Mexico, 425 U.S. 794 (1976) (per curiam). In *Arizona*, the Supreme Court exercised discretion in adjudicating original jurisdiction even though the jurisdiction was exclusive. Relying on nonexclusive original jurisdiction decisions, the *Arizona* opinion declined to invoke exclusive original jurisdiction in a suit between two states. *Id.* at 796 (citing Illinois v. City of Milwaukee, 406 U.S. 91 (1972)); Washington v. General Motors Corp., 406 U.S. 109 (1972); Ohio v. Wyandotte Chem. Corp., 401 U.S. 493 (1971)). The *Arizona* Court's reliance on these cases was unfounded because fundamental differences exist between exclusive and nonexclusive original jurisdiction. See notes 51-52 and accompanying text supra.

60. LA. REV. STAT. ANN. §§ 47:1301-1307, :1351 (West Supp. 1981). Energy producing states desire control over the amount and manner of production, the compensation for the depletion of their energy resources, the compensation for damage to the environment, and for the socio-economic problems associated with energy production. These states often attempt to achieve these goals through taxation. Note, *The Effect and Validity of State Taxation of Energy Resources*, 58 WASH. U.L.Q. 345, 346 (1980).

61. LA. REV. STAT. ANN. § 47:1303(B) (West Supp. 1981). Under the First-Use Tax statute the term “use” includes: the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state. *Id.* § :1302 (8).

62. Two Louisiana statutes provided tax credit for in-state producers of natural gas and for state owned natural gas distribution services. *Id.* §§ 47:11(B), :647. Because these exemptions
they had title to the natural gas when the first use occurred in Louisiana.\textsuperscript{63} To remedy the pipeline companies’ tax burden, the Federal Energy Regulatory Commission allowed the pipeline companies to increase their rates, thereby passing the tax burden on to the consumers of natural gas.\textsuperscript{64}

Subsequently, eight states\textsuperscript{65} filed a motion to the Supreme Court for leave to file a complaint within the Court’s original jurisdiction.\textsuperscript{66} The plaintiff states in their proprietary and parens patriae capacities sought a declaratory judgment that Louisiana’s First-Use Tax was unconstitutional on the grounds that the tax interfered with interstate commerce and violated the supremacy clause.\textsuperscript{67} Because the claim involved a dispute between sovereign states, the action was within the statutory exclusive original jurisdiction of the Supreme Court.\textsuperscript{68} After the Court granted the plaintiff states’ motion for leave to file an original action,\textsuperscript{69} the State of Louisiana moved to dismiss the case on the ground that the states lacked sufficient standing to invoke exclusive original Supreme Court jurisdiction.\textsuperscript{70}

Louisiana argued that the plaintiff states lacked standing to sue in their proprietary capacity because the tax was imposed upon the pipeline companies and not upon the plaintiff states.\textsuperscript{71} Moreover, Louisiana contended that the plaintiff states were only remotely affected by imposition of the tax, thus the causation component was too tenuous to grant standing.\textsuperscript{72} In addition, Louisiana asserted that the plaintiff states’ claim of parens patriae standing suffered the same deficient causal connection that defeated proprietary standing.\textsuperscript{73} Under Louisiana’s argument, the interests of plaintiff states did not fall within the sovereignty concerns that justify parens patriae standing.\textsuperscript{74} Louisiana argued that the citizen consumers of natural gas had no legal interest in challenging the tax when identifiable taxpayers—the

were only for Louisiana distributors of natural gas, Louisiana consumers were insulated from increases in the price of natural gas resulting from the First-Use Tax.

\textsuperscript{63} Id. § 47:1302 (9). The State of Louisiana’s alleged purpose for the First-Use Tax was to prevent economic and physical waste of natural energy resources, and to compensate the citizens of Louisiana for damage to the state’s waterbottom and shoreline. Id. § 47:1301.


\textsuperscript{65} The states involved were Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island, and Wisconsin.

\textsuperscript{66} An original action in the Supreme Court must be commenced by a motion for leave to file the initial pleading. Sup. Ct. R. 9, 346 U.S. 955 (1954).

\textsuperscript{67} 101 S. Ct. at 2136.

\textsuperscript{68} See notes 47-53 and accompanying text supra.

\textsuperscript{69} Maryland v. Louisiana, 442 U.S. 937 (1979) (miscellaneous order).

\textsuperscript{70} 101 S. Ct. at 2123. See Motion to Dismiss and Brief in Support of Motion to Dismiss at 12-13, Maryland v. Louisiana, 101 S. Ct. 2114 (1981); Brief in Opposition to Motion for Leave to File Complaint at 1-8, Maryland v. Louisiana, 101 S. Ct. 2114 (1981).

\textsuperscript{71} 101 S. Ct. at 2123. See note 63 and accompanying text supra.

\textsuperscript{72} 101 S. Ct. at 2123. See note 64 and accompanying text supra.

\textsuperscript{73} 101 S. Ct. at 2124.

\textsuperscript{74} See notes 25-28 and accompanying text supra.
pipeline companies—were capable of protecting the validity of the First-Use Tax in the Louisiana state court system.\textsuperscript{75}

The Supreme Court, however, summarily rejected Louisiana's standing argument. In holding that plaintiff states had standing to initiate a claim against the First-Use Tax, Justice White, writing for the majority, stated that the plaintiff states had a legal and recognizable interest in challenging the tax in their proprietary capacity.\textsuperscript{76} The Maryland Court reiterated the Simon v. Eastern Kentucky Welfare Rights Organization\textsuperscript{77} holding that standing exists if the alleged injury fairly can be traced to the action of the defendant, and if the injury is not the result of an independent action of some third party not before the Court.\textsuperscript{78} Using the "fairly traceable" test, therefore, the Supreme Court concluded that the plaintiff states, as consumers of natural gas, "clearly" had proprietary standing because the tax was intended to be passed on to the ultimate consumers.\textsuperscript{79}

Additionally, the Maryland Court held that plaintiff states had parens patriae standing to challenge the First-Use Tax.\textsuperscript{80} The parens patriae determination was based on the same reasoning the Court applied in its proprietary capacity determination. The Maryland Court held that the plaintiff states' injury to their proprietary interests, as consumers of natural gas, was a direct result of the First-Use Tax.\textsuperscript{81} The Maryland Court equated plaintiff states' proprietary injury with the citizen consumers' injury imposed by the First-Use Tax and concluded that the citizen consumers also suffered substantial direct harm.\textsuperscript{82} The Maryland opinion concluded that a state may act as the representative of its citizens when the injury substantially affects the state's general population.\textsuperscript{83}

\textsuperscript{75} 101 S. Ct. at 2125. Two separate actions concerning the constitutionality of the First-Use Tax had been filed in Louisiana courts. The first suit was brought by Louisiana in a state court seeking a declaratory judgment that the First-Use Tax was constitutional. The defendant pipeline companies removed the case to federal court; however, the case was subsequently remanded back to the state court. Edwards v. Transcontinental Gas Pipe Line Corp., 464 F. Supp. 654 (M.D. La. 1979). The second challenge was a suit brought by the Federal Energy Regulatory Commission testing the constitutionality of the First-Use Tax. The case was stayed pending a decision in the Edwards case. Federal Energy Regulatory Comm'n v. McNamara, No. 78-384 (M.D. La., filed Sept. 29, 1978).

\textsuperscript{76} Because the consumers of natural gas were required to pay higher prices, the issue of actual injury was evident and did not present conflict. The issue of causation between the economic injury and the imposition of the First-Use Tax, however, posed the critical issue to be resolved by the Maryland Court. See 101 S. Ct. at 2123-25.

\textsuperscript{77} 426 U.S. 26 (1976). See notes 36-38 and accompanying text supra.

\textsuperscript{78} 101 S. Ct. at 2123.

\textsuperscript{79} 101 S. Ct. 2123.

\textsuperscript{80} Id. at 2124.

\textsuperscript{81} Id. Accord, Pennsylvania v. West Virginia, 262 U.S. 553 (1923). In a suit to enjoin the enforcement of a West Virginia conservation statute threatening to cut off Pennsylvania's supply of natural gas, Pennsylvania was found to have standing as a proprietor of public institutions that used natural gas. Id. at 591.

\textsuperscript{82} 101 S. Ct. at 2125.

\textsuperscript{83} Id. Accord, Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). In a suit seeking in-
Louisiana posed an alternative argument for dismissing the plaintiff states' claim against the First-Use Tax. Louisiana maintained that even if plaintiff states had standing, the *Maryland* case was inappropriate to be deemed an original action. Although *Maryland* involved a suit between sovereign states, Louisiana, relying on *Arizona v. New Mexico*, urged that the Supreme Court not exercise exclusive original jurisdiction. In *Arizona*, Arizona challenged the constitutionality of an electrical energy tax imposed by New Mexico. The Supreme Court stated that the grant of exclusive original jurisdiction was to be applied only in cases in which the claim is serious and no proper alternative forum is available to litigate the issues. The Court, therefore, declined to exercise exclusive original jurisdiction in a suit between states because a state court proceeding provided an alternative forum. Citing *Arizona*, Louisiana advocated that pending Louisiana state court actions were appropriate alternative forums in which the specific issues involved could be addressed.

Despite Louisiana's contention, the Supreme Court exercised exclusive original jurisdiction. Although the Court applied the *Arizona* discretionary alternative forum analysis, the *Maryland* Court reached a conclusion different from that in *Arizona*. The *Maryland* opinion emphasized that appropriateness of an exclusive original action must be determined on a case-by-case basis. Although the *Maryland* Court acknowledged factual similarities between *Maryland* and *Arizona*, it construed significant differences between the cases that compelled an opposite result.

Junctive relief from increased railroad rates, Georgia was allowed to invoke the original jurisdiction of the Supreme Court as parens patriae, representing the interests of its citizens. *Id.* at 447-51.

84. 101 S. Ct. at 2125. See Motion to Dismiss and Brief in Support at Motion to Dismiss at 16-19, Maryland v. Louisiana, 101 S. Ct. 2114 (1981); Brief in Opposition to Motion for Leave to File Complaint at 9-10, Maryland v. Louisiana, 101 S. Ct. 2114 (1981).


86. *Id.* at 796.

87. *Id.* at 796-97 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 93-94 (1972)).

88. In *Arizona*, three Arizona utilities sought a declaratory judgment in the District Court for Santa Fe County, New Mexico. Because one of the three utility companies was a political subdivision, the *Arizona* Court concluded that Arizona's interests were adequately represented in the state court proceeding. 425 U.S. at 796.

89. See note 75 *supra*.

90. 101 S. Ct. at 2125. See note 75 *supra*.

91. 101 S. Ct. at 2125-28.

92. *Id.* See note 59 *supra*.

93. The *Maryland* Court, although distinguishing its holding from *Arizona*, implicitly sustained the *Arizona* discretionary limitation on exclusive original jurisdiction by engaging in a discretionary analysis. Despite the factual similarities between *Maryland* and *Arizona*, the Supreme Court focused on insubstantial distinctions to justify a contrary result. In so distinguishing, the *Maryland* Court's jurisdictional determination appears arbitrary. See notes 126-38 and accompanying text *infra*.

94. 101 S. Ct. at 2127.

95. *Id.*
In discerning these differences, the Maryland Court first recognized that in Arizona the lower state court action directly represented plaintiff, the State of Arizona.96 Conversely, in Maryland, the Court noted that the plaintiff states were not directly represented in the Louisiana state court proceedings.97 In addition, the Court noted that the State of Arizona had not suffered any injury because the tax had not yet been collected.98 In Maryland, however, the pipeline companies were required to pay the tax and seek reimbursement from the consumers.99 Finally, the Maryland Court distinguished the Arizona decision because Maryland involved states’ use of natural gas extracted from the federally controlled Outer Continental Shelf, thus implicating “unique concerns of federalism” not present in Arizona.100 The Supreme Court concluded that, despite the factual similarities between the cases, the exercise of exclusive original jurisdiction in Maryland was fully in accord with the purposes of its exclusive original jurisdiction.101

CRITICISM

The Standing Determination

The standing determination in Maryland reflects the Supreme Court’s continued tolerance of inconsistent standing principles. Although the standing doctrine has not posed definitional problems for the Court, the Court has not settled on an appropriate application of the causation element of standing.102 In determining whether the injury was caused by the First-Use Tax, the Maryland Court relied on the Simon “fairly traceable” test and ignored the more recent Duke Power “but for” test.103 Although the Court’s

96. Id. See note 88 supra.
97. Despite that the plaintiff states were invited to intervene, the Maryland Court stressed that the Louisiana state court was an inappropriate forum, primarily because no injunctive relief prior to a determination on the merits was possible under Louisiana law. 101 S. Ct. at 2127 n.19. See LA. REV. STAT. ANN §§ 47:1575-1576 (West 1970 & Supp. 198).
98. New Mexico’s procedure did not limit the utility companies from seeking a refund of taxes already paid, but permitted the companies to refuse to pay the tax pending a declaration of the statute’s constitutionality. 101 S. Ct. at 2127 (citing Arizona v. New Mexico, 425 U.S. 794, 798 (1976) (Stevens, J., concurring)).
100. 101 S. Ct. at 2127. Few issues of contemporary legal and political policies elicit the intensity of concern as the development and production of offshore natural resources. See Breeden, Federalism and the Development of Outer Continental Shelf Mineral Resources, 28 STAN. L. REV. 1107 (1976). Although the Louisiana tax was levied upon gas extracted from the federally controlled Outer Continental Shelf, this issue should not be dispositive of the jurisdictional ruling. See note 138 and accompanying text infra.
102. See notes 29-42 and accompanying text supra.
103. 101 S. Ct. at 2123. Although the Maryland Court cited the Duke Power case, the opinion did not mention the “but for” test, nor did the opinion specify any reasons for not utilizing this most recent causation analysis. See notes 39-42 and accompanying text supra.
use of the "fairly traceable" analysis was not necessarily improper, the absence of a rationale for its use and the absence of an explanation of the status of the "but for" test is misleading. The Supreme Court has explicitly acknowledged that the causation element is the most difficult standing inquiry, yet the Court added to the already existing legal complexities when it inconsistently applied the causation analysis in Maryland. In order to establish a solid standing causation analysis, the Court should avoid vacillating between the various standing causation tests and delineate a specific standing causation analysis.

Assuming that the Court's reliance upon the Simon "fairly traceable" test was correct, the Court inadequately applied this test to the Maryland factual situation. According to the Maryland Court, the plaintiff states "clearly" had proprietary and parens patriae standing because, as consumers, both plaintiff states and their citizens suffered economic injury due to the First-Use Tax. The Court held that the plaintiff states' and the citizen consumers' economic injuries were fairly traceable to the challenged action of Louisiana, and were not injuries that resulted from the independent action of some third party not before the court. A more exacting application of the "fairly traceable" causation analysis, however, demonstrates that standing does not "clearly" exist as readily as the Maryland Court advanced.

In Maryland, the injury, arguably, resulted from the independent action of some third party not before the court. Specifically, the plaintiff states' standing to sue appears to be remote because the pipeline companies, with the approval of the Federal Energy Regulatory Commission, passed the

104. The significance of the Maryland Court's reliance on the "fairly traceable" test and omission of the "but for" test is uncertain. This omission may imply that the Court has either abandoned the test or confined it to suits that challenge specific statutes rather than to suits that are based on general constitutional claims. The omission of the "but for" test can be compared with the benign neglect of the zone of interest test. See note 35 supra. 105. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1978). See note 29 supra.


107. The Maryland opinion merely quoted the Simon "fairly traceable" test and made a cursory summation that standing "clearly" existed. 101 S. Ct. at 2123-24.

108. Id. See notes 36-38 and accompanying text supra.

109. Under the "fairly traceable" test, actual injury may not be linked to defendant's challenged action if the injury arises from an independent action of a third party. This third party factor must be considered if the "fairly traceable" test is to be applied accurately. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).
burden of the tax on to the consumers.\textsuperscript{110} Therefore, the pipeline companies and the Federal Energy Regulatory Commission, not the State of Louisiana, were responsible for the economic injury to plaintiff states and their citizens. Even the Maryland Court admitted that the consumers of natural gas were only indirectly responsible to Louisiana for payment of the taxes.\textsuperscript{111} Consequently, there is an indirect causal connection between the consumers of natural gas and Louisiana's imposition of the First-Use Tax.

When the injury is indirect, the analysis of the causation requirement becomes more difficult. Although the indirectness of the harm does not preclude the Court from granting standing to sue, the standing analysis must explicitly delineate the causal link.\textsuperscript{112} The Maryland opinion did not explicitly articulate the causal connection, but instead summarily analyzed the causation component.\textsuperscript{113} Thus, the Maryland Court failed to establish an adequate basis for its standing decision, thereby fostering judicial unpredictability due to a lack of guidance for future application of the standing causation component.\textsuperscript{114}

\textit{Original Jurisdiction Determination}

Although the Maryland Court reached the proper conclusion with regard to its grant of original jurisdiction, its application of discretion to review exclusive original actions was unwarranted. As a result, the decision affects the Supreme Court's role as an impartial tribunal.\textsuperscript{115} Developing a policy of judicial discretion when statutory authority appears to set forth judicial obligation\textsuperscript{116} indicates that the Maryland Court is divesting its judicial responsibility.\textsuperscript{117}

The fundamental purpose of exclusive original Supreme Court jurisdiction is to ensure that actions between states be brought only before the nation's

\textsuperscript{110} See note 64 and accompanying text supra.
\textsuperscript{111} The Maryland opinion initially observed that consumers of natural gas incurred serious injury as a direct result of the First-Use Tax. Inconsistent with the direct harm analysis, the Court noted that the consumers were indirectly responsible to Louisiana for payment of the taxes. The opinion's contradiction of direct harm and indirect responsibility evinces the need for an explicit standing causation analysis in order to avoid confusion. See 101 S. Ct. at 2125.
\textsuperscript{112} Warth v. Seldin, 422 U.S. 490, 504-05 (1975).
\textsuperscript{113} 101 S. Ct. at 2123-24. See note 107 and accompanying text supra.
\textsuperscript{114} The sacrifice of clarity and predictability in standing analyses is more than a sacrifice of intellectual tidiness. It is a sacrifice of judicial resources. Varat, supra note 6, at 319-20. Because the law of standing is "amorphous and confused," the ease of manipulation may produce unintended results. Tushnet, \textit{The Sociology of Article III: A Response to Professor Brilmayer}, 93 HARV. L. REV. 1698, 1705 (1980).
\textsuperscript{115} The Supreme Court is viewed as that "independent judicial branch, neutral as between government and individual, class and class, party and party." R. Jackson, \textit{The Supreme Court in the American System of Government} 2 (1955).
\textsuperscript{116} See notes 44-52 and accompanying text supra.
\textsuperscript{117} Justice Stewart stipulated that the Supreme Court has a responsibility to exercise exclusive original jurisdiction when the suit is properly invoked. California v. Texas, 437 U.S. 601, 606 (1978) (concurring opinion).
highest tribunal. In a suit between states, if the issues framed by the pleadings constitute a justiciable controversy within the meaning of the constitutional limitation, the Supreme Court has a responsibility to review the case within its exclusive original jurisdiction. Because the justiciability requirement adequately protects the Court from the exercise of unwarranted exclusive original jurisdiction, it was unnecessary for the Maryland Court to undertake a discretionary analysis. The Maryland Court, however, exercised discretion to determine whether to review an exclusive original action when judicial obligation was mandated.

Resorting to a policy of discretion to review exclusive original cases suggests that the Court was willing to divest its exclusive original jurisdiction. The discretionary analysis focuses on the availability of alternative forums in which to adjudicate the controversy. In Maryland, the only alternative forum for deciding the issues was in a state court of defendant Louisiana. Adjudication of the claim in a Louisiana court, however, contravenes the rationale for Supreme Court exclusive original jurisdiction involving suits between states. The Supreme Court has recognized that a state should not be compelled to resort to the tribunals of other states because parochial factors might result in the appearance, if not the reality, of preferential treatment. This fundamental policy mandates that the Supreme Court exercise exclusive original jurisdiction without analyzing the availability of an alternative forum.

Discretionary limitations on exclusive original jurisdiction are unwarranted. This discretionary policy is particularly disturbing when the discretion appears arbitrary. In light of Arizona v. New Mexico, the Maryland Court's jurisdictional determination appears incongruous. Although Maryland and Arizona involved nearly identical factual situations, the Supreme Court reached contrary conclusions regarding the exercise of ex-

118. See note 14 supra.
120. Justice Stevens expressed that the discretionary limitations of nonexclusive original jurisdiction do not apply to actions under the Supreme Court's exclusive original jurisdiction. Arizona v. New Mexico, 425 U.S. 794, 799 (1976) (Stevens, J., concurring).
123. See note 56 and accompanying text supra. See generally Original Jurisdiction, supra note 14, at 694-96 (discussion of the discretionary analysis in original jurisdiction cases).
125. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475-76 (1793).
exclusive original jurisdiction. 127 The Maryland Court justified the grant of exclusive original jurisdiction by distinguishing the Arizona holding. 128 In so distinguishing, the Maryland Court implicitly adopted a policy of discretionary analysis without a basis in precedent.

In Maryland, the majority distinguished Arizona on three premises. The first distinction concerned the availability of alternative state court forums. The Maryland Court contended that the alternative Louisiana state court actions, unlike the alternative state proceeding in Arizona, 129 did not directly represent the plaintiff states. 130 From this distinction, the Maryland Court concluded that the state proceedings would be inappropriate, and it must therefore invoke exclusive original jurisdiction. 131 The Arizona opinion, however, stressed that the relevant inquiry was whether the issue could be litigated in an alternative forum, not whether the litigants were directly represented. 132 Consequently, the alternative forum distinction was applied inconsistently.

The Maryland Court's second distinction was that, unlike the situation presently before the Court, Arizona had not suffered any injury at the time it moved to invoke exclusive original jurisdiction because the New Mexico electrical energy tax had not yet been collected. 133 In Maryland, the plaintiff states suffered injury at the time they moved to invoke exclusive original jurisdiction because the Louisiana tax on natural gas had already been paid. 134 This distinction, however, related to the justiciability limitation and was not properly part of the jurisdictional analysis. 135 Because the justiciability limitation adequately addressed the distinction involving injury-in-fact, the Maryland Court's reliance on a discretionary jurisdictional limitation was misplaced.

Finally, the Maryland Court distinguished Arizona by acknowledging that "unique concerns of federalism" formed the basis for adjudicating the Maryland controversy within Supreme Court exclusive original jurisdiction. 136 The Supreme Court recognized that the First-Use Tax burdened federal Outer Continental Shelf natural gas and conflicted with the federal regulation of

127. See notes 85-91 and accompanying text supra.
129. See note 88 supra.
130. 101 S. Ct. at 2127. See note 96 and accompanying text supra.
132. See note 87 supra.
133. 101 S. Ct. at 2127. See note 98 and accompanying text supra.
135. Specifically, the question of whether injury has been suffered relates to the standing issue. See notes 1-5 and accompanying text supra. Within the standing analysis is an element of discretion; this discretionary concern provides the Court with judicial self-governance. Warth v. Seldin, 422 U.S. 490, 498-502 (1975). See notes 15-18 and accompanying text supra.
136. 101 S. Ct. at 2127.
the Outer Continental Shelf. Although this is an important federalism concern, this distinction departs from a fundamental policy underlying exclusive original jurisdiction. Exclusive original jurisdiction depends entirely upon the character of the parties, not upon the subject matter of the controversy. The majority's misconceived federalism distinction illustrates the unprincipled application of a discretionary limitation applied to exclusive original Supreme Court jurisdiction.

CONCLUSION

The Supreme Court's decision in Maryland v. Louisiana, granting a state standing to invoke exclusive original jurisdiction, failed to promulgate sound judicial policies. The Maryland Court inadequately applied the standing causation inquiry to the factual situation. As a result, the decision complicates the already confused status of the causation requirement. Moreover, the Maryland decision demonstrates the Court's continued tolerance of inconsistent standing principles.

Additionally, because the Court exercised discretion in deciding to hear an exclusive original action, the decision reflects the Court's willingness to divest its authority over exclusive original jurisdiction. Embracing this discretionary policy may lead to arbitrary application of exclusive original jurisdiction in future proceedings. Unfortunately, the Maryland decision's inadequate standing analysis coupled with its unwarranted discretionary analysis of an exclusive original action may impair the Supreme Court's appearance of evenhandedness.

Nancy E. Schiavone

137. Id. at 2128. The First-Use Tax burdens federal Outer Continental Shelf natural gas, and conflicts with the broad federal regulatory scheme set forth in the Submerged Lands Act. 43 U.S.C. § 1333(a)(2) (1976) (state taxation laws shall not apply to the Outer Continental Shelf).

138. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821). The Court stated: "If [two states are parties], it is entirely unimportant what may be the subject of the controversy. Be it what it may, these parties have a constitutional right to come into [the Supreme Court]." Id. at 378.