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Standing and the Privatization of Public Law

Cass R. Sunstein

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It is ironic that during the early period of administrative law, doctrines controlling regulatory agencies were built directly on common-law principles that administrative regulation was self-consciously designed to displace.[1] Not until the 1960s did courts, in concert with Congress, begin to develop an independent public law—a set of principles that owed their origin not only to traditional private law, but also to the ideas that gave rise to administrative regulation in the first place.[2] At their best, the emerging principles revealed an understanding of the functions and malfunctions of regulation, the potential dangers of inaction and deregulation as well as overzealous intervention, the risks and possibilities of judicial control, the appropriate roles of politics and technical sophistication in the administrative process, and the extent to which regulatory systems repudiated the premises of market ordering that had been built into common-law principles.[3]

The last decade has seen preliminary signs of a countermovement, with courts reorienting administrative law in the direction of ideas that last appeared in the initial encounters between the judiciary and the administrative state.[4] Some of those signs have been especially con-

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1. Examples include principles of standing, scope of review, ripeness, and reviewability, as well as interpretation of the due process clause and of article III. See J. Vining, Legal Identity (1978) (discussing standing); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975) (discussing standing, due process, and reviewability); see also infra notes 8–25 and accompanying text (tracing development of standing).

2. Some of these developments are treated in J. Vining, supra note 1; Stewart, supra note 1; Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Sup. Ct. Rev. 177.

3. See sources cited supra note 2.

4. See infra notes 88–136 and accompanying text; see also Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding agency inaction presumptively unreviewable); cf. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 295–313 (1988) (criticizing asymmetry between rights of defendants to seek deterrent remedies and judicial skepticism toward deterrent suits brought by plaintiffs). The Court has also reinvigorated separation of powers obstacles to legislative experimentation with the administrative process, though the recent decisions call into play distinct problems of congressional usurpation of executive power. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating Gramm-Rudman statute); INS v. Chadha, 462 U.S. 919 (1983) (invoking separation of powers objections to legislative veto); cf. Morrison v. Olson, 108 S. Ct. 2597, 2620–22 (1988) (upholding independent counsel act, in part because

spicuous in the Supreme Court's standing decisions.[5] Recent and still quite tentative innovations in the law of standing have started to push legal doctrine in the direction of what we may call a private-law model of standing. Under this model, a nineteenth century private right is a predicate for judicial intervention; as a result, courts may not redress the systemic or probabilistic harms that Congress intended regulatory schemes to prevent.

Not fully developed until the New Deal, the private-law model played a large role in legal doctrine between the late 1930s and the early 1960s. The principal problem with that model—widely recognized in the 1960s and 1970s—was that it distinguished sharply between the legal rights of regulated entities on the one hand and those of regulatory beneficiaries on the other. The interests of regulated industries could be protected through the courts, whereas the interests of regulatory beneficiaries were to be vindicated through politics or not at all.

The private-law model was correctly repudiated in a series of developments culminating in the 1970s. While the model is often justified by reference to the case or controversy requirement of article III, there is in fact no basis in that article or in any other provision of the Constitution for the view that the private-law model is constitutional in status. For purposes of standing, the principal question should be whether Congress has created a cause of action, through the Administrative Procedure Act[6] (APA) or otherwise, not whether the plaintiff is able to invoke a nineteenth century private right.[7] If the law were reoriented in this way, existing doctrine would be greatly simplified; and a focus on congressional enactments would reveal that the Court's current approach has resulted in some decisions denying standing when it

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Congress did not usurp executive prerogatives). Some of these ideas retain vitality. See Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 496–502 (1987) (defending the result in *Bowsher* and the continued use of separation of powers principles, understood in functional terms, to limit congressional initiatives).

5. For various evaluations, see Fallon, Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of *Lyons*, 59 N.Y.U. L. Rev. I (1984); Nichol, Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint, 69 Ky. L.J. 185 (1981); Nichol, Abusing Standing: A Comment on *Allen v. Wright*, 133 U. Pa. L. Rev. 635 (1985) [hereinafter Abusing Standing]; Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881, 897–99 (1983).

6. 5 U.S.C. § 702 (1982).

7. There is a difference between the principles governing standing in the areas of administrative and constitutional law—mostly because the APA creates distinctive standing doctrines for review of agency behavior and partly because efforts to require administrative agencies to comply with the governing statute raise considerations different from those raised by efforts to require Congress or the executive branch to comply with the Constitution. See infra note 197. For the most part, this discussion focuses on principles of standing in administrative law, although constitutional principles are frequently introduced.

ought to have been granted, and others granting standing when it ought to have been denied.

This Article is organized in three parts. Part I traces the evolution of modern standing doctrine, outlining its original roots in private law, the creation of a novel set of standing limitations in response to the New Deal, and the development of an independent public law of standing in the 1960s and 1970s. Part II discusses the recent revival of private law understandings and the principles of separation of powers that appear to underlie that revival. Part III criticizes the recent developments, describes the appropriate contours of standing requirements in administrative law cases, and concludes with a discussion of the relationship between article III and standing doctrine.

I. PRIVATE LAW, PUBLIC LAW, AND THE EVOLUTION OF STANDING DOCTRINE

For most of the nation's history, there was no distinctive body of standing doctrine. Whether there was standing depended on whether positive law created a cause of action.[8] In the modern period, however, judicial review of administrative action has been an outgrowth of a simple framework.[9] If administrators intruded on interests protected at common law, judicial review was available to test the question whether there was statutory authorization for what would otherwise be a common-law wrong. If no common-law right were at stake, judicial protection was unavailable. The most distinctive feature of this framework was the use of common-law understandings to define the judicial role in public-law cases.

The basic framework was built on an analogy and an identifiable underlying theory. The analogy was to private law, in which the issues of standing, cause of action, and the merits are closely intertwined. In an action in which *A* causes an injury to *B*, the question whether *B* has a cause of action overlaps a great deal with the question whether *B* has standing and whether *B* is correct on the merits. For all three issues, the question is whether *A* has violated a duty it owes to *B*. *C*, an affected third party, generally may not bring suit when *A* injures *B*—even if *C* is

8. See Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816, 839 (1969); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033, 1044 (1968); Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1395–96 (1988).

9. The discussion here draws on J. Vining, supra note 1; Stewart, supra note 1. The tradition of prerogative writs—most notably mandamus—provided a different framework, one that allowed a variety of actions when no common-law right was at stake. See infra note 19. The existence of the writ tradition, especially at the origin of the republic, makes it extremely awkward to suggest that modern notions of injury in fact, see infra notes 52–55 and accompanying text, have constitutional status. See Berger, supra note 8; Jaffe, supra note 8; Winter, supra note 8.

materially affected.[10] At private law, there is no need for a distinctive set of principles to govern standing.

In the early period of administrative regulation, similar ideas were at work in public law.[11] A prospective litigant could not bring suit if the government had regulated, or failed to regulate, some entity, even if the interests of the prospective litigant had been substantially and materially affected. At both private and public law, the question was not whether the litigant was harmed or whether the governmental or nongovernmental defendant acted unlawfully, but whether the government breached some duty owed to the litigant. If the litigant had no common-law interest at stake—if it was not the "object" of the regulation[12]—courts saw no legal duty suitable for legal redress. Illegality in the abstract was not an appropriate concern of the courts. Since the line between legal injury and injury in the abstract was defined by reference to the common law, the interests of statutory beneficiaries were invisible as far as the courts were concerned.

The underlying theory was based on notions of social contract. When citizens entered into civil society from the state of nature, they did so with certain rights.[13] The state could not interfere with those rights except on a showing of collective authorization for the interference—legislative action combined with proper executive implementation. The relevant category of interests consisted of the rights of private property and liberty that had existed in the state of nature. If no such interest was at stake, there was simply no predicate for legal intervention. Common-law interests, or traditional private rights, were thus sharply distinguished from statutory benefits for purposes of standing.

It should be unsurprising that this framework operated at the same time as—indeed was a part of—the set of ideas associated with the *Lochner* era.[14] When the Supreme Court invalidated social and economic regulation associated with the progressive and New Deal periods, it did so by invoking common-law categories in order to test the

10. An exception is the third-party beneficiary doctrine in contract law. See E. Farnsworth, Contracts § 10.5 (1982).

11. Inroads on the framework began in The Chicago Junction Case, 264 U.S. 258 (1924) (allowing standing for competing carriers to challenge acquisition approval by ICC), though the private-law understanding played a large role until the 1960s. See infra notes 26–67 and accompanying text.

12. The understanding of who is an object of regulation turns on an antecedent baseline—the nineteenth century common law—establishing the ordinary or natural functions of government. Under an alternative baseline, however, any beneficiary left unprotected by government might be treated as an object of the inadequate protection. See Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873 (1987) (discussing role of baselines in standing and other areas of public law); infra notes 61–63 and accompanying text. For a defense of the old view, see Scalia, supra note 5, at 887 & n.28.

13. See Stewart, supra note 1, at 1672–73.

14. So-called after Lochner v. New York, 198 U.S. 45 (1905) (state law regulating working hours unconstitutional).

validity of public law.[15] Intrusions on common-law interests, or departures from common-law principles, were thought to require special justification; by contrast, adherence to the common law was seen as unobjectionable neutrality. The use of common-law notions, sharply distinguishing between statutory benefits and nineteenth century private rights, was the central mark of the jurisprudence of the *Lochner* period.[16]

In the context of standing, this view had two principal implications. First, regulated entities—industries and others who were the object of regulation—had access to court to challenge agency action as unlawfully infringing on their common-law rights. In such cases, there was no problem of standing. Regulated entities were usually in the position of actual or prospective defendants, and there was little doubt that defendants had standing to resist coercive governmental action—a view with constitutional foundations.[17] Second, the interests of competitors and regulatory beneficiaries[18] were not legally cognizable.[19] Those interests, treated as privileges or legal gratuities, were to be vindicated through the political process or not at all. We may describe the resulting framework—an ambiguous amalgam of federal common law, statutory construction, and constitutional law—as a private-law model of public law.

Another, quite different idea was at work here as well. Many judges who were hospitable toward administrative regulation sought to develop devices to minimize legal or judicial intrusions into the regula-

15. See generally L. Tribe, American Constitutional Law § 1-3, at 5, § 1-4, at 76–77 (2d ed. 1988) (describing the *Lochner*-era "belief that property and its contractually realizable advantages were attributable to some natural order to things implicit in a revealed structure of common-law rights"); Sunstein, supra note 12, at 879 (common law formed "baseline from which to measure deviations from neutrality, or self-interested 'deals' ").

16. See Sunstein, supra note 12, at 874.

17. See Yakus v. United States, 321 U.S. 414 (1944).

18. Competitors and beneficiaries were considered to be "bystanders," an idea that depended on an assortment of unarticulated substantive conclusions. But the characterization of a claim as that of a bystander operates as a conclusion or an epithet rather than as an analytical device. There is no prepolitical or prelegal way to decide who is a bystander; the term is a function of law, not of anything in the world that is independent of the legal system. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (indicating that statute may create an injury where none existed before).

19. See, e.g., Alabama Power Co. v. Ickes, 302 U.S. 464, 479–80 (1938) (competitors). An exception here can be found in the law of mandamus. As a historical matter, mandamus remedies quite generally permitted suits to compel government action. See L. Jaffe, Judicial Control of Administrative Action 468–69 (1965). But the Supreme Court ruled in an early case that federal courts do not have general authority to issue writs of mandamus, McIntire v. Wood, 11 U.S. (7 Cranch) 503, 504 (1813), and in any case, mandamus could not control discretionary decisions. See Wilbur v. United States ex rel. Kudrie, 281 U.S. 206, 218 (1930); Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir. 1970). Note, however, that such rulings were interpretations of positive law, and therefore of congressional intent, not of article III.

tory process.[20] This development was a conspicuous part of the New Deal attack on legalism and the judiciary. That attack had substantive and institutional dimensions. The substantive dimension consisted of a belief that the nineteenth century catalogue of common-law rights was hardly natural; instead, it was a controversial regulatory system. In the view of the New Deal reformers, the common law was inadequate as such because it was excessively protective of property rights, insufficiently protective of the disadvantaged, and ill-adapted to economic welfare in an integrated national economy.[21] The institutional dimension consisted of an attack on the judicial system in favor of regulatory agencies, which were to be democratically controlled, technically expert, self-starting, and free of the traditional constraints of adjudication. Taken in concert, these ideas provided much of the impetus for administrative regulation.[22]

Against this background, courts favorably disposed toward the New Deal reformation developed doctrines of standing, ripeness, and reviewability largely to insulate agency decisions from judicial intervention.[23] Such doctrines were used enthusiastically by judges associated with the progressive movement and the New Deal, most prominently Justices Brandeis and Frankfurter, who reflected the prevailing belief that traditional conceptions of the rule of law were incompatible with administrative regulation.[24] In this view, the interests supporting the

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20. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154–55 (1951) (Frankfurter, J., concurring) (upholding agency action by denying standing in part because challenged action was not final); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341–45 (1936) (Brandeis, J., concurring) (upholding agency's dealings with corporation by denying standing to corporate stockholders); cf. Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922) (dismissing prospective challenge to constitutional amendment and its enforcement by attorney general, by denying standing to plaintiff); Wilson v. Shaw, 204 U.S. 24, 30–31 (1907) (upholding agency action, in part because injunctive relief is inappropriate remedy to protect citizen against wrongful government act). Notably, in *McGrath*, *Ashwander*, and other cases, a majority of the Supreme Court rejected the Brandeis-Frankfurter position and allowed standing in cases that plausibly amounted to taxpayer suits. These and other aspects of the development of standing limitations are illuminatingly discussed in Winter, supra note 8.

One of the most influential achievements of A. Bickel, The Least Dangerous Branch (1962), was to generalize the Brandeis-Frankfurter position on standing, to remove it from its context, and to give it a life entirely independent of New Deal concerns. Id. at 113–27.

21. See Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 423, 437–40 (1987). In this respect, there is an alliance among Shelley v. Kraemer, 334 U.S. 1 (1948), Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and West Coast Hotel v. Parrish, 300 U.S. 379 (1937)—all of which recognized that the common law is a regulatory system and hardly prepolitical.

22. See Sunstein, supra note 21, at 424–25, 440–46.

23. See cases cited supra note 20 (cases involving standing); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943) (reviewability); FCC v. CBS, 311 U.S. 132 (1940) (reviewability); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (reviewability and ripeness).

24. See J. Landis, The Administrative Process 30–46 (1938) (common law wholly

rise of regulation—technocratic expertise, flexibility, and political accountability—argued strongly against judicial interference.[25] This view has enjoyed a kind of renaissance in recent years, though from judges with a quite different political orientation.

The private-law model of standing thus reflected a confluence of two sets of ideas, both closely associated with the *Lochner* era and the New Deal attack on the jurisprudence of *Lochner*. The first, prominent in *Lochner* itself, was that the judiciary existed largely to protect common-law interests from governmental incursions. The common law formed the baseline from which courts distinguished between government inaction and action or neutrality and partisanship. For this reason, intrusions on common-law rights, and not on other sorts of interests, served to trigger judicial protection. The second idea—a reaction against *Lochner* on the part of those hospitable to the administrative state—was that doctrines of justiciability, including standing, should be designed to minimize the occasions for judicial intervention into the regnlatory process.

The advocates of judicial control, hostile to administrative regulation, saw no need for judicial intervention in order to safeguard the interest in regulatory protection. And in light of the recent history, those favorable to regulation were highly suspicious of the courts. The idea that courts might intervene to protect regulatory beneficiaries from a recalcitrant agency was entirely foreign to their experience. As a result, there was mutual agreement on the private-law model from those who believed in the need for a continuing role for the legal system in supervising administrative regulation, and those who thought that adjudicative controls were to a large degree anachronistic. The consequence of the convergence of these ideas was that those without a common-law interest were unable to seek judicial relief. At the time, it was unclear whether this framework was rooted in federal common law or statutory construction—or instead whether it amounted to a largely revisionist reading of article III.[26]

In two basic steps, courts abandoned this model. The first was the conclusion that interests protected by statute were also judicially cognizable.[27] If the interest of a prospective litigant in freedom from compe-

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inadequate as regulatory scheme); Sunstein, supra note 21, at 440–42 (describing New Deal attack on common law and on traditional notions of separation of powers); Winter, supra note 8, at 1455–57 (discussing use of standing by Brandeis and Frankfurter to protect legislative sphere); supra note 20 (same).

25. See J. Landis, supra note 24, at 10–46.

26. See Winter, supra note 8, at 1394–96 (original conception of article III did not limit standing to those with common-law injuries); infra notes 205–32 and accompanying text.

27. See The Chicago Junction Case, 264 U.S. 258, 262–69 (1924) (allowing standing based on provisions of Transportation Act and Judicial Code). It may have been thought here that competition among the objects of regulation, including monitoring of compliance with regulation, would ultimately serve to protect the public as a whole.

tition was a factor made relevant by the governing statute—if the agency was required by law to take that factor into account in deciding the merits—the litigant would have access to court in order to vindicate its interest.[28] In such a case, the litigant would not have to show that a common-law interest was at stake.

The second step was the recognition of "surrogate standing," by which Congress could allow certain plaintiffs to bring suit to vindicate the claims of the public at large even though they did not themselves have a statutorily protected interest. This principle applied when an organic statute granted standing to anyone "who is aggrieved or whose interests are adversely affected."[29] Thus, for example, competitors of a radio station would have standing to protect the interests of listeners under the FCC statute.[30]

Under this framework, it was not always necessary for Congress expressly to confer a right to bring suit on the plaintiff. The existence of an interest protected by statute was sufficient. Courts treated the congressional desire to protect a statutory interest as an implicit grant of a right to bring suit. The requirements for an implicit cause of action were thus quite lenient.[31]

Moreover, the existence of an interest protected at common law was sufficient to confer standing, even if there was no particular evidence of congressional intent to allow the action to go forward. This conclusion reflected a background understanding, not traceable to statute, that the objects of regulation should ordinarily be permitted to raise the question whether there was legal authorization for intrusion on common-law interests. This understanding, part of the private-law model and emphasized in the New Deal period, was probably a product of a constitutional concern. If those seen as the objects of regulation were prohibited from seeking judicial review to protect liberty or prop-

28. Id.

29. E.g., Communications Act of 1934, 47 U.S.C. § 402(b)(6) (1982 & Supp. III 1985).

30. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940).

31. See infra note 37 (discussing legislative history of the APA). Modern law reflects a striking contrast here. See, e.g., Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 758 n.16 (1987) (explicitly distinguishing existence of standing under APA from existence of implied cause of action); California v. Sierra Club, 451 U.S. 287 (1981) (no implied cause of action under section 10 of Rivers and Harbors Appropriation Act of 1899); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (no implied cause of action for damages under section 215 of Investment Advisors Act of 1940). It may be possible to explain this difference in standards by reference to the nature of the remedies being sought. Suits brought under the APA attempt to nullify administrative action; implied causes of action are frequently damage actions. This explanation fits well with *Transamerica*, in which the Court implied an equitable remedy for rescission, but refused to permit a damage action to go forward. *Transamerica*, 444 U.S. at 18–24. On some of the difficulties with implied causes of action for damages, see Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1289–1315 (1982).

erty interests against unauthorized executive action, a serious constitutional question would be raised under both the due process clause and article III.[32]

In contrast, no similar question was thought to be raised by a measure preventing statutory beneficiaries from seeking judicial relief. Their interests were legal gratuities.[33] In the modern period, however, serious constitutional problems might also be raised by congressional efforts to deny standing to those seeking governmental assistance in preventing illegality by third parties.[34]

Despite these complications, there was in this period a close association between the existence of an implied cause of action and the existence of standing. The question of standing turned on whether Congress had explicitly or implicitly granted the plaintiff a right to bring suit, at least if the notion of implicit grant is understood with the foregoing qualifications.[35] That question was in turn informed largely by background understandings about the circumstances in which judicial relief should be available.

In 1946, Congress codified the various bases for standing outlined above in section 702 of the APA: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[36] The reference to legal wrong was meant to include

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32. See Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 954–56 (1988) (discussing article III); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953) (discussing due process clause and article III).

33. See Hart, supra note 32, at 1384–85.

34. See infra note 222 and accompanying text. In the modern period, the distinction between the objects and beneficiaries of regulation has become problematic and largely anachronistic. See infra notes 62–63 and accompanying text. In this respect, the constitutional questions raised by a denial of judicial review and a denial of standing are quite similar. See Fallon, supra note 32, at 963–67; cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430–31 (1982) (discussing "new property" cases putting statutory benefits on the same footing as common-law interests). Consider also the idea that under modern law, a "separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review." Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986).

A central flaw in Hart, supra note 32, is its dependence on an anachronistic distinction between coercive and noncoercive governmental action. Id. at 1383. Hart suggests that whether there is a constitutional right to judicial review depends on whether or not the government is acting coercively, and he defines coercion by reference to common-law categories. Id. at 1387–1401. But in the post-New Deal era, such ideas cannot be sustained. Indeed, reliance on pre-New Deal understandings of legal rights pervades Hart's dialogue.

35. See Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 Yale L.J. 425, 451–55 (1974); Currie, Misunderstanding Standing, 1981 Sup. Ct. Rev. 41, 42–44.

36. 5 U.S.C. § 702 (1982). It is incorrect to interpret the APA as incorporating an

harm to common-law, statutory, and constitutional interests; in the setting of administrative law, the first two were by far the most important. The "adversely affected or aggrieved" language was designed to allow for surrogate standing if the organic statute provided such standing.[37] There was no clear indication, in the text or history of the APA, whether and when the beneficiaries of regulation might have standing to vindicate legal requirements[38]—though they too could easily be thought to suffer from a legal injury in the form of harm to their statutorily protected interests.

In the 1960s, courts interpreted the statutorily protected interest aspect of the legal-wrong test in order to reach precisely this conclu-

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injury-in-fact standard like that subsequently adopted in Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152–53 (1970). The text and history of the APA suggest that it was intended instead to incorporate the framework described above, supra text accompanying notes 27–35. For this reason, the treatment in Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450, 452–53 (1970), is off the mark.

37. The legislative history of the APA is not clear, but it tends to confirm this reading.

> The phrase "legal wrong" means such a wrong as is specified in section 10(e). It means that something more than mere adverse personal effect must be shown in order to prevail—that is, that the adverse effect must be an illegal effect. Almost any governmental action may adversely affect somebody—as where rates or prices are fixed—but a complainant, in order to prevail, must show that the action is contrary to law in either substance or procedure.

Senate Comm. on the Judiciary, Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 276 (1946) [hereinafter APA Leg. History]. It is notable in this regard that the drafters of the APA expressly conflate the issue of standing with the merits. Id. at 212; see also id. at 368–69 (agencies "may not willfully act or refuse to act. . . . They may not take affirmative action or negative action without the factual basis required by the laws under which they are proceeding. . . . Legal wrong means action or inaction in violation of the law or the facts."); id. at 308–11 (noting that the "adjective 'legal' is a limiting adjective").

Consider also the analysis in the highly influential report of the Attorney General's Committee on Administrative Procedure:

> The standing may be conferred by statute; but it frequently is not so conferred in specific terms. The question is then whether the person has otherwise a private right not to have the administrative body act in the allegedly unlawful manner. . . . Whether a particular person shall have the right to contest administrative action . . . is a question of law and policy dependent on a number of variable factors. Consideration, though not conclusive, has been given, for example, to the nature and extent of the person's interest, and the character of the administrative act, whether it commands conduct by the person, permits conduct by his rival, withholds a service or benefit which the Government is free to withhold, and so forth. . . . Except in special cases, when special considerations require a contrary holding, *judicial review within the usual limits is appropriate whether the applicant seeks protection of a constitutional right or of a statutory or common-law right, privilege, or bounty.*

Att'y Gen. Comm. on Admin. Procedure, Final Report: Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 84 (1941) [hereinafter Att'y Gen. Rep.] (emphasis added).

38. See APA Leg. History, supra note 37 (evidence of legislative intent to provide standing to beneficiaries); see also infra notes 45 & 50 (same).

sion, allowing regulatory beneficiaries to vindicate claims of administrative illegality. Thus, for example, viewers of television, victims of housing discrimination, and users of the environment were able to bring suit because their interests were statutorily protected.[39] This conclusion was a natural and unsurprising interpretation of the legal-wrong test, since beneficiaries, at least as clearly as competitors, were intended to be protected by regulatory statutes.[40] Here too there was a connection between the question of standing and the existence of an implied cause of action; the existence of a statutorily protected interest was thought to create a legal wrong under the APA.[41] The existence of a common-law interest became a sufficient but not a necessary condition for legal protection.[42] Eventually, the law no longer distinguished sharply between the interests of regulatory beneficiaries and those of regulated industries.

The shift of the 1960s and 1970s was attributable to a general consensus that, from the standpoint of the New Deal period, was quite puzzling. According to the emerging view, a belief in the rule of law was entirely compatible with a system of administrative regulation. Legal controls on regulatory agencies seemed well adapted to or even necessary for the successful implementation of statutory programs. Judges and others who rejected common-law baselines in general were thus well disposed toward legal intervention. In their rejection of the use of

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39. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000–06 (D.C. Cir. 1966) (viewers of television had standing under Federal Communications Act to contest renewal of broadcast license); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 932–37 (2d Cir. 1968) (alleged housing discrimination victims had standing under Housing Acts of 1949 and 1954); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615–17 (2d Cir. 1965) (users of environment have standing under Federal Power Act to protect their interests from activities of FPC), cert. denied, 384 U.S. 941 (1966).

40. See cases cited supra note 39.

41. Without the APA, this conclusion might have been controversial. The existence of an interest protected by statute need not imply a correlative right to bring an action to vindicate that interest. Some of the recent cases involving implied causes of action make this point clear. See cases cited supra note 31.

42. The development of the law here thus replicated the shifting definition of liberty and property interests during the same period. Originally those interests were defined by reference to the common law. In the late 1960s and 1970s, however, statutorily protected interests assumed constitutional status. See Perry v. Sindermann, 408 U.S. 593, 599–603 (1972) (professor's interest in position under de facto tenure program is property interest); Goldberg v. Kelly, 397 U.S. 254, 260–66 (1970) (due process requires that welfare recipient be afforded evidentiary hearing before benefits can be terminated). Here too, courts made inroads on a private-law model of public law, and for many of the same reasons. The distinction between common-law and statutory interests does, however, persist in other areas of the law. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1986) (noting that existence of interest protected at common law is relevant to availability of article III tribunal); Comment, Sovereign Immunity and Entitlement Benefits, 56 U. Chi. L. Rev. (forthcoming 1989) (discussing relevance of common-law interest in sovereign immunity doctrine).

common-law baselines in the law of standing,[43] they were conforming to the understandings that gave rise to regulation in the first place; but the new synthesis reflected a firm rejection of the New Deal belief in an inevitable disjunction between the realm of law and the realm of administrative government. The consequence was that judicial checks became a significant part of the network of controls on administrative behavior, controls that were designed to promote as well as to check regulatory intervention.[44]

Three particular ideas played a role in this shift. The first was an understanding that congressional purposes could be defeated not only by overzealous regulation, but also by unlawful failure to regulate or agency hostility to statutory programs.[45] If conformity to law was a goal of administrative law, there was no reason to distinguish between the beneficiaries and the targets of regulation. Far from being incompatible with the administrative process, some measure of judicial supervision appeared to be a means of promoting agency fidelity to statutory purposes.

The second idea derived from widespread (though not monolithic) evidence of the influence of regulated industries over regulatory programs.[46] In the face of such evidence, it was most peculiar to suggest

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43. These baselines were rejected elsewhere as well. See J. Vining, supra note 1; Stewart, supra note 1; Sunstein, supra note 2.

44. The idea of what sort of government action represents "regulatory intervention" requires an antecedent baseline establishing the ordinary or desirable functions of government.

45. The point had been recoguized long before:

> From the point of view of public policy and public interest, it is important not only that the administrator should not improperly encroach on private rights but also that he should effectively discharge his statutory obligations. Excessive favor of private interest may be as prejudicial as excessive encroachment.... A Federal Trade Commission may violate the legislative policy and cause harm to private interests by failing to investigate and detect unfair methods of competition as well as by overzealously condemning fair methods.
>
> Yet judicial review is rarely available, theoretically or practically, to compel effective enforcement of the law by the administrators. It is adapted chiefly to curbing excess of power, not toward compelling its exercise.

Att'y Gen. Rep., supra note 37, at 76. The report goes on to note:

> [T]he problem of whether the administrator's refusal to take action is reviewable still remains.... In some instances review may be unavailing because the determination of whether or not action should be taken in the circumstances may have been committed to the exclusive judgment of the administrator as to the public interest and convenience. *But if the denial is based on an erroneous interpretation of law, judicial review is available to remove at least that barrier.*

Id. at 86 (emphasis added); see also Jaffe, The Individual Right to Initiate Administrative Process, 25 Iowa L. Rev. 485, 529 (1940) (discussing importance of individual's power to initiate administrative proceedings to guard against inadequate administrative implementation).

46. An influential early study was M. Bernstein, Regulating Business by Independent Commission (1955). For recent discussion of this phenomenon, which varies with context, see P. Quirk, Industry Influence in Federal Regulatory Agencies (1981); K.

that regulated industries, and not regulatory beneficiaries, should have access to court. Political remedies were no more obviously available to regulatory beneficiaries than to regulated entities; indeed, the beneficiaries faced especially severe problems of political organization.[47] If an agency failed to implement a statutory program to the legally required degree, it was often unrealistic to expect the political process to provide relief. In any case, the possible availability of political remedies was not thought to be a reason to deny standing to regulated entities. In both cases, judicial review was a means of promoting agency conformity to the commands of the legislative process.

The final idea was that from the standpoint of the legal system, the claims of regulatory beneficiaries were of no less importance than those of regulated industries. The interests of victims of discrimination, pollution, unfair labor practices, securities fraud, and other statutory harms seemed no less deserving of legal protection than the common-law interests that had served as the traditional predicate for judicial review. This conclusion was a natural—indeed inevitable—outgrowth of the New Deal, which arose from a belief that the common-law catalogue of interests was inadequate.[48]

The conclusion that statutory and common-law interests should not be sharply distinguished seemed irresistible if importance was assessed by reference to the beliefs of Congress, which, after all, created the statutory programs. The limitation of standing to those having traditional common-law interests at stake appeared to depend on an anachronistic conception of legal rights traceable above all to the discredited jurisprudence of *Lochner v. New York*.[49] The attack on common-law baselines thus merged with an attack on the belief that administrative autonomy was the most promising institutional mechanism for producing the appropriate level of regulatory control.

It would have been possible for courts to use these ideas to build on the legal-wrong test in such a way as to grant statutory beneficiaries broad standing to bring suit. Because regulatory programs quite generally, and indeed by definition, reflect a desire to protect beneficiaries, allegations of inadequate regulatory action might always be thought to create a legal wrong, and therefore standing, within the meaning of the

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Schlozman & J. Tierney, Organized Interests and American Democracy 341–46 (1986); Stewart, supra note 1, at 1684–87. A particular difficulty here stems from the collective-action problems that impose severe transaction-cost barriers to organization on the part of beneficiaries. See R. Hardin, Collective Action 53–54 (1982); M. Olson, The Logic of Collective Action 22 (1971).

47. See R. Hardin, supra note 46; M. Olson, supra note 46.

48. See Sunstein, supra note 21, at 423, 437–46.

49. 198 U.S. 45 (1905); see supra notes 14–16 and accompanying text; see also Fallon, supra note 32, at 963–67; Meltzer, supra note 4, at 304. This is the central error in Scalia, supra note 5, at 894, which argues that standing should be limited to those who have at stake "individual rights." See infra notes 182–88 and accompanying text.

APA.[50] This conclusion, in fact reached in many lower court decisions in the 1960s,[51] would have had the advantage of promoting fidelity to the text and purposes of the governing provision of the APA. It would also have tied the problem of standing to the question whether Congress had explicitly or implicitly conferred on plaintiffs a right to bring suit.

The Supreme Court, however, took a different route to the revision of standing doctrine. In its decision in *Association of Data Processing Service Organizations v. Camp*,[52] the Court abandoned the previous framework altogether, signalling a significant departure from the private-law underpinnings of previous law. The Court replaced the legal interest test with a factual inquiry into the existence of harm; the existence of a "legal" interest was utterly irrelevant.[53] What was relevant was whether there was an injury in fact that was "arguably within the zone" of interests protected by the statutory or constitutional provision at issue.[54] The Court therefore interpreted the APA to grant standing even if the particular substantive statute did not confer on plaintiffs a right to bring suit and indeed even if there was no legal interest at all.[55]

The "arguably within the zone of interests" requirement responded to some of the same concerns as the legal-interest test, and it too called for a degree of entanglement between standing and the merits; but the requirement was, by design, quite lenient, and involved only a brief examination of the statute to see if the plaintiff's interests were entirely far afield from the statutory purposes.[56] Notably, however, *Data Processing* was styled as an interpretation of the APA. As such, it

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50. There is evidence that those responsible for the APA contemplated standing on the part of regulatory beneficiaries. The influential and contemporaneous Attorney General's Committee noted that judicial review "is adapted chiefly to curbing excess of power, not toward compelling its exercise." Att'y Gen. Rep., supra note 37, at 76. But it added that "*if the denial [of action] is based on an erroneous interpretation of law, judicial review is available to remove at least that barrier.*" Id. at 86; see also supra note 37 (legislative history of APA). Note also that the APA defines "agency action" to include "failure to act," 5 U.S.C. § 551(13)(1982), and authorizes courts to "compel agency action unlawfully withheld or unnecessarily delayed," Id. § 706(I). The contrary position is presented in Scalia, supra note 5, at 887–88, but the position is insufficiently attentive to the context and history of the APA. Cf. Heckler v. Chaney, 470 U.S. 821, 828–35 (1985) (holding agency inaction presumptively unreviewable, but apparently allowing review to overcome errors of law).

51. See cases cited supra note 39.

52. 397 U.S. 150 (1970).

53. Id. at 153 ("[T]he legal interest test goes to the merits[;] the question of standing is different.").

54. Id.

55. See id.; Currie, supra note 35, at 44 (discussing *Data Processing*).

56. See Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 757 (1987) ("[T]he test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."). The Supreme Court has never denied standing for failure to meet the "arguably within the zone" test.

was incorrect;[57] but in actual effect, it could be interpreted so as not to depart substantially from the original APA framework.[58]

Data Processing responded to a belief that the private-law model no longer worked in public-law cases.[59] Why this is so is a complex matter.[60] A principal reason was that the private-law inquiry into whether *A* has violated a duty owed to *B* does not quite capture the dynamics of public-law cases, in which disputes cannot so readily be understood in terms of clear rights and duties. Often administrative disputes do not have a bipolar structure: there may be many people on one or both sides of the dispute, and the agency may be authorized to consider numerous factors, no one of which is controlling. Since a number of factors are relevant, and none decisive, the right-duty relationship between the government and any particular legal complainant is not crisp and bilateral. It is important not to overstate this point. In public-law cases, there are rights and duties too. The failure to consider a relevant factor, or the consideration of an irrelevant factor, might well be thought of as a breach of a legal duty owed by the government to the complainant. But the inquiry into consideration of relevant factors does not have a clear parallel in private-law actions.

Moreover, once public-law plaintiffs are authorized to appear in court, they do not argue that the government has breached a duty owed to them—at least not in the common-law sense—but instead that the government has behaved unlawfully.[61] In this respect, public law has for a long time split the question of standing and the merits.

Even under *Data Processing*, there remained a bow in the direction of dispute-settlement, for the requirement of an injury in fact eliminated those plaintiffs with purely ideological claims.[62] But the Court moved dramatically in the direction of a standing doctrine that no

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57. See Currie, supra note 35, at 43–44 (contrasting standing grant in *Data Processing* with grant implied by legislative history of APA); supra notes 36–37 and accompanying text (legislative history of APA).

58. This is because the injury-in-fact test was designed and interpreted largely so as to allow standing, not for all those "affected," but for competitors and regulatory beneficiaries. This test in substance replicated the expansion of the legally protected interest model in the late 1960s and early 1970s, which built on the legal-wrong standard repudiated in *Data Processing*. See supra notes 38–42 and accompanying text.

59. See J. Vining, supra note 1, at 39–40.

60. See id. at 171 ("We do not know how a value becomes a public value.").

61. See id. at 142; cf. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78–79 (1978) (plaintiffs need not show a nexus between injury to them and intended scope of constitutional right at stake). There are, however, prudential limitations on the ability of one person to raise the interests of another. See generally Monaghan, Third Party Standing, 84 Colum. L. Rev. 277 (1984) (discussing the expansion and problematic nature of discretionary judicial limitations on third-party standing doctrine).

62. Here as elsewhere a standard is necessary to explain what a purely ideological claim is. There is no prelegal category of ideological claims; to say that a claim is ideological is to say that no legal right is at stake. That question will depend in turn on the substantive law. See infra notes 205–32 and accompanying text (discussing article III).

longer owed its shape to common-law categories, or distinguished between the rights of regulated entities and regulatory beneficiaries.

Indeed—and this is the central point—that very distinction depended on a conceptual foundation that had become anachronistic precisely because it was dependent on common-law baselines. Whether someone is the object of regulation or its beneficiary cannot be decided without an independent theory outlining what it is that government ordinarily or properly does. Regulated entities are themselves the beneficiaries of statutory limits on agency power—and of the common law—insofar as those sources of law protect them from public or private incursions into their legally created spheres. The beneficiaries are the objects of regulation insofar as positive law authorizes such intrusions and affords them less protection from private conduct than they would like.[63] Indeed, the very term "statutory beneficiary," as conventionally used, assumes that the common law is the ordinary backdrop or the usual state of affairs, and that departures from that state should be understood as providing special benefits and special burdens. It is not surprising that assumptions of this sort became impossible to sustain in the wake of the New Deal attack on the common law.

Notwithstanding these considerations, the *Data Processing* decision was justifiably subject to powerful criticism.[64] First, an effort to build on the legal-wrong standard probably would have been superior to the injury-in-fact approach. All of the foregoing ideas could have been accommodated within the legal-wrong standard. That standard accurately captures the original meaning of the APA, and it has the further advantage of deriving standing doctrine from congressional purposes in enacting regulatory legislation.[65] The legal-wrong test also has the siguificant virtue of dissolving the distinction between beneficiaries and regulated entities by making it clear that statutes provide the only workable metric for deciding whether there is a judicially coguizable injury. Whether there is such an injury cannot be decided in the abstract, without regard to what the law provides. The legal-wrong test does not build into the inquiry a distinct, extralegal category of beneficiaries. In this respect, it was the injury-in-fact test that was anachronistic, precisely because it suggested that there was a prelegal category of injuries—a point that has turned out to have considerable importance.[66]

In addition, and more generally, the injury-in-fact requirement it-

63. See J. Vining, supra note 1, at 102–03.

64. See Stewart, Book Review, 88 Yale L.J. 1559, 1569 (1979) (describing *Data Processing* as an "unredeemed disaster").

65. See supra notes 34–35 and accompanying text; see also Currie, supra note 35, at 43–44 (describing legal-wrong test in original understanding of APA); Stewart, supra note 64, at 1569 (characterizing legal-wrong standard as providing "ample flexibility for recognition of emerging societal interests through judicial expansion of the statutorily protected-interest test").

66. See infra notes 88–136 and accompanying text.

self was criticized as a holdover from private-law ideas from which *Data Processing* had to some degree escaped.[67] That requirement, and standing limitations generally, are often quite sensible,[68] but they have been justified on the basis of policies that actually have little or nothing to do with standing at all. Standing limitations are said to ensure that lawsuits are concrete rather than hypothetical or remote.[69] But the injury-in-fact requirement and other limitations on standing do not promote concreteness; indeed, the problem of concreteness has nothing to do with the question of standing. Whether a plaintiff is able to point to an injury peculiar to him is a question independent of the concreteness or abstraction of the dispute. For example, the dispute in *Sierra Club v. Morton*[70]—the principal modern example of a case denying standing on injury-in-fact grounds—was hardly hypothetical or remote.[71] Standing limitations are also said to be a way of ensuring sincere or effective advocacy.[72] But institutional litigants not having injury in fact are particularly likely to be strong advocates.[73] It is expensive to initiate a lawsuit, and those who do so without meeting the standing requirements are especially committed.[74]

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67. See L. Tribe, supra note 15, at 1571; Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv. L. Rev. 1698 (1980). On the ahistorical character of the injury-in-fact test, see Berger, supra note 8, at 827; see also Jaffe, supra note 8, at 1035–37, 1047 (Anglo-American courts not restricted by requirement of Hohfeldian plaintiff, and courts should explicitly recognize this and the importance of individual conscience).

68. See infra notes 156–57, 176–81 and accompanying text (defending injury-in-fact limitation of APA); infra notes 205–32 and accompanying text (discussing possible article III limitations).

69. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471–76 (1982).

70. 405 U.S. 727 (1972).

71. See id. at 734 (alleged injury was adverse effect on national park of recreational development that would "impair the enjoyment of the park for future generations").

72. See, e.g., *Valley Forge*, 454 U.S. at 472–73.

73. See Jaffe, supra note 8, at 1044; Meltzer, supra note 4, at 295–313.

74. The injury-in-fact requirement, however, might be justified as an interpretation of the APA that promotes autonomy and self-determination on the part of those directly affected. See infra note 157 and accompanying text.

An additional justification for standing limitations is that they are an effective means of limiting the federal caseload. But unless there is an independent reason for the limitation in question, it is an entirely arbitrary way of accomplishing that goal; and in any case, there is little evidence that the elimination of standing requirements would materially affect the number of suits brought in federal court. Indeed, the available evidence suggests that broadened standing has produced very little in the way of increased lawsuits—perhaps an unsurprising result in light of the numerous costs, monetary and nonmonetary, of initiating litigation. See K. Davis, Administrative Law Treatise 222–27, 338 (1983); Fadil, Citizen Suits Against Polluters: Picking Up the Pace, 9 Harv. Envtl. L. Rev. 23, 29, 39 (1985); Meltzer, supra note 4, at 308–09. Standing limitations are also said to be a component of judicial restraint, or to serve the system of separation of powers. This claim raises more complex issues and is discussed infra notes 182–204 and accompanying text.

Notwithstanding these problems, the *Data Processing* approach appeared for a long time to generate a body of standing doctrine that had a large measure of coherence, at least under the APA.[75] As the law developed, courts did not sharply distinguish between statutory beneficiaries and regulated class members, thus largely eliminating the asymmetry built into previous law.[76] This development served to remove a skewed set of incentives for administrators who, under the previous regime, could be subject to a lawsuit in the event of overzealous enforcement action, but would be immunized from legal controls if they furnished insufficient protection.[77] There is powerful evidence that the recoguition of standing for regulatory beneficiaries has been important in bringing about agency compliance with law.[78] At the same time, the doctrine has excluded merely ideological interests and the interest in law enforcement for its own sake.[79]

A principal goal of the *Data Processing* approach was to achieve a large degree of clarity and predictability. And for a period, the injury-in-fact requirement seemed to operate in a reasonably straightforward fashion. It should be clear, however, that an assessment of whether the plaintiff has suffered injury in fact could not be the only question for purposes of standing. In an integrated economy, an enormously wide variety of people are affected by an agency's decision to act or not to

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75. See J. Vining, supra note 1, at 39–42.

76. Some asymmetry remains, however, since scarce prosecutorial resources provide a legitimate reason for agency inaction. The fact that agencies must allocate their limited resources to those problems that seem most pressing, however, has implications for reviewability rather than for standing. See Heckler v. Chaney, 470 U.S. 821, 831 (1985); Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 683 (1985).

77. Congress has recognized this risk and expressly granted rights to beneficiaries in many statutes. See, e.g., Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1982); Energy Policy and Conservation Act, 42 U.S.C.A. § 6305 (West 1983 & Supp. 1988); Clean Air Act, 42 U.S.C. § 7604 (1982).

78. See, e.g., Exec. Office of the President, Office of Management and Budget, Regulatory Program of the U.S. Gov't 213–14, 432–34, 469 & 492 (Apr. 1, 1986–Mar. 31, 1987) (reflecting agency initiatives, resulting from judicially imposed deadlines in such areas as environmental and labor law); see also United Steelworkers of Am. v. Pendergrass, 819 F.2d 1263 (2d Cir. 1987) (requiring Secretary of Labor to publish standards for providing employees with information about hazardous chemicals, resulting in 29 C.F.R. §§ 1915.99, 1917.28, 1918.90 (1988)); Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986) (finding that OSHA failed to set proper exposure limits for ethylene oxide, resulting in 29 C.F.R. § 1910.1047 (1987)); International Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Donovan, 590 F. Supp. 747 (D.D.C. 1984) (requiring OSHA to reconsider decision not to issue temporary standards regarding workplace exposure to formaldehyde, resulting in 29 C.F.R. § 1910.47 (1987)).

79. The characterization of an interest as "merely ideological" or involving "law enforcement for its own sake," must, however, be based on the relevant statutes; the characterization cannot be made in the abstract. By conferring a legal right, a statute might convert an ideological interest into a legal one. See infra notes 205–32 and accompanying text.

act.[80] The decision of the Environmental Protection Agency (EPA) whether a particular company violated an environmental statute, and should face civil and criminal penalties, will have consequences "in fact" for workers and employers in many other companies as well—not to mention consumers generally.

In *Data Processing*, the Court could not have meant to suggest that all affected workers, employers, and consumers could challenge all EPA decisions. In order to produce sensible results, courts had to build into the new framework some distinction between direct and indirect consequences of agency decisions, or between legally cognizable injuries and harms that Congress could not have intended to be vindicated in court.[81] In this sense, the injury-in-fact test was (and is) quite malleable, and the standing determination inevitably depends on a range of considerations that the notion of injury in fact, by itself, cannot capture.

In these circumstances, the "arguably within the zone" test, though appearing unwieldy, served in practice as a lenient and workable threshold inquiry, capturing the understanding that those whose interests were entirely afield of statutory purposes could not bring suit. The test thus operated as a check against suits brought by people with interests unrelated to the statutory scheme.[82] And the injury-in-fact test itself, in its early period, appeared to allow suits by regulatory beneficiaries and by adversely affected competitors, but not to allow standing for those whose interests were only indirectly and incidentally affected.[83] Thus, the new standing doctrine seemed as if it might serve the function, intended by the Court in *Data Processing*, of ensuring that jurisdictional inquiries were reasonably simple and crisp,[84] and did not unduly complicate the case before courts reached the merits.

Data Processing was part of a set of developments that began to point the way toward an independent public law.[85] Such developments

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80. APA Leg. History, supra note 37, at 276. See the discussion of the "Donne effect" in J. Vining, supra note 1, at 32.

81. Cf. J. Vining, supra note 1, at 60–62 (suggesting that courts allow suits by those able to invoke "public values").

82. See Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750 (1987), which suggests that:

> [i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit.

Id. at 757.

83. There are few cases on the point, and notions of indirect and incidental effect need to be unpacked.

84. Cf. Currie, Venue and the Sagebrush Rebellion, *in* Venue at the Crossroads 65, 77 (S. Schlesinger ed. 1982) (emphasizing importance of simplicity in determining venue).

85. Other developments in this vein included the protection of statutory benefits as liberty or property, see supra note 42; the refusal to distinguish between deregulation and regulation, see Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463

were a natural product of the skepticism about common-law ordering that gave rise to regulatory regimes in the first instance.[86] Upon a showing of harm, fidelity to law, rather than protection of the objects of regulation, became the purpose of judicial review. At the same time, *Data Processing* contributed to a set of innovations that attempted to synthesize the rise of administrative regulation with the continuing existence of legal constraints on governmental processes and outcomes. With these innovations, courts placed statutory rights on the same level as common-law interests and supervised a wide range of agency decisions, including inaction and deregulation, in order to ensure legality.[87]

II. The Return of Private Law: Prelegal "Injuries" and Causation

A. *The Doctrinal Trajectory: Injury, Nexus, and Causation*

After *Data Processing*, the Supreme Court employed several principles to limit free access to judicial review.[88] None of these principles was, however, of particular importance to administrative law, and most of them were supported by at least plausible reasons.[89] Much more

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U.S. 29, 40–42 (1983); the recognition of harms that amounted to mere probability of injury, rather than sharply focused and certain to be imposed on particular individuals, as a sufficient basis for regulatory intervention, see FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 796–97 (1978); the relaxation of private law conceptions of ripeness, see Abbott Laboratories v. Gardner, 387 U.S. 136, 148–51 (1967); and the limited grant of review of enforcement decisions, see Dunlop v. Bachowski, 421 U.S. 560, 571–73 (1975).

86. See Sunstein, supra note 21, at 423, 437–46.

87. See supra note 85; cases cited supra note 78; see also B. Ackerman, Reconstructing American Law (1984) (arguing for legal controls in activist state). But see Stewart, The Discontents of Legalism: Interest Group Relations in Administrative Regulation, 1985 Wis. L. Rev. 655, 678–82 (arguing that in certain contexts, including environmental, health, and safety regnlation, legal controls on adminstration have led to pathologies such as increased transaction costs of negotiating solutions).

The development and enactment in 1946 of the Administrative Procedure Act of 1946, Pub. L. No. 79-404, 10 Stat. 237, was a critical step in this process. The expansion of legal controls on administration continued from 1946.

88. See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (denying citizen and taxpayer standing); United States v. Richardson, 418 U.S. 166 (1974) (denying taxpayer standing)

89. Thus, the prohibition on citizen or taxpayer standing might be understood as a response to the possibility that the political process would afford sufficient protection: if all citizens are affected, there should be political checks on official illegality. It would be possible, however, to respond that the political checks have not worked in the circumstances; that the constitutional prohibition is not otherwise enforceable; and that the original decision to constitutionalize the prohibition reveals that it was intended to operate even in the face of political acquiescence. The citizen and taxpayer standing cases are best understood as rulings that the relevant constitutional provisions do not create self-executing causes of action on behalf of plaintiffs. See infra note 208 (discussing implicit constitutional grants of cause of action).

important innovations in modern standing doctrine can be found in a series of recent decisions.[90] In these cases, the Supreme Court has held that in order to have standing, plaintiffs must show not only injury in fact, but also (a) that there is a substantial likelihood that plaintiffs' injury will be remedied by a decree in their favor and (b) that plaintiffs' injury is a result of the action of the governmental defendant. It is not altogether clear whether these requirements are an interpretation of the APA or of article III, though the Court currently classifies them as constitutional in status.[91]

Understood in the abstract and properly applied, the requirements are natural and entirely unobjectionable corollaries of the injury-in-fact requirement of *Data Processing*—not to mention the article III ban on advisory opinions. If the plaintiffs cannot show that a decree in their favor will remedy their injury or that the defendant was responsible for that injury, why should they be entitled to seek judicial relief at all?

At the outset, however, it is revealing that the recent requirements have proved important principally in cases in which statutory beneficiaries are challenging as legally inadequate the government's regulation of third parties. In such cases standing has been denied because it is said to be uncertain that government regulation would actually help any particular private plaintiff. And it is in such cases that one can find a partial return to a private-law model of public law.

The first case in this line of decisions was *Linda R.S. v. Richard D.*[92]—a case that appeared quite trivial at the time, but that has come to assume substantial importance. *Linda R.S.* involved an action brought by a woman against a local district attorney for failing to bring suit to compel the father of her illegitimate child to make child custody payments.[93] The plaintiff alleged that the state statute was unconstitutional because it required support only of legitimate children.[94] The Court's response was somewhat odd. In the Court's view, the plaintiff lacked standing because she could not show that a criminal action by the prosecutor would benefit her. The father of the child might, for example, simply go to jail. "The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative."[95]

One problem with this view is that the very existence of the criminal law attests to the seemingly obvious assumption—held by the legislature and the public at large—that criminal penalties influence

90. See Allen v. Wright, 468 U.S. 737 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (*EKWRO*); Warth v. Seldin, 422 U.S. 490 (1975).

91. For discussion of the difference, see infra notes 205–32 and accompanying text.

92. 410 U.S. 614 (1973).

93. Id. at 614–16.

94. Id. at 616.

95. Id. at 618.

behavior.[96] If a prosecutor actually seeks criminal sanctions against someone who fails to make custody payments, there is good reason to believe that he will comply. The increased likelihood of compliance should suffice to confer standing. The point is supported by the fact that if the father of a child in the case brought suit to challenge the constitutionality of the child-support law requiring him to make payments, there would be no problem of standing.[97] For this reason *Linda R.S.* is probably best understood as a response to the courts' traditional reluctance to compel action by criminal prosecutors.[98] It is not an ordinary standing case at all. Even if it is understood in these terms, however, it is an unfortunate holdover from private-law notions of legal injury; and it may no longer be good law.[99]

The requirement of causation was more fully elaborated in subsequent decisions.[100] In *Simon v. Eastern Kentucky Welfare Rights Organization*[101] (*EKWRO*), the Court denied standing to indigents who were

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96. [I]t is hard to take seriously the claim that enforcement of legal rules does not affect bystanders. . . . I suffer an injury if the police announce that they will no longer enforce [the rule against murder] in my neighborhood. . . . Only a judge who secretly believes that the law does not influence behavior would find no injury in fact.

Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 40 (1984).

97. See L. Tribe, supra note 15, § 3-18, at 130–31.

98. See *Linda R.S.*, 410 U.S. at 619; cf. Easterbrook, supra note 96, at 40 (suggesting that enforcement policies can produce injury in fact).

99. The plaintiff's claim was one of inequality: enforcement proceedings were brought against fathers of legitimate but not of illegitimate children. A judicial decision redressing the inequality should suffice to provide standing; it is the inequality that is the injury. Here, moreover, the question was the inequality in the "protection" afforded to mothers of illegitimate children, who were in the position of plaintiffs, and not—as the Court would have it—fathers, who were in the position of defendants. Indeed, inequality in "protection" was at the center of the fourteenth amendment, and the failure to treat such inequality as legally cognizable is an unfortunate holdover from *Lochner*-like conceptions of legal injury. See Kennedy, *McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court, 101 Harv. L. Rev. 1388, 1422–23 (1988).

The Court recognized considerations of this sort in Heckler v. Mathews, 465 U.S. 728 (1984). There the Court said: "[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." Id. at 740 (quoting Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931)). *Linda R.S.* cannot be squared with *Heckler*, and the latter decision states the appropriate rule.

100. See, e.g., Warth v. Seldin, 422 U.S. 490 (1975). In that case, various organizations and individuals in Rochester, New York, brought suit against Penfield, New York, claiming that the Penfield zoning ordinance violated the Constitution and federal law by excluding poor people and members of minority groups. The Court held that the challenge was barred on standing grounds. Id. at 517–18. In its view, the central problem with the claim of those plaintiffs allegedly denied the opportunity to purchase or lease Penfield housing was that they could not show a particular housing opportunity that was rendered unavailable to them as a result of the ordinance. Id. at 504.

101. 426 U.S. 26 (1976).

challenging an Internal Revenue Service (IRS) ruling decreasing incentives to hospitals to provide medical services to the poor. The plaintiffs alleged that they had been denied medical services as a result of this ruling.[102] The Court, however, denied standing because the plaintiffs could not show that the ruling affected their own situation.[103] "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."[104]

The *EKWRO* decision might be treated as an exceptionally broad ruling, having the effect of barring many suits brought by regulatory beneficiaries on the ground that it is uncertain whether a particular benefit will come to them as a result of government action against third parties. The decision could be understood, however, as a quite narrow response to the well-established idea that one taxpayer should not ordinarily be permitted to litigate the tax liability of another.[105] In this sense, the causation requirement, as applied in *EKWRO*, can operate as a surrogate for a belief that Congress implicitly precluded standing of this kind in most tax cases.[106]

Perhaps the most important decision in this line of cases is *Allen v. Wright*,[107] in which the parents of children attending schools undergoing desegregation challenged, on statutory and constititutional grounds, the IRS' failure to deny tax deductions to segregated private schools. The plaintiffs claimed that the tax deductions increased the

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102. Id. at 32–33.

103. Id. at 42–43. For criticism of this decision, see Currie, The Supreme Court and Federal Jurisdiction: 1975 Term, 1976 Sup. Ct. Rev. 183, 183–85 (describing Court's approach as "unnecessarily stingy" and arguing that devision "impose[s] a highly restrictive notion of what it takes to satisfy the injury requirement"). Here too, it is important and revealing that the hospitals in question would undoubtedly have had standing to challenge an IRS decision increasing hospitals' obligations to provide medical care to the indigent. See L. Tribe, supra note 15, § 3-18, at 131.

104. *EKWRO*, 426 U.S. at 42–43.

105. See id. at 46 (Stewart, J., concurring). This idea is responsive to the fear that since numerous people are affected by tax provisions that influence private conduct, an injury-in-fact test would lead to widespread litigation, uncertainty, and unfortunate stare decisis effects. The idea is also an outgrowth of the fact that Congress has expressly provided standing for some taxpayers and not others, see 26 U.S.C. §§ 7421–7422, 7426, 7428–7429 (1982 & Supp. IV 1986), and a corresponding belief that it is unlikely that Congress intended to allow all third parties affected by tax incentives to bring suit against the government.

106. The coherence of this rule depends on the precise right asserted. A claim of illegality in a tax measure allowing every white family to take a $1000 deduction would surely provide standing for black plaintiffs. Cf. Heckler v. Mathews, 465 U.S. 728, 738 (1986) (husband has standing to challenge "pension offset" that adversely affects males).

107. 468 U.S. 737 (1984); see also Diamond v. Charles, 476 U.S. 54, 66 (1986) (physician did not have standing "as a doctor, a father, and a protector of the unborn" to challenge abortion law).

funds available to segregated schools in a way that impaired the desegregative process; their injury consisted of a distortion of desegregation by unlawful tax relief to private schools, which, they said, increased the likelihood of white flight.[108] The Court held that the plaintiffs did not have standing because they could not show that a decree in their favor would actually help their particular children in a particular way.[109]

Two recent cases involving regulation of fuel economy in automobiles presented similar issues.[110] Both cases involved a statutory provision allowing "[a]ny person who may be adversely affected" by an agency rule passed under the Energy Policy and Conservation Act of 1975 to seek review.[111] In both cases, it was assumed that Congress intended to permit the plaintiffs to bring suit; the only question was whether article III permitted the action to go forward. In *Center for Auto Safety v. NHTSA*,[112] a membership association, including prospective purchasers of trucks, challenged a regulatory decision to reduce minimum fuel-economy standards for light trucks. The plaintiffs contended that the vehicles available for purchase would have reduced fuel efficiency as a result of this decision.[113] The court of appeals held that the requirements for standing were satisfied: the injury consisted of the diminished opportunity to purchase the trucks in question, that injury was a product of the agency's decision, and a reversal of that decision would remedy the injury.[114] Judge Scalia, in dissent, complained that "petitioners make no effort to identify any particular types of fuel-efficient light truck or any particular fuel-saving model options that their

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108. *Allen*, 468 U.S. at 743–45.

109. Id. at 758–59. The Court stated:

> [I]t is entirely speculative . . . whether withdrawal of a tax exemption from any particular [private] school would lead the school to change its policies. It is just as speculative whether any given parent of a child attending such a [private] school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the [private] school once it was threatened with loss of tax-exempt status.

Id. at 758 (citations omitted).

The Court also emphasized separation of powers concerns that, in its view, counseled against supervision of the executive branch. In this connection, the Court cited the constitutional provision granting the President, and no one else, the power "to take Care that the Laws be faithfully executed." Id. at 761 (quoting U.S. Const. art. II, § 3, cl. 4). For a discussion of the separation of powers issues, see infra notes 182–203 and accompanying text.

110. Center for Auto Safety v. Thomas, 806 F.2d 1071 (D.C. Cir. 1986), vacated per curiam, 810 F.2d 302 (D.C. Cir. 1987)(en banc), reinstated per curiam by an equally divided court, 847 F.2d 843 (D.C. Cir.) (en banc)), vacated per curiam, No. 85-1515 (D.C. Cir. Sept. 16, 1988)(en banc); Center for Auto Safety v. NHTSA, 793 F.2d 1322 (D.C. Cir. 1986).

111. 15 U.S.C. § 2004(a) (1982).

112. 793 F.2d 1322 (D.C. Cir. 1986).

113. Id. at 1332.

114. Id. at 1341.

members desire but are or will be unable to purchase."[115] Moreover, "manufacturers might well react to the threat of civil penalties either by merely paying them or by altering the marketing of currently available products, rather than by installing the unidentified new technology petitioners' members allegedly desire to purchase."[116]

In *Center for Auto Safety v. Thomas*,[117] organizations representing purchasers of automobiles challenged an EPA rule that compensated manufacturers retroactively for changes in testing procedures used to measure the fuel economy of each manufacturer's sales fleet. The EPA concluded that the previous testing procedures were inadequate. The retroactive compensation gave General Motors and Ford credits that were worth hundreds of millions of dollars. The resulting credits could be used to offset penalties incurred in previous years or to produce a cushion against future deficiencies in fuel-economy standards.[118]

The plaintiffs alleged that as a result of this decision, automobile manufacturers would fail to develop and use technologies that would improve the fuel efficiency of their vehicles. In the plaintiffs' view, their members would be less likely to be able to purchase fuel-efficient cars. Their injury consisted of the diminished availability and increased price of the relevant cars. No individual person could show, however, that the EPA's decision would affect a particular purchasing decision.[119] A panel of the court of appeals held that the requirements for standing were satisfied,[120] and an en banc court affirmed by an equally divided vote.[121]

Five judges concluded that the original panel decision was correct. The injury consisted of the increased price and diminished availability of fuel-efficient cars, and invalidation of the agency's decision would redress that injury.[122] Five other judges contended that "it is not likely that" the plaintiffs' injury, even if it occurred, "will be caused by the challenged action, or be redressed by a favorable decision."[123] According to the five judges, a change in the mix of products was not a suffi-

115. Id. at 1343 (Scalia, J., dissenting).

116. Id. at 1345. After the 5-5 division in Center for Auto Safety v. Thomas, 847 F.2d 843 (D.C. Cir.) (en banc), vacated per curiam, No. 85-1515 (D.C. Cir. Sept. 16, 1988) (en banc), *Center for Auto Safety v. NHTSA* appears to be accepted by nine judges on the D.C. Circuit. Only Judge Silberman said that the case was wrongly decided. Id. at 876 (Silberman, J.); Judge Williams indicated uncertainty on that point. Id. at 887 (Williams, J.); the remaining eight judges unequivocally accepted the NHTSA decision on standing.

117. 806 F.2d 1071 (D.C. Cir. 1986), vacated per curiam 810 F.2d 302 (D.C. Cir. 1987)(en banc), reinstated per curiam by an equally divided court, 847 F.2d 843 (D.C. Cir.) (en banc), vacated per curiam, No. 85-1515 (D.C. Cir. Sept. 16, 1988) (en banc).

118. Id. at 1073–75.

119. 847 F.2d at 876–78 (Silberman, J.).

120. 806 F.2d at 1075.

121. 847 F.2d at 843–44 (per curiam).

122. Id. at 862–63 (Wald, C.J.).

123. Id. at 868 (Buckley, J.); id. at 884 (Silberman, J.).

cient injury. Changes in product design qualified as such an injury; but with respect to those changes, the causation requirements were not met.[124]

In an elaborate separate opinion, Judge Silberman contended that the injury recognized by the five judges finding standing "stretches beyond recognition the limits the Supreme Court has articulated for the types of harm sufficient to confer Article III standing."[125] In his view, the entire concept of consumer standing must be rejected. "So long as consumers have available virtually interchangeable products, a reduction in supply—indeed even the actual cessation—of one brand cannot constitute an Article III injury."[126] All that is at stake here is "a political or ideological interest in seeing a federal law enforced against a third party."[127] Consumer standing should be treated like taxpayer standing; in both cases, article III requires that "redress is to be found under our constitutional system at the polls—not in Federal courts."[128]

Adoption of ideas of the sort expressed by the five judges argning against standing in *Thomas* would have enormous consequences for the law, the same is even more emphatically true of the views expressed by Judge Silberman and Judge Scalia. Indeed, such views would move the doctrine sharply in the direction of the private-law model as it existed well before the original cases that extended the category of legally cognizable interests to include statutory beneficiaries.[129] In those cases too, the injury, narrowly defined, would not necessarily be alleviated by action from the governmental defendant.[130] By restricting the requirement of an injury to a nineteenth century private right, a strong version of the causation requirements would replicate ideas last seen in public law more than two decades ago, when the legal culture had only begun

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124. [A] company cannot be expected to mount a comparable research and development effort as a short-term response to an unanticipated penalty. It is not credible that a manufacturer will attempt, let alone achieve, the necessary advances in time to incorporate them in its third year's production. The more likely alternative is that a company faced with substantial penalties will first review the available alternatives, including payment of the penalties and changes in model mix, and then pursue the least costly of them. . . .

. . . .

Given the industry's lead times, we also find it unlikely that a reversal of the . . . rule would cause the manufacturers . . . to redesign their MY 1987 and 1988 cars to incorporate tested technologies in a broader range of vehicles.

Id. at 870–72 (Buckley, J.).

125. Id. at 876 (Silberman, J.).

126. Id. at 878 (Silberman, J.).

127. Id. at 882 (Silberman, J.).

128. Id. at 883 (Silberman, J.).

129. See, e.g., Alabama Power Co. v. Ickes, 302 U.S. 464, 478 (1938) (no legally cognizable injury, and hence no standing when plaintiff alleged loss of business due to competition fostered by government loan program).

130. See cases cited supra note 39.

to accommodate the understandings that gave rise to regulatory systems in the first instance.

As the disputes in the *Center for Auto Safety* cases suggest, the reach of the recent decisions is a matter of current controversy. In some cases, the causation requirements are easily met when a plaintiff is asking the government to seek sanctions against a violator.[131] In other cases, however, the causation requirements are much more difficult to apply. Any particular beneficiary of a regulatory program will often have a hard time showing that any particular regulatory intervention will help in a particular way. The reason is that the injury is not of the discrete and individual sort typical at common law. Instead, it is regulatory in nature,[132] and best characterized as systemic, collective, or probabilistic. Regulatory regimes are typically desigued to reduce risks of injury that affect large numbers of people. The connection between the risk and any actual injury to any person cannot readily be established either before or after the fact. The consequences of greater enforcement for any particular member of the class of beneficiaries are often unavoidably speculative, even though the systemic impact—for classes of citizens suffering from inadequate administrative protection against product risks, discrimination, fraud, or other harms—is substantial. The basic point applies to many statutes, ranging from those covering environmental, automotive, and occupational hazards to those designed to reduce discrimination.

Moreover, there is no clear basis for deciding whether or not redress of injuries in such cases is speculative. The manipulable character of the inquiry has resulted in considerable doctrinal confusion.[133] And as the disagreements in the *Center for Auto Safety* cases make clear, the causation inquiry will turn in large part not on causation itself, but on how the relevant injury is characterized and on what sorts of injuries qualify as legally cognizable.[134] The Supreme Court has given conflicting siguals on this point as well.[135] In these ways, the causation requirements have reintroduced precisely the sort of unpredictability that

131. Consider a suit brought by a labor union election candidate to compel the Secretary of Labor to set aside a particular union election. See Dunlop v. Bachowski, 421 U.S. 560, 566–68 (1975) (allowing such a suit to go forward).

132. Cf. Mashaw & Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 272–73 (1987) (discussing antipathy of legal culture to regulatory harms and greater judicial receptivity to ex post harms of the common-law variety). Note, however, that some probabilistic injuries are coguizable at common law. See Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 851, 867, 885 (1984) (citing asbestosis and DES cases in which "market-share" liability is apportioned, and other cases in which risk of future injury is basis for damage awards).

133. See infra notes 163–72 and accompanying text.

134. See infra notes 167–72 and accompanying text.

135. Id.

the *Data Processing* test was intended to eliminate.[136]

B. *Separation of Powers*

EKWRO and *Allen* might be understood as narrow decisions about the standing of one taxpayer to litigate the tax liability of another. In such cases, it is plausible to infer that Congress foreclosed a general right to bring suit.[137] As pure standing cases, however, some of the causation decisions are not easy to defend. In particular, *EKWRO* and especially *Allen* seem wrongly decided.[138] There can be little doubt that the decisions are informed by norms of separation of powers, quite apart from ideas about causation. In the absence of other doctrinal avenues for restricting standing, the causation requirements are being used to do work that has little to do with causation.[139]

The separation of powers norms were made explicit in *Allen v. Wright*,[140] in which the Court said that the "idea of separation of powers that underlies standing doctrine explains" the conclusion in the case.[141] The Court wrote that a decision to allow standing in *Allen*

> would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication. "Carried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action.[142]

In this view, the causation requirements are a means of ensuring against certain sorts of actions against governmental defendants, actions that raise serious questions of judicial role.

Ideas of this sort help account for the denial of standing in *EKWRO* and *Linda R.S.*, which also involved suits attempting to compel governmental officials to bring actions against private parties. The Supreme Court has shown hostility to such suits in other contexts as well, quite outside the law of standing.[143] On this view, actions brought by regula-

136. Indeed, that understates the matter. See infra notes 164–72 and accompanying text.

137. See supra notes 105–06 and accompanying text.

138. See Easterbrook, supra note 96, at 40–42; Nichol, Abusing Standing, supra note 5, at 656–57; see also infra notes 163–81 and accompanying text (discussing appropriate role of causation).

139. A variety of other ideas may also be at work in these cases. Indeed, the causation requirements appear to be attempts to perform some of the role of the legal-interest test by responding to a perception that Congress implicitly barred the action.

140. 468 U.S. 737 (1984).

141. Id. at 759 (citations omitted).

142. Id. (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)); see also Scalia, supra note 5, at 890–94 (making a similar argument).

143. See Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) (refusing to review FDA

tory beneficiaries to require greater regulatory protection attempt to vindicate injuries that ought to be cognizable politically but not through the judiciary. There is in this respect a clear connection between the causation requirements and certain conceptions of judicial restraint and separation of powers. The recent cases might be understood as an effort to narrow the judicial role in actions brought by statutory beneficiaries—often having numerous members—to compel government action against private parties. The causation requirements are one of several devices by which to accomplish this goal.[144]

The underlying concern, captured in *Allen v. Wright*,[145] is that while courts should protect the objects of regulation, they should be reluctant to compel the executive branch to undertake enforcement action to vindicate the general or societal interests of regulatory beneficiaries. In this view, suits brought to challenge "the particular programs agencies establish to carry out their legal obligations"[146] should not be judicially cognizable. The distinctive judicial role is the protection of traditional or individual rights against governmental overreaching.[147] This claim purports to derive strength from the constitutional provision, invoked in this way in *Allen* and another recent decision of the Court,[148] that confers on the President, not the judiciary, the authority to "take Care that the laws be faithfully executed."[149]

The recent standing requirements belong in the same category as other recent decisions restricting judicial intrusions into administration, with respect to both substance[150] and procedure.[151] They reflect a form of judicial skepticism about both government regulation and

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decision not to bring enforcement proceedings against unauthorized use of approved drug); Block v. Community Nutrition Inst., 467 U.S. 340, 352 (1984) (refusing to recognize standing for consumers under Agricultural Marketing Agreement Act); Laird v. Tatum, 408 U.S. 1, 15 (1972) (refusing to allow standing to challenge data-gathering system used by Army at riots).

144. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (refusing to allow equitable relief on basis of past use of "choke holds" by police), discussed critically in Meltzer, supra note 4, at 297–327; Rizzo v. Goode, 423 U.S. 362, 371–76, 380 (1976) (refusing to permit injunctive relief on basis of past incidents of mistreatment of black citizens by police); O'Shea v. Littleton, 414 U.S. 488, 498, 502 (1974) (illegal bond-setting, sentencing, and other practices by magistrate and circuit court judge not sufficient basis for equitable relief).

145. See supra notes 107–09 and accompanying text.

146. Allen v. Wright, 468 U.S. 737, 759 (1984).

147. See Scalia, supra note 5, at 894–97. The cases thus far have not, however, endorsed this general view.

148. *Allen*, 468 U.S. at 761; Heckler v. Chaney, 470 U.S. 821, 832 (1985).

149. U.S. Const. art. II, § 3, cl. 4.

150. See Chevron USA v. NRDC, 467 U.S. 837, 864–66 (1984) (calling for judicial deference to agency interpretations of law).

151. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543–49 (1978). The Court stated that in drafting the APA, "Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed." Id. at 546 (emphasis in original).

court entanglement in executive functions. The congruence of these kinds of skepticism has been critical in the cases. The two have been combined in no other recent period.[152]

There is a commonality between the New Deal approach and still tentative developments in current law, and it lies in the belief that administrative regulation, grounded as it is in technocratic expertise and political accountability, is incompatible with judicial oversight. The difference is that the New Deal view was rooted in hospitality toward regulatory intervention and fear of politically motivated invalidation, by the courts, of desirable administrative programs, whereas the modern developments are based on hostility to intervention and fear of judicially compelled regulation. But in either case, the doctrine of standing serves to minimize the occasions for legal intervention into the regulatory process, and thus to limit the strain between what are regarded as two distinct mechanisms for social ordering. Understood against this background, the causation requirements are a means of ensuring against the perceived excesses of *Data Processing* in allowing judicial redress of what might be seen as essentially political grievances.[153] That rationalization, however, is ultimately unpersuasive.

III. Public Law and Standing

A. *The Appropriate Role of Standing Limitations*

As a general rule, the question for purposes of standing is whether Congress has created a cause of action.[154] A congressional resolution of the standing issue is almost always authoritative. It is in this sense,

152. Thus, in the 1930s, skepticism about the judiciary generally accompanied enthusiasm about regulation; among conservatives, a minority in that period, skepticism about regulation led to enthusiasm for the judiciary; and in the 1960s, liberal judges combined hospitality toward regulation with enthusiasm for an aggressive judicial role. See Sunstein, supra note 21, at 437–41. The general phenomenon is remarked on in Note, Intent, Clear Statement, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892, 910–12 (1982). See generally Sunstein, Statutes and the Regulatory State (Sept. 1988) (unpublished manuscript on file at the Columbia Law Review).

153. One of the problems with the recent trend is that it treats a dispute as "political," not because of the absence of legal constraints, but because the injury is different from what is typical at common law. Whether a grievance is political depends on the underlying statute; the question cannot be answered in the abstract. See infra notes 229–30 and accompanying text. Moreover, the political question doctrine—not standing—is the appropriate tool for ensuring that courts do not hear cases involving issues not suited to the judiciary. See Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597 (1976) (suggesting political question applies where there are no legally cognizable standards). Properly understood, the principles of standing deal with appropriate plaintiffs, not with issues beyond judicial competence—though the two ideas have not been kept entirely separate in practice. See, e.g., Allen v. Wright, 468 U.S. 737, 751 (1984) (suggesting that issues of standing must be considered in context of separation of powers).

154. There are some exceptions here. See infra notes 205–32 (discussing article III

and only this sense, that standing limitations are part of the "case or controversy" requirement of article III; and it is in this sense that standing doctrine serves an important separation-of-powers function.

In many standing cases, however, the question whether Congress has created a cause of action cannot be answered simply. The legislature cannot be expected to resolve that question in every setting. The APA is of course controlling in most administrative law cases, and interpretation of the standing requirements of the APA is therefore the central question. Probably the best approach here would have been to use the legal-wrong test as it had been developing before *Data Processing*, focusing attention on whether the plaintiff's interest was protected by the underlying substantive statute.[155] The law has taken a quite different direction, however, and it is possible to understand the current injury-in-fact test as an interpretation of the APA that does relatively little violence to the underlying purpose of that statute. The principal function of the requirement of injury in fact—insofar as it provides a limitation on standing—is to decrease the likelihood that outsiders or intermeddlers[156] will be able to disrupt mutually beneficial arrangements. In this respect, the requirement of injury in fact—rooted in the APA, not article III—promotes autonomy and self-determination on the part of litigants.[157]

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and standing). In some cases, moreover, the issue is whether the Constitution itself creates a right to bring suit. See infra note 208.

155. See supra notes 39–51 and accompanying text.

156. Here as elsewhere it is necessary to develop a standpoint from which to describe some people as "intermeddlers" and others as "injured"; there is no extra-legal way to make that determination, or to do so without invoking controversial substantive considerations.

157. Stewart, supra note 1, at 1735–47. In Sierra Club v. Morton, 405 U.S. 727 (1972), the Court refused to recognize standing in an action brought by an environmental organization whose members had not claimed use of a recreational preserve threatened with an allegedly unlawful development project. Id. at 735. The Court's conclusion was correct, for if none of those affected by the creation of a development in the preserve was willing to come forward, a group of outsiders probably should not be permitted to do so—at least as a matter of interpretation of the APA and other relevant statutes. Cf. Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 310–15 (1979) (discussing autonomy and self-determination as animating concerns of article III). A different result might be appropriate if it could be shown that those directly affected were unwilling to bring suit for reasons other than contentment with the status quo. See L. Tribe, supra note 15, § 3-19.

At least ordinarily, the fact that the law prohibits certain activity is not a sufficient reason to permit a suit by outsiders. Agencies quite properly use prosecutorial discretion to allocate resources among various problems; some of those problems may have comparatively weak claims to the public fisc. If no one directly affected by government action is sufficiently concerned to bring suit, the usual assumption—subject to congressional override—ought to be that third parties should not be permitted to do so. Note, however, that concepts like "bystander" and "outsider" are artifacts of preexisting ideas about who should be able to bring suit and that all of the foregoing concerns are subject to congressional revision. See infra notes 205–32 and accompanying text. Congress

The causation requirements present different issues. Standing by themselves, they are natural corollaries of the injury-in-fact requirement and unobjectionable as such. But aside from their manipulability, the central problem is that in the suits in question here, the relevant harms are quite generally probabilistic or systemic. The purpose of the regulatory program is to redress harms of precisely that sort.[158] It would be a large mistake to conclude that such harms are not judicially cognizable. Nineteenth century conceptions of injury should not be used to resolve standing issues in administrative law. Those conceptions have no place in regimes in which the legal injury is often of a different order. A system in which regulatory harms were not judicially cognizable would tend to allow regulated industries, but not regnlatory beneficiaries, to have access to court—thus imposing a perverse set of incentives on administrative actors by inclining them against regulatory implementation when it is legally required.[159] Such a result would tend to defeat congressional purposes.[160] Nothing in article III, the APA, or the governing statutes justifies this result.

In cases brought under the APA, then, courts should generally allow standing to plaintiffs who seek to redress systemic or probabilistic harms. On this view, there will remain a role for the causation requirements,[161] but the role will be the limited one suggested by the best of the Supreme Court's decisions on the point.[162]

B. *Cognizable Injuries and the Appropriate Role of Causation*

It should come as no surprise that the causation requirements are highly manipulable. Judgments about whether or not causation is speculative depend on no clear metric. It is difficult to make systematic the inquiry into whether government action against a third party is likely to affect behavior in ways that will help a particular class of plaintiffs. Thus, the Court has found that the causation requirements were met when the connection between the injury, the defendant's conduct, and

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could therefore reject the outcome in *Sierra Club* by granting standing if it so chose; and the best argument against the result in *Sierra Club* would be that the relevant statutes should have been interpreted to create a cause of action for the plaintiffs.

158. For the same argument in the context of constitutional claims, see Meltzer, supra note 4, at 304 ("The common law understanding of injury, however, is not well suited to deal with the distinctive problems of modern governments, which can cause serious harm of a systemic or probabilistic kind that does not fit into the common-law mold of identifiable injury to identifiable individuals.").

159. See supra note 78 (listing regulatory initiatives brought about as a result of suits by beneficiaries).

160. For most of the nation's history, the question for purposes of standing and article III was whether there was an invasion of a legal right. That question is analogous to the inquiry recommended here. See Winter, supra note 8, at 1395–96.

161. See infra notes 177–81 and accompanying text (discussing proper role of causation as a limiting requirement).

162. See cases cited infra note 163.

the relief sought were no clearer than in *Linda R.S.*, *EKWRO*, and *Allen v. Wright*.[163] After these decisions, the precise nature of the causation requirements is quite obscure.[164]

In particular, the causation requirements, as sometimes applied, threaten to make standing issues turn on considerable discovery, factfinding, and, worst of all, judicial speculation on the precise effects of regnlatory initiatives. All this is a significant disadvantage over the pre-*Data Processing* approach, which depended on legal issues that could be resolved on the basis of the pleadings without complex factual inquiries. The new law of standing has in this respect come to be less crisp and certain than the previous regime—precisely the opposite of what the *Data Processing* Court intended.

A large amount of doctrinal confusion is the consequence. The opinions of the en banc court of appeals in the *Thomas* case provide the most conspicuous example. In that case, standing was made to turn on an extraordinarily complicated inquiry into the real-world impact of fuel economy credits on automobile manufacturers.[165] There is something seriously wrong with standing principles that produce so high a degree of confusion in what is, after all, a jurisdictional determination. Moreover, the relevant decisions have not turned on causation alone, notwithstanding their rhetoric. The inquiry into causation is in part a disguise for other sorts of considerations—prominently including the view that Congress could not have intended to grant standing to plaintiffs whose access to court would interfere with executive prerogatives about implementation.[166]

The manipulable nature of the inquiry into causation appears in a less obvious and more important place as well. The central problem in the causation cases is not whether there is a causal nexus among injury, remedy, and illegality; it is how to characterize the relevant injury. Whether the injury is due to the defendant's conduct, or likely to be

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163. See Duke Power Co. v. North Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). In *Duke Power* the plaintiffs complained that the Price-Anderson Act encouraged the building of a nuclear power plant in their vicinity. Id. at 69. The Court concluded that the various environmental and aesthetic consequences of thermal pollution were sufficient to qualify as injuries "in fact." Id. at 73–74. But the claim of a causal connection was quite speculative; it was hardly certain that such effects would occur, and their consequences for any particular plaintiff were highly uncertain. Other cases allowing standing despite relatively attenuated chains of causation include Heckler v. Mathews, 465 U.S. 728, 737–38 (1984); Larson v. Valente, 456 U.S. 228, 239–42 (1982); Bryant v. Yellen, 447 U.S. 352, 366–68 (1980); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261–64 (1977); and United States v. SCRAP, 412 U.S. 669, 687–90 (1973).

164. *Duke Power* usefully illustrates the point. See supra note 163; see also Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 20–22 (1982); Fallon, supra note 5, at 37 n.201.

165. Center for Auto Safety v. Thomas, 847 F.2d 843, 855–58 (D.C. Cir.) vacated per curiam, No. 85-1515 (D.C. Cir. Sept. 16, 1988) (en banc).

166. See infra notes 189–93 and accompanying text.

remedied by a decree in his favor, depends on how the injury is described. In *EKWRO*, for example, the plaintiffs might have characterized their injury as an impairment of the opportunity to obtain medical services under a regime undistorted by unlawful tax incentives. In *Allen v. Wright*, the plaintiffs themselves argued that their injury should be characterized as the deprivation of an opportunity to undergo desegregation in school systems unaffected by unlawful tax deductions.[167] Thus recharacterized, the injuries are not speculative at all.[168] If described at a certain level of generality, the causation requirements are comfortably met in both cases. It is for this reason that in *Center for Auto Safety v. Thomas*, much of the dispute—under the rubric of causation—actually turned on whether the injury to the opportunity to purchase fuel-efficient cars was a legally cognizable one.

The device of recharacterization of the injury may seem artificial, but it is at work in at least one Supreme Court decision. In *Regents of the University of California v. Bakke*,[169] a question was raised about Allen Bakke's standing. There was no showing that Bakke would have been admitted to the medical program of the University of California at Davis if the affirmative action program were invalidated. The Court responded that "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. . . . The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race."[170] The Court thus concluded that the interference with the opportunity to compete was the relevant injury, and that the causation requirements were met with respect to that injury.[171] For regulatory harms as well, the central question is whether an increased risk or diminished opportunity is legally cognizable, or whether particular plaintiffs must instead show that there is a substantial likelihood that particular harm will come to them as individuals.

The causation issues could, in short, turn entirely on whether plaintiffs are permitted to characterize the relevant harm broadly rather than narrowly. A relatively broad characterization has been critical not only in *Bakke*, but in a number of lower court decisions as well.[172] But

167. Allen v. Wright, 468 U.S. 737, 746 (1984).

168. Roe v. Wade, 410 U.S. 113, 124–25 (1973) (even though plaintiff no longer pregnant at time of court review, "pregnancy . . . provides a classic justification for a conclusion of nonmootness"), and Laird v. Tatum, 408 U.S. 1, 10 (1972) (finding no legally cognizable injury as a result of data-gathering activities of Army), pose similar issues.

169. 438 U.S. 265 (1978).

170. Id. at 280–81 n.14.

171. Id.

172. See West Virginia Ass'n of Community Health Centers, Inc. v. Heckler, 734 F.2d 1570 (D.C. Cir. 1984) (granting standing to community health center that characterized its injury as impairing "opportunity to compete"); Autolog Corp. v. Regan, 731

the Supreme Court has given little or no guidance for resolving the problem of characterization.

On one view, the problem should be solved by looking at the nature of the interest protected by the relevant statutory or constitutional provision. The harm might be characterized broadly if the relevant source of law is designed to prohibit the injury thus characterized. A related route would be to ask straightforwardly whether Congress intended to confer on the plaintiff a right to bring suit. There are significant advantages to such an approach, and to some degree it is endorsed in current law.[173]

But the *Data Processing* Court interpreted the APA to confer a cause of action on those harmed by agency behavior, thus separating the issues of standing and the merits;[174] and this interpretation was intended precisely to allow a brisk threshold determination, one that would not call for elaborate statutory construction. On the other hand, it is impossible in the hardest cases to decide standing issues without asking whether the governing substantive statute is designed to protect the plaintiffs; in those cases, some such inquiry is necessary because by itself, the injury-in-fact test is too open-ended and malleable in an integrated economy. Insofar as they act as crude surrogates for this inquiry, the causation requirements confirm this proposition.

A large part of the solution lies in a recognition that the problem of standing is generally for legislative resolution, and that if Congress chooses to create regulatory systems to prevent probabilistic or systemic injuries, the usual rule ought to be that courts should permit litigants suffering such injuries to bring suit. Nothing in article III or the APA justifies a sharp split between injuries of the nineteenth-century variety and injuries that regulatory systems are designed to prevent. The question whether there is a "case or controversy" within the meaning of article III depends largely or entirely on positive law, not on the nature of the injury.[175] Moreover, a prohibition on standing in regula-

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F.2d 25, 28–31 (D.C. Cir. 1984) (loss of employment opportunity as injury in fact); International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 809–10 (D.C. Cir. 1983) (granting standing to organizations challenging rescission of restrictions on homework); National Coalition to Ban Handguns v. Bureau of Alchohol, Tobacco & Firearms, 715 F.2d 632, 633–34 (D.C. Cir. 1983) (granting standing to organization challenging issuance of firearms dealers' licenses). Compare Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1334–35 (D.C. Cir. 1986) (recognizing denial of opportunity to purchase as cognizable injury) and Center for Auto Safety v. Thomas, 847 F.2d 843, 849–50 (D.C. Cir. 1988) (en banc) (Wald, C.J.), vacated per curiam, No. 85-1515 (D.C. Cir. Sept. 16, 1988)(en banc) (same) with *NHTSA*, 793 F.2d at 1343–44 (Scalia, J., dissenting) (narrowly characterizing relevant injury) and *Thomas*, 847 F.2d at 886 (Silberman, J.) (injury to consumers is not constitutionally coguizable).

173. See Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 757 (1987).

174. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). The zone test also implicated the merits, but because of its leniency, the entanglement was not severe. See supra note 56 and accompanying text.

175. See infra notes 205–32 and accompanying text.

tory cases would represent a partial return to the private-law model of the 1950s and 1960s, allowing regulated entities, but not regulatory beneficiaries, to bring suit. Such a result would skew regulatory incentives against implementation, thus tending to defeat congressional purposes and expectations.

It follows that the *Center for Auto Safety* cases were quite easy. Congress expressly conferred standing on the plaintiffs to redress regulatory harms—"any person who may be adversely affected"—and there was no need for elaborate speculation about the precise effects of administrative controls. Even if the cases had not involved a specialized standing provision and had arisen under the APA, the same result would be appropriate. The regulatory harm provided the necessary injury in fact, and with respect to that harm, there was no problem with causation. It also follows that *EKWRO* and *Allen* were wrongly decided as general standing cases, although *EKWRO* may have been correctly decided because the area of taxation presents special reasons for caution.[176]

To say this is hardly to suggest that courts should abandon the causation requirements and the instincts that underlie them. Standing should be denied in three categories of cases brought under the APA. The first includes cases in which even broadly characterized injuries do not meet the causation requirements. Suppose, for example, that the plaintiffs are able to characterize their injuries in probabilistic or systemic terms, but those injuries are not likely to be redressed by a ruling against the defendant.[177] A denial of standing in such cases is a natural implication of the injury-in-fact requirement that the Court has found in the APA. If the harm, however characterized, is not likely to be redressed by a ruling for the plaintiffs, it is appropriate to conclude that there is no injury in fact. Judicial relief should be unavailable on the same theory as in *Sierra Club v. Morton*,[178] in which the plaintiffs did not allege that they were actual or prospective users of the park in question.

The second category includes cases in which the injury, once

176. See supra notes 105–06 and accompanying text.

177. United States v. SCRAP, 412 U.S. 669 (1973), is an illustration here. Even as recharacterized, the connection between the relief sought and the plaintiffs' injury was extremely loose. For other possible examples, see Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 666–70 (D.C. Cir. 1987) (denying standing to homeless people seeking to challenge a report on the homeless); American Legal Found. v. FCC, 808 F.2d 84, 89–92 (D.C. Cir. 1987) (denying standing to organization, which, although having no members but only supporters, attempted to challenge FCC failure to investigate network broadcasting concerning the CIA); California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823, 825–27 (D.C. Cir. 1985) (denying standing to association challenging transfer of ownership of television network stock on grounds that stock transfer was unconnected with network's employment of physically handicapped or network's failure to use methods of making broadcasts accessible to the hearing impaired).

178. 405 U.S. 727 (1972); see supra note 157.

recharacterized, is so generalized or diffuse that all or almost all citizens are affected in the same way.[179] Recharacterized injuries may become so open-ended that they are no longer properly treated as injuries at all; here the proper analogy is to taxpayer or citizen standing. In such circumstances as well, the case is quite similar to *Sierra Club v. Morton*, and in the absence of a clear statement from Congress, standing should be unavailable. The APA is properly interpreted to forbid standing in such cases, even if the principle is understood as subject to legislative override. This category is relatively small, however, as *Bakke*, *Duke Power*, and the *Center for Auto Safety* cases reveal. It is critical not to use the prohibition on citizen or taxpayer standing to support a broader, and indefensible, view that disallows standing when a large number of people are affected.

Finally, and most importantly, standing should be denied to those seeking to redress regulatory harms when there is good reason to believe that Congress intended not to allow the suit to go forward. The presumption here should be in favor of standing, since in *Data Processing* the Court interpreted the APA as creating a general background rule in favor of standing for those harmed and arguably within the zone of protected interests.[180] Sometimes, however, that rule will be rebutted by the statutory language or structure in particular cases, as the Court found in *Block v. Community Nutrition Institute*.[181] By itself, the injury-in-

179. The Court's decision in *SCRAP* may be incorrect because the case falls in this category. *SCRAP*, 412 U.S. at 686–88. In Diamond v. Charles, 476 U.S. 54 (1986), the Court properly denied standing to a doctor who attempted to defend a state statute limiting abortion. The doctor claimed, in relevant part, that his injury consisted in a smaller number of children available for his medical practice. Id. at 66. But if injuries of this sort sufficed, all or almost all citizens could defend restrictive abortion statutes. Notably, however, the *Diamond* Court recognized that the Illinois legislature might grant standing even in such cases. Id. at 65 n.17; see also Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 754 n.7 (1987) (recognizing that Congress may either grant or withhold standing); *EKWRO*, 426 U.S. 26, 41 n.22 (1976) (legislature may grant standing, but " 'plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants' ") (citations omitted).

In *Center for Auto Safety v. Thomas*, Judge Silberman attempted to assimilate the case of consumer standing to the case of a harm applying to all citizens and all taxpayers. 847 F.2d 843, 886 (D.C. Cir.) (Silberman, J., concurring), vacated per curiam, No. 85-1515 (D.C. Cir. Sept. 16, 1988) (en banc). But the cases are distinct. The plaintiffs in *Center for Auto Safety v. Thomas* consisted of a subclass of the citizenry made up of people who sought to purchase fuel-efficient cars; that subclass is sufficiently well-defined for purposes of standing. Indeed, it is no different in principle from a class of employers seeking to avoid regulatory controls.

180. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153–54 (1970).

181. 467 U.S. 340, 346–48 (1984) (finding implicit preclusion of consumer standing). The results in Allen v. Wright, 468 U.S. 737 (1984), and especially *EKWRO*, 426 U.S. 26 (1976), might be defended on this ground, by reference to the peculiar nature of standing in tax cases. See supra notes 105–07 and accompanying text; see also infra notes 205–32 and accompanying text (discussing article III). On the background assumption in favor of standing for those actually harmed, see *Clarke*, 107 S. Ct. at 755 n.9.

fact test is too open-ended to produce sensible results in an integrated economy. Millions of people are affected "in fact" by many agency decisions. In these circumstances, the application of the test in the hardest cases will inevitably depend on a judicial perception of whether the injury is direct or incidental, and that perception should be based on a reading of congressional purposes. The causation requirements have been made to do much of the work of restrictions on standing when such restrictions are a plausible understanding of legislative will. That issue should be approached more directly. If *EKWRO* was rightly decided, it was because the tax statutes should have been interpreted so as to deny standing, not because of a problem with causation; and if people now thought to be indirectly or incidentally harmed by regulatory action or inaction are to be denied standing, it is because the denial is a sensible reading of congressional purposes in enacting regulatory legislation.

The usual solution, then, is that the intended beneficiaries of regulatory programs should be permitted to bring suit to vindicate statutory requirements. In some circumstances, suits will be brought by people not within the zone of protected interests, or—as in *Block* and the tax context of *EKWRO*—there will be some other indication that Congress did not intend the suit to go forward. Most actions brought by beneficiaries to redress regulatory harms will not, however, fall within these categories, and the general rule of *Data Processing* will control.

C. *Separation of Powers Revisited*

The recent standing decisions are rooted in part in views about separation of powers. These views are quite distinct from notions of causation, standing by themselves. Three central ideas support the separation-of-powers concerns. The first is a belief that courts should protect individual rights rather than general social interests; the second invokes the "take Care" clause to argue against judicial interference with executive implementation; the third emphasizes the availability of the political process to protect interests in regulatory enforcement. These ideas are interrelated. None of them, however, supplies a sufficient reason for a refusal to treat probabilistic or systemic harms as judicially coguizable, or indeed for a general reluctance to hear actions brought by beneficiaries to bring about regulatory intervention.

1. *The Question of Individual Rights.* — There is considerable ambiguity in the view that courts should protect only traditional or individual rights. In particular, it is not clear whether standing is to be eliminated whenever many people are affected by the decision, or instead when an interest in regulatory protection—an interest not protected at common law—is at stake. If numbers are the crucial concern, standing would be foreclosed not only for regulatory beneficiaries, but also in cases in which many people or businesses are the object of government control. Such cases provide the staple of administrative law;

consider, for example, a carcinogen regulation that affects numerous industries and plants. No one would argue that, in cases of this sort, affected industries should be deprived of access to judicial review to test the question of legality. Such a result would mean quite generally that the rulemaking activity of federal agencies could not be subject to challenge from the objects of regulation. For this reason, the claim that courts should protect only traditional or individual rights cannot be made in terms of numbers alone.[182]

It is quite plausible to suggest that citizen or taxpayer standing ought to be unavailable, certainly in the absence of clear congressional authorization.[183] A rule of that sort can be supported by the basic consideration that underlies the injury-in-fact requirement. People ordinarily treated as bystanders ought not to be allowed to disrupt mutually advantageous relations,[184] and in any case political remedies are most reliable when all citizens are affected in the same way. This assumption is part of the set of prudential limitations on standing[185]—judge-made clear statement principles that are subject to congressional override.[186] To say that citizen or taxpayer standing should be unavailable is not, however, to say that when large numbers of people are affected by agency action, they should be remitted to political remedies, whether they are beneficiaries or objects of regulation. In both cases, the plaintiffs are seeking to require administrators to comply with statutory requirements; in both cases, the plaintiffs represent a subcategory of the citizenry; and in both cases, judicial relief should be available to bring about conformity to the law.[187] Nothing in article III argues against

182. On this score, the analysis in *SCRAP* is correct. See *SCRAP*, 412 U.S. at 686–88 ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody. We cannot accept that conclusion.").

183. See supra note 105.

184. See supra notes 156–57 and accompanying text. The term "bystander" is subject to the usual qualification: the question whether someone is a bystander cannot be decided prelegally, but is instead a function of the governing legal rules.

185. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474–75 (1982) (listing prudential limitations).

186. Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 754 n.7 (1987) (prudential limitations subject to congressional override).

187. In *Center for Auto Safety v. Thomas*, Judge Silberman, concurring, suggests that a class of consumers ought not to have standing to challenge regulatory action that makes certain products available at higher cost or not available at all—even if the relevant action is unlawful, and even if Congress has expressly granted standing in such cases. 847 F.2d 843, 886 (D.C. Cir.) (Silberman, J., concurring), vacated per curiam No. 85-1515 (D.C. Cir. Sept. 16, 1988) (en banc). The underlying reasoning is obscure. The rule against taxpayer or citizen standing is prudential in character, and the grant of standing to classes of consumers is designed to vindicate statutory requirements against administrative illegality. It is true that all citizens are in a sense consumers, id., but in the relevant cases a subgroup of consumers seeking to purchase a particular product is contending that the agency has violated statutory requirements. It is no more plausible to deny standing because the relevant consumers are numerous than it is plausible to

this view, and the APA is best interpreted to grant standing in both cases, even if the class of plaintiffs is quite large.

An alternative view would not emphasize numbers, but would instead distinguish sharply between the injuries of regulated entities and those of regulatory beneficiaries. But this view, depending as it does on nineteenth century conceptions of legal harm, cannot be sustained.[188] Congress has abandoned those conceptions, and in light of that abandonment, the interests of beneficiaries are no more "general" or "societal," and no less individual, than those of regulated entities.

2. *The "Take Care" Clause.* — It is possible to supplement the distinction between regulated entities and regulatory beneficiaries with a reference to the "take Care" clause.[189] On one view, the clause makes it problematic for courts to compel executive implementation, rather than to prevent agency action. In the former case, it might seem that courts are usurping the President's power to "take Care" that the laws are faithfully executed.

The "take Care" clause, however, is a duty, not a license.[190] The clause requires the President to carry out the law as enacted by Congress. It does accord to the President—and no one else—the authority to control the execution of the law when Congress has not spoken, and that authority will involve a measure of discretion. But the President's discretion, and the "take Care" clause in general, do not authorize the executive branch to violate the law through insufficient action any more than they authorize it to do so through overzealous enforcement.[191]

If administrative action is legally inadequate or if the agency has violated the law by failing to act at all, there is no usurpation of executive prerogatives in a judicial decision to that effect.[192] Such a decision is necessary in order to vindicate congressional directives, as part of the judicial function "to say what the law is."[193] The "take Care" clause

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deny standing to the objects of carcinogen regulation because the relevant industry has many members—or because the ultimate objects of regulation are consumers in that setting as well.

188. See supra notes 175–76 and accompanying text (arguing that the view depends on an anachronistic conception of injury, is inconsistent with congressional directives, and creates odd incentives for administrators); infra notes 205–32 (discussing article III).

189. The President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 4.

190. Allen v. Wright, 468 U.S. 737, 792–95 (1984) (Stevens, J., dissenting); see Miller, The President and Faithful Execution of the Laws, 40 Vand. L. Rev. 389, 396–97 (1987).

191. Miller, supra note 190, at 398.

192. To be sure, there may be difficult remedial problems in suits of this sort. See Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 562–63 (1985). Those problems, however, do not bear on the issue of standing and should be taken care of under a separate line of analysis. See Fallon, supra note 5, at 22–47, for a detailed discussion.

193. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). It is for this reason

and concerns of separation of powers argue in favor of rather than against a judicial role when statutory beneficiaries challenge agency behavior as legally inadequate.

3. *Political Redress.* — It is not persuasive to respond that the legal claims of statutory beneficiaries are properly handled in the political process and not in the judiciary. To be sure, judicial review must be seen as only a part of the network of controls on administrative action. It is a large mistake to focus exclusively on the courts.[194] In these cases, however, the claim is that a regulatory agency has violated a statute. Arguments that invoke the primacy of the democratic process call for judicial involvement. The plaintiff is seeking to compel the executive to comply with the political resolution as it is expressed in law. In this sense, the problem of standing presents distinctive considerations in the statutory realm. Nor is there a reason to distinguish between these claims and the legal claims of regulated industries, which are of course protected through the judiciary; a system that made the courts available only to the latter would be hard to defend.

In addition, the cases at issue involve legal, not political, claims—a point often missed in the opinions.[195] If the argument is genuinely political in character, the plaintiff will lose on some ground other than standing—either because there is no plausible claim on the merits, or because the decision is committed to agency discretion by law.[196] It is true that cases of this sort will often involve a wide range of interests and a number of affected parties. That fact should not, however, obscure the point that the plaintiff's objection is that the agency has violated a congressional directive; there are legally cognizable standards by which to resolve that issue.[197] Far better devices than standing are

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that the quotation from *Allen v. Wright*, see supra note 142 and accompanying text, is largely a muddle. The question in that case was not whether courts should be " 'continuing monitors of the wisdom and soundness of Executive action,' " *Allen*, 468 U.S. at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)); it was whether the agency's policies violated the governing statute. See id. at 784 (Stevens, J., dissenting).

194. See M. Reagan, Regulation: The Politics of Policy 113–17 (1987); D. Riley, Controlling the Federal Bureaucracy 159–60 (1987); Sunstein, supra note 21, at 463–78.

195. See *Allen*, 468 U.S. at 759–61; Center for Auto Safety v. Thomas, 847 F.2d 843, 882–83 (D.C. Cir.) (Silberman, J., concurring), vacated per curiam, No. 85-1515 (D.C. Cir. Sept. 16, 1988) (en banc).

196. Some plaintiffs should, however, be precluded from bringing suit because of the generalized character of their claims. See supra note 179 and accompanying text.

197. In this respect, standing issues are quite different in the constitutional and statutory realms. It is at least plausible to invoke such limitations as a prudential notion designed to limit use of the Constitution to challenge legislative or executive behavior. See A. Bickel, supra note 20, at 116–27 (judiciary's self-restraint in not granting standing reduces clash between judiciary and other branches and preserves its power). Such limitations received much of their impetus from efforts to insulate New Deal programs from intervention from a judiciary perceived to be hostile to regulation. See supra notes 20–25 and accompanying text. It is far less plausible to invoke prudential concerns as a reason to shield administrative agencies from congressional limitations.

The best argnment in this connection would emphasize that governing legal stan-

available for reducing inappropriate judicial intrusions in such cases, including, most prominently, deference on the merits.

The most general point is that there is no incompatibility between a system of administrative regulation and a continued regime of judicial control of administrative illegality.[198] Some of current law reflects an emerging but still tentative belief—reminiscent of the New Deal—in administrative autonomy from judicial intrusions, a belief that is supported by similar references to agency expertise and accountability.[199] Here, however, the skepticism about judicial intrusion is typically associated with fear that courts will compel rather than proscribe administrative regulation[200]—a peculiar reversal of the New Deal concern that courts would invalidate, on ideological grounds, necessary administrative action.

From the standpoint of the separation of powers, this skepticism is as myopic as its New Deal predecessor. There is no inconsistency between adherence to law and administrative regulation, even if legal intrusions occasionally produce pathologies.[201] Statutory requirements will sometimes call for or proscribe agency action. Under the APA, suits by those with a legal interest or an injury in fact as understood here—including both beneficiaries and regulated entities, if anachronistic concepts of this sort are to be used—should therefore be permitted.

It is, moreover, possible to read the recent cases relatively narrowly. Both *EKWRO* and *Allen* involved efforts by one taxpayer to litigate the tax liability of another. In neither case, moreover, were the injuries characterized as regulatory harms. *Bakke*,[202] the *Center for Auto Safety* cases,[203] and other decisions[204] suggest that under some consti-

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dards are often ambiguous and suggest that in the absence of injury to an object of regulation, outcomes should be the product of the political process, as reflected in informal interactions involving the executive branch, legislative authorities, and affected groups. This argument is, however, bard to defend when there is an injury in fact to a regulatory beneficiary who is within the zone of protected interests. See supra notes 182–88 and accompanying text (criticizing distinction between objects and beneficiaries of regulation).

198. The nature of judicial intrusion must be made to accommodate the dynamics of the regulatory process, and here there is considerable room for substantive regulatory change and reform of the approaches of reviewing courts. See Mashaw & Harfst, supra note 132, at 312–16 (criticizing judicial review of rulemaking in NHTSA context); Stewart, supra note 87, at 683–85 (suggesting market incentives replace legal regulation in certain settings).

199. See supra notes 20–25 and accompanying text.

200. Thus, most of the standing cases involve suits brought by regulatory beneficiaries.

201. See Mashaw & Harfst, supra note 132, at 302–09 (discussing pathologies of legalism); Stewart, supra note 87, at 673–78 (same).

202. See supra notes 169–71 and accompanying text.

203. See supra notes 117–24 and accompanying text.

204. See cases cited supra note 172.

tutional and statutory provisions, the device of recharacterization is appropriate. There is thus reason to believe that the causation requirements will not signal a significant departure from the understandings that underlay the rejection of private-law notions of standing.

D. *Injury, Causation, and Article III: An Excursus*

Because references to article III have played a prominent role in recent standing decisions, it is useful to conclude with a brief treatment of the relationship between the causation requirements, the characterization of injuries, and the case or controversy requirement of article III.[205]

The connection between standing limitations and article III is far from clear. Article III limits federal courts to cases or controversies, but this limitation does not explicitly require that plaintiffs have a particular stake in the outcome. A case or controversy might exist quite apart from whether there is an injury, legal or otherwise, to the complainant. To explore the problem, it is useful to distinguish among three conceptions of the relationship between article III and standing requirements. The first view would allow Congress to create judicially cognizable injuries whenever it chooses; the second would interpret article III to require a traditional private right; the third would impose some limitations on congressional power to create judicially enforceable rights, but would allow courts to redress regulatory harms of the sort involved in the *Center for Auto Safety* and similar cases.

On the first view, article III requires a case or controversy, but whether there is a case or controversy is something on which, with respect to standing, article III is silent. The existence of a case or controversy with respect to standing is a question of positive law and therefore for congressional resolution. Whether there is standing depends on whether positive law has created it by granting a cause of action or a legal right or immunity to the particular plaintiff. On this view, article III does require standing in the form of a legally cognizable injury; but article III does not say whether there is a legal injury in a particular case. The existence of standing, like the existence of property, depends on what the law provides.[206] Whether there is a "case or

205. See generally Berger, supra note 8, at 827 (questioning the historical accuracy of the "personal stake" element of the article III "case or controversy" requirement in *Flast v. Cohen*); Currie, Judicial Review Under Federal Pollution Laws, 62 Iowa L. Rev. 1221, 1225–47 (1980) (surveying requirements for judicial review under Clean Air Act and Federal Water Pollution Control Act); Currie, supra note 103, at 183–85 (criticizing Court as "unnecessarily stingy" in denying plaintiffs standing in *EKWRO*); Fallon, supra note 5, at 47–59 (arguing in favor of broad congressional power to create legal rights and therefore standing); Jaffe, supra note 8, at 1037–39 (arguing for a broader definition of "case or controversy").

206. In this respect, the problem of standing is distinct from the questions of ripeness, mootness, and advisory opinions. The latter requirements are not wholly within congressional control, though the legislative power to define injury includes some

controversy" is not answered by article III, but instead by Congress and the Constitution in creating legal rights and obligations.

On this view, moreover, the existence of standing and the existence of a cause of action present the same basic question. And in this respect, the requirement of standing serves an important separation-of-powers function, by ensuring that it will be Congress, rather than the courts, that will decide who may bring suit against the government. This view has two principal implications. The first is that litigants do not have standing unless Congress or the Constitution has granted them a right to bring suit. This view draws considerable support from the first hundred and fifty years or so of the republic.[207] It also receives significant though not unanimous support from the recent cases.[208]

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power over these requirements as well. What is distinctive about standing is that its existence depends on the creation of a legal right. While there may be some limitations on congressional power to create standing, those limitations, if they exist, are quite insubstantial. See infra notes 221–32 and accompanying text. In all of these settings, however, the New Deal reformation has large implications; but the general relationship between justiciability and the rise of the administrative state is beyond the scope of the present discussion.

207. See Berger, supra note 8, at 22 (arguing against "personal stake" requirement); Jaffe, supra note 8, at 1035 (arguing in favor of private attorneys general); Winter, supra note 8, at 1394–1409.

208. See Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 757–58 (1987); Havens Realty Corp. v. Coleman, 455 U.S. 363, 372–73 (1982). But see Allen v. Wright, 468 U.S. 737 (1984); *EKWRO*, 426 U.S. 26 (1976).

When the objects of regulation are seeking to test the question of authorization, it is plausible to understand previous doctrine as having been rooted in a belief that the due process clause implicitly furnishes a cause of action to bring suit. It was on this understanding that courts permitted regulated entities to challenge unlawful administrative incursions on their interests. This reading of the cases raises interesting questions about more modern and more controversial cases in which plaintiffs claim that a constitutional provision implicitly creates a cause of action. See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–92 (1971). The difference is that in some of the most controversial of the modern cases, damages are often sought, and it may be less clear that plaintiffs are seeking to fend off unauthorized governmental intervention; but that distinction is quite thin.

On this view, moreover, some of the cases involving standing to assert constitutional claims raise the question, not whether there is injury in fact, but whether the relevant provision creates a cause of action. Flast v. Cohen, 392 U.S. 83 (1968), would be understood as recognizing an implied cause of action under the establishment clause when certain conditions are met. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), denied a cause of action when those conditions were not met. *Bivens*, *Flast*, and *Valley Forge* thus raise closely related questions. Furthermore, the struggle over the characterization of the plaintiff's injury in cases involving constitutional claims might be understood as part of an effort to define the circumstances in which constitutional provisions implicitly create causes of action. In addition, the manipulable character of the causation requirements in constitutional cases might be defended on the basis of the (controversial) claim, made most notably in A. Bickel, supra note 20, at 115–27, that courts use doctrines of justiciability so as to control the amount and timing of their intervention into the democratic process. The discussion in the text, however, deals with the question whether and when the Constitu-

The second implication is that if Congress has granted such a right, there is no problem under article III.

Notably, the pre-*Data Processing* view of standing largely incorporates this understanding of article III.[209] The legal-interest test reflects a conception of standing that draws an inference of congressional intent to allow the plaintiffs' action to go forward on the basis of the congressional desire to protect their interests in the regulatory process.

There is much to be said in favor of this view of article III.[210] Insofar as it suggests that the problem of standing is largely within congressional control, it seems to be correct as a matter of both history and logic. The basic position has, moreover, been accepted explicitly or implicitly in a number of recent decisions by the Supreme Court.[211] Those decisions recoguize that the problem of standing is, in administrative-law cases, governed by the APA,[212] and that Congress can create standing if it chooses.[213] In tbis view, Congress can create a legal injury where none had existed before. Consider the fact that the Freedom of Information Act creates a cause of action for "any person,"[214] and that the injury, thus defined, has raised no constitutional problem.[215] Consider also the legislative creation of citizens' suits under various statutes[216] and the creation of legal injuries quite foreign to the common law.[217]

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tion permits Congress to create a cause of action, not with the quite distinct question whether the Constitution creates a cause of action of its own force.

209. See supra notes 23–51 and accompanying text.

210. See Albert, supra note 35, at 450–56 (whether there is standing is the same question as whether there is private right of action); Fallon, supra note 5, at 30–34 (Congress can "adjust doctrines of justiciability to allow private parties to enforce constitutional rights").

211. See *Clarke*, 107 S. Ct. at 757–58; Diamond v. Charles, 476 U.S. 54, 65 n.17 (1986); *Havens Realty Corp.*, 455 U.S. at 373 ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .' ") (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 155–56 (1970).

212. 5 U.S.C. § 702 (1982).

213. See cases cited supra note 211; see also Tennessee Valley Auth. v. Hill, 437 U.S. 153, 164 n.15 (1978) (statute allows "any person" to commence a civil action to enjoin any individual or government agency that is alleged to be in violation of the Endangered Species Act of 1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209–10 (1972) (Congress intended that complaints by private persons be the primary method of obtaining compliance with the Civil Rights Act of 1968). See generally Fallon, supra note 5, at 48–54 (recognizing broad congressional power to create legal rights and therefore standing).

214. 5 U.S.C. § 552 (1982).

215. See, e.g., Brandon v. Eckard, 569 F.2d 683, 687–88 (D.C. Cir. 1977) (affirming validity of congressional grant of standing in FOIA cases).

216. See, e.g., Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1982); Energy Policy and Conservation Act, 42 U.S.C.A. § 6305 (West 1983 & Supp. 1988); Clean Air Act, 42 U.S.C. § 7604 (1982).

217. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (Section 804

For the most part, the question of standing therefore involves the meaning of congressional enactments.[218] The *Data Processing* requirement of "injury in fact" has confused this point. But it is notable that the Supreme Court has also said that this requirement is a creation of Congress in enacting the APA, emphasizing that the APA generally creates standing for those who are harmed, and that there need be no separate indication of congressional intent to create a cause of action.[219] The downfall of the legal interest test in *Data Processing* is thus an interpretation of the APA,[220] and the problem of standing in this sense remains within congressional control.

The claim that the problem of standing is for congressional resolution might be thought to run into two sorts of constitutional objections. First, the denial of standing, like the denial of judicial review,[221] might sometimes raise serious problems under the due process clause or article III. If, for example, Congress provided that those subject to environmental regulation could not seek review of the regulation, a serious problem would arise under the Constitution. In the modern period, the same proposition may sometimes hold for regulatory beneficiaries.[222] From this direction, one can find a limitation, even if a rela-

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of Fair Housing Act of 1968 "establishes an enforceable right to truthful information concerning the availability of housing"); *Trafficante*, 409 U.S. at 212 (Civil Rights Act of 1968 creates right to protection against housing discrimination).

218. See Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 754 (1987) (describing the problem in *Data Processing* as "basically one of interpreting congressional intent"); id. at 755 n.9, 757, 758 n.16 (emphasizing that availability of standing is different from availability of implied cause of action because of broad purposes of standing provision of APA).

219. See id.

220. But see J. Vining, supra note 1, at 39–41; supra notes 36–37 and accompanying text.

221. See supra note 34 and accompanying text.

222. The denial of standing to regulatory beneficiaries would be most likely to run into constitutional obstacles if the benefit is individual rather than collective. The issues would be (a) whether the due process clause requires judicial review of the administrative determination and (b) whether article III requires some role for a federal court in supervising the administrative decision. See Fallon, supra note 32, at 963–67; cf. Webster v. Doe, 108 S. Ct. 2047, 2051–52 (1988) (construing CIA statute so as to permit judicial review of constitutional claims); id. at 2058–60 (Scalia, J., dissenting) (arguing that there is no general right to judicial review); Goldberg v. Kelly, 397 U.S. 254, 260–61 (1970) (welfare benefits qualify as property for purposes of procedural due process).

If the answer to either question is in the affirmative, a legislative repeal of the standing provisions of the APA, or a general effort to insulate administrators from judicial review, would run into serious constitutional difficulty—unless heavy reliance is placed on the distinction between legislative and adjudicative determinations. Compare Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (taxpayer has no due process right to a hearing when tax is part of general statute within state power) with Londoner v. Denver, 210 U.S. 373, 385 (1908) (when state legislature commits the

tively unimportant one in practice,[223] on the claim that the question of standing is for congressional resolution.

The second constitutional objection is that the grant of standing might sometimes be thought to raise questions under article III—an objection that can be generalized into a second and different view of the relationship between article III and standing requirements. On this view, article III does impose substantive limitations on the sorts of injuries that can be redressed in federal court. Only injuries to nineteenth century individual rights—those that are, or that resemble, common-law harms—can be remedied by the judiciary. Congress is without power to allow federal courts to remedy certain sorts of injuries, even if it attempts to create a cause of action to do precisely that. This view takes various forms.[224] In all of those forms, however, the central point is plain: article III allows federal courts to vindicate some injuries and not others, and the line between them depends on traditional conceptions of what constitutes a legal harm.

Some of the Court's decisions offer support for this view, appearing to conflate APA and constitutional standards,[225] to require a judicially approved injury in fact no matter what Congress has said, and at least to imply that the Constitution disallows standing even if Congress has created it.[226] For this reason, it is controversial to claim that there are no limitations on congressional power to grant standing. To be sure, any such limitations should come up infrequently even if they exist. But on one view, the requirement of an injury in fact stems from

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determination of the tax to a subordinate body, taxpayer has due process right to a hearing).

There would be no anomaly in a constitutional order that permitted Congress to grant standing freely but limited its power to deny it. A principle of that sort is rooted in the idea, with powerful roots in current law, that whether there is a legal "case" is a function of positive law, but that there are constitutional limits on Congress's power to authorize administrative officials to make unreviewable decisions about legal rights. But a detailed exploration of these complex issues is beyond the scope of the present discussion.

223. The background rule recognized in the APA, allowing standing for regulated entities and beneficiaries, means that the constitutional objection will come up quite rarely, if at all.

224. Thus it might be said that Congress is without power to authorize courts to remedy probabilistic or systemic harms, or that courts may redress only injuries of the sort cognizable at common law, or, more narrowly, that article III forbids Congress from conferring on citizens a right to vindicate merely ideological claims. On the latter view, Sierra Club v. Morton, 405 U.S. 727 (1972), is properly decided as a matter of article III, but Congress has the constitutional power to overrule the decisions in, for example, Allen v. Wright, 468 U.S. 737 (1984), *EKWRO*, 426 U.S. 26 (1976), and Warth v. Seldin, 422 U.S. 490 (1975).

225. *Allen*, 468 U.S. at 750–56; *EKWRO*, 426 U.S. at 38; United States v. SCRAP, 412 U.S. 669 (1973). But see Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750 (1987).

226. *Allen*, 468 U.S. at 750–52; *EKWRO*, 426 U.S. at 38–41. The cases are, however, quite ambignous on this point. See supra note 208.

article III; it forbids courts to redress or prevent regulatory harms; and the requirement cannot be overcome by statute.

That view is, however, misguided.[227] The best interpretation of article III would recognize that Congress has the authority to define legal rights and obligations, and that it may therefore, by statute, create an injury in fact where, as far as the legal system was concerned, there had been no injury before. Article III does not require an injury in fact, even if the APA does, and article III certainly does not require a traditional private right. Article III requires a case or controversy, a concept that depends on the acts of Congress. Many of the Court's decisions appear to recognize this point.[228]

In this respect, the question whether an injury is merely ideological or instead legal is one of positive law; there is no pre- or post-legal metric for distinguishing between the two. This view draws support from the original understanding of the case-or-controversy requirement.[229] It also draws support from the view, prominent in the post-New Deal period as well as in the founding era, that whether there is a case or controversy, or a legal injury and legal right, cannot be understood independently of what the law provides. The modern network of legal rights may or may not closely resemble the sorts of interests protected at common law, and nothing in the Constitution requires that they do so. There is much to be said, then, in favor of the view that article III does not limit Congress' power to grant standing, and that the only limitations, grounded in article III and the due process clause, are those that prohibit Congress from denying standing in certain cases. The contrary position is based on a peculiar and quite modern revisionist reading of the Brandeis-Frankfurter effort—itself revisionist—to immunize administrative regnlation from judicial control.[230]

Like the second view, and unlike the first, the third approach reads article III as imposing substantive limitations on the sorts of injuries that plaintiffs may invoke; but it would allow courts to redress injuries that do not in any sense resemble those recognized at common law. On this view, Congress could not enact a statute providing, for example, that all citizens may bring suit to redress all official illegality. The requirement of an injury in fact is thus constitutional in status; it is not solely an interpretation of the APA; and merely ideological or law enforcement interests cannot be converted into legal harm by legislative

227. See supra notes 206–20 and accompanying text; see also Berger, supra note 8, at 827; Fallon, supra note 5, at 30–34; Stewart, supra note 1, at 1735–42 (all resolving the question in the same way as the text).

228. See supra note 208.

229. See Winter, supra note 8, at 1394–97; see also Berger, supra note 8, at 827, 832–35 (arguing against requirement of personal stake); Jaffe, supra note 8, at 1034 (same).

230. See Winter, supra note 8, at 1442–52; supra notes 20–25 and accompanying text.

fiat.[231] On the other hand, this third view would allow systemic or probabilistic harms to be redressed if Congress has created a regulatory system to reduce or eliminate those harms. If article III is to be understood as imposing substantive limitations on the sorts of injuries that may suffice for federal jurisdiction, this third position is preferable to the second—even though, for reasons suggested above, the best view is that article III permits Congress to create standing as it chooses.

It would be ironic indeed if article III were interpreted to preclude federal courts from compelling regulatory agencies to adhere to the will of Congress by undertaking enforcement action to the degree or of the nature that statutes require. Such an interpretation would be reminiscent, above all, of the early period of administrative law, when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in deference to private-law understandings of the legal system.[232]

CONCLUSION

The rise of administrative regulation was a deliberate rejection of common-law principles. In particular, regulatory regimes often repudiated common-law baselines for distinguishing between inaction and action, or neutrality and partisanship. In these circumstances, it is not surprising that the principles governing legal control of administrative behavior have largely abandoned common-law categories, allowing courts to remedy violations of statutorily protected interests.

Recent decisions by the Supreme Court and some lower courts, however, threaten to reintroduce a sharp distinction between the interests of regulatory beneficiaries and those of regulated entities, a distinction that would move the law not only toward the period before *Data Processing*, but toward anachronistic understandings that restricted the category of legally coguizable interests to nineteenth century private rights. The recent use of the causation requirements has been justified as an inference from the system of separation of powers, but it is more realistically understood as an outgrowth of a private-law model of public law, one that stems not from a belief in judicial restraint in the abstract, but instead from hostility to suits brought by beneficiaries of regulatory programs to ensure fidelity to statute. The reintroduction of such hostility would not only be inconsistent with a wide range of cases pointing in the direction of an independent public law; it would also contradict the text and history of article III, fly in the face of congressional understandings and expectations, and skew administrative incentives in undesirable directions.

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231. The view that Congress should be entitled to define legal rights as it wishes is, however, supported by judicial acceptance of various provisions furnishing citizens' suits against public and private actors. See supra note 77.

232. See, e.g., Lochner v. New York, 198 U.S. 45 (1905).

Such a step should be firmly resisted. For the most part, the question of standing is for legislative resolution. Because the constitutional constraints are thin, the law of standing has generally depended on congressional intent, which must sometimes be extrapolated on the basis of background understandings about the circumstances in which judicial relief ought to be presumed to be available.

In the 1970s, the Supreme Court interpreted the APA as granting standing to almost all those actually harmed by administrative illegality[233]—an interpretation that departed from the original understanding of the APA, but that can be understood in a way that is largely consistent with the basic purposes of that statute, and that placed the problem of standing in the control of Congress, where it largely belongs. Neither the APA nor article III need be interpreted to make common-law conceptions of injury controlling in public-law cases. The development of a set of independent principles of public law is a large task indeed; but in the context of standing, a revival of private-law ideas, coexisting with administrative regulation, would be singularly ill-conceived.

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233. The qualification is necessary because (a) the "zone" test prevented suit by those whose interests were entirely far afield of the statute and (b) the injury-in-fact test had to be interpreted in such a way as to exclude suits by those incidentally or indirectly harmed.