

# Articles

## The Structure of Standing

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### INTRODUCTION

The structure of standing law in the federal courts has long been criticized as incoherent. It has been described as “permeated with sophistry,”<sup>1</sup> as “a word game played by secret rules,”<sup>2</sup> and more recently as a largely meaningless “litany” recited before “the Court . . . chooses up sides and decides the case.”<sup>3</sup> This unhappy state of affairs does not result from the unimportance of standing doctrine.<sup>4</sup> If anything, the contrary is true. The root of the problem is, rather, that the intellectual structure of standing law is ill-matched to the task it is asked to perform. In this article I propose a new structure, one that can serve as a paradigm not only in the scientific sense of explaining observed phenomena,<sup>5</sup> but also in the sense

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I wish to thank my colleagues and friends Stephen Bundy, Jesse Choper, Kevin James, Stephan Kuttner, Kirk McInnis, Robert Post, Edward Rubin, Joseph Sax, and Kim Scheppele, my father Robert Fletcher, and my wife Linda Fletcher, for their valuable criticism and suggestions. I particularly wish to thank Akhil Amar and Daniel Meltzer for their contributions. Finally, I wish to thank Adam Belsky and Pamela Johnston for their excellent research assistance.

1. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983).

2. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

3. Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22, 23 (1982).

4. Complaints about standing law, and suggestions for change, are legion. See, e.g., Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425 (1974); Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

5. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

of permitting us to shape the legal materials that we seek simultaneously to explain.

The stated purposes and black-letter doctrine of standing are numbingly familiar. The purposes include ensuring that litigants are truly adverse and therefore likely to present the case effectively,<sup>6</sup> ensuring that the people most directly concerned are able to litigate the questions at issue,<sup>7</sup> ensuring that a concrete case informs the court of the consequences of its decisions,<sup>8</sup> and preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches.<sup>9</sup> Under present doctrine, a plaintiff can have standing only if he satisfies the "case or controversy" requirement of Article III of the Constitution.<sup>10</sup> To satisfy Article III, a plaintiff must show that he has suffered "injury in fact"<sup>11</sup> or "distinct and palpable" injury,<sup>12</sup> that his injury has been caused by the conduct complained of, and that his injury is fairly redressable by the remedy sought.<sup>13</sup> If a plaintiff can show sufficient injury to satisfy Article III, he must also satisfy prudential concerns<sup>14</sup> about, for example, whether he should be able to assert the rights of someone else,<sup>15</sup> or whether he should be able to litigate generalized social grievances.<sup>16</sup> Assuming that Article III has been satisfied, Congress can confer

6. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 679-81 (1973).

7. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); Brilmayer, *A Reply*, 93 HARV. L. REV. 1727, 1732 (1980) (granting standing to litigate rights of others can be paternalistic toward those who choose to waive their rights); Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 311 (1979) [hereinafter Brilmayer, *Perspectives*] ("The doctrine of 'standing to sue' also reflects the ideal of self-determination. It holds that litigation may only be initiated by an individual with a 'personal stake' in the dispute—that is, by someone with personal and not merely external preferences about the outcome.") (footnote omitted).

8. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?"); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924) ("[A]dvisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting").

9. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

10. See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

11. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970); see also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (standing requirement "assures an actual factual setting in which the litigant asserts a claim of injury in fact"); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977) ("[P]laintiff must show that he himself is injured.")

12. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

13. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

14. See *infra* text accompanying notes 134-40.

15. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

16. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *United States v. Richardson*, 418 U.S. 166, 176-77 (1974).

standing by statute when, in the absence of a statute, a plaintiff would have been denied standing on prudential grounds.<sup>17</sup>

As currently constructed, standing is a preliminary jurisdictional requirement, formulated at a high level of generality and applied across the entire domain of law. In individual cases, the generality of the doctrine often forces us to leave unarticulated important considerations that bear on the question of whether standing should be granted or denied. This consequence is obvious in the apparent lawlessness of many standing cases when the wildly vacillating results in those cases are explained in the analytic terms made available by current doctrine. But we mistake the nature of the problem if we condemn the results in standing cases. The problem lies, rather, in the structure of the doctrine.

In this article, I propose that we abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of "injury in fact." Instead, standing should simply be a question on the merits of plaintiff's claim.<sup>18</sup> If a duty is statutory, Congress should have essentially unlimited

17. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-10 (1972) (Congress may explicitly grant standing as broadly as Article III permits).

18. Fragments of the approach suggested here have appeared both in the academic literature and in Supreme Court cases. The most important is Albert, *supra* note 4 (standing to challenge administrative action is question of law on merits). *See also* Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750 (1987) (standing under Administrative Procedure Act depends on statute under which relief is sought); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 490 (1982) (Brennan, J., dissenting) (federal taxpayer standing to bring establishment clause challenge depends on meaning of clause); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 466 (1974) (Douglas, J., dissenting) (difference between standing and cause of action matter of "semantics"); *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring) (federal taxpayer standing permitted because of particular nature of establishment clause); *id.* at 115-16 (Fortas, J., concurring) (same); S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 1105-07 (2d ed. 1985) (*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), can be justified by looking to statute at issue); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 528-31 (1965) (standing under Administrative Procedure Act depends on statute under which relief is sought); Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977) (doctrines of justiciability do not tie closely to justifications for judicial review); Currie, *supra* note 4 (standing is question of law on merits, following Professor Albert); Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. 256 (1971) (determination of what constitutes injury is normative determination); Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76 (1973) (standing in *Sierra Club v. Morton*, 405 U.S. 727 (1972), should have depended on statutes plaintiff sought to enforce); Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1 (1980) (standing in housing cases should depend on statutes plaintiff seeks to enforce); Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665, 1670 (1974) (standing depends on merits of provision sought to be enforced, and Article III does not contain "injury in fact" requirement).

For an argument specifically rejecting the view that standing should be seen as a determination on the merits, see Lebel, *Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013.

power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it. If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it. Congress should have some, but not unlimited, power to grant standing to enforce constitutional rights. The nature and extent of that power should vary depending on the duty and constitutional clause in question.

## I. ORIGINS OF MODERN STANDING LAW

No thorough history of the development of federal standing law has been written, and I will not attempt to do so here.<sup>19</sup> It is at least clear that current standing law is a relatively recent creation.<sup>20</sup> In the late nineteenth and early twentieth centuries, a plaintiff's right to bring suit was determined by reference to a particular common law, statutory, or constitutional right, or sometimes to a mixture of statutory or constitutional prohibitions and common law remedial principles.<sup>21</sup> Friendly suits were prohibited,<sup>22</sup> and on one occasion general pleading requirements were read in conjunction with a jurisdictional statute to deny an appeal to the United States Supreme Court on the ground that appellant had alleged insufficient personal interest.<sup>23</sup> But no general doctrine of standing ex-

19. Useful, but incomplete, histories include Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) [hereinafter Jaffe, *Public Actions*].

20. See, e.g., J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 34-54 (1978) (noting doctrinal development of concept of standing).

21. For example, Judge Cooley wrote in 1888, "[W]hen the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none." T. COOLEY, *A TREATISE ON THE LAW OF TORTS* 790 (2d ed. 1888). Justice Stevens noted this statement in *California v. Sierra Club*, 451 U.S. 287, 299 n.2 (1981) (Stevens, J., and Rehnquist, J., concurring), in discussing private causes of action under modern statutes. Cooley's revisors continued this statement unchanged in later editions after his death. See, e.g., 2 T. COOLEY, *A TREATISE ON THE LAW OF TORTS* 1408 (J. Lewis ed. 1906) (same statement). For a history of the development of implied private causes of action, see Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501 (1986).

22. See, e.g., *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 344-45 (1892) ("It [is] evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation . . . . Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature . . . the court must, in the exercise of its solemn duties, determine whether the act be constitutional . . . . It never was thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.").

23. *Tyler v. Judges of the Court of Registration*, 179 U.S. 405 (1900), *dismissing appeal from* 175 Mass. 71, 55 N.E. 812 (1900). The plaintiff objected to the form of notice provided in a land registration proceeding under the Torrens Act on the ground that the claims of interested parties, other than himself, would be cut off without due process of law. The Supreme Judicial Court of Massachusetts had heard the case on the merits, upholding the constitutionality of the statute. The United States Supreme Court refused to hear the case on a writ of error on the ground that the plaintiff had not alleged "an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute." 179 U.S. at 407.

isted. Nor, indeed, was the term "standing" used as the doctrinal heading under which a person's right to sue was determined.<sup>24</sup> As late as 1923, in *Frothingham v. Mellon*,<sup>25</sup> the Supreme Court denied a federal taxpayer the right to challenge the federal Maternity Act on the ground that the taxpayer's interest was "minute and indeterminable" without ever employing the word "standing."<sup>26</sup>

The creation of a separately articulated and self-conscious law of standing can be traced to two overlapping developments in the last half-century: the growth of the administrative state and an increase in litigation to articulate and enforce public, primarily constitutional, values.<sup>27</sup> As private entities increasingly came to be controlled by statutory and regulatory duties, as government increasingly came to be controlled by statutory and constitutional commands, and as individuals sought to control the greatly augmented power of the government through the judicial process, many kinds of plaintiffs and would-be plaintiffs sought the articulation and enforcement of new and existing rights in the federal courts. Beginning in earnest in the 1930's, the Supreme Court began to develop a new doctrine, or perhaps more accurately, a new set of loosely linked proto-doctrines, to replace the relatively stable formulations that had previously been used to decide who could sue to enforce various rights.

Among the difficult questions posed by the enormous growth of administrative agencies in the 1930's,<sup>28</sup> one of the most prominent was how to determine who could sue to enforce the legal duties of an agency. It was not feasible to infer simply from the existence of an agency's duty that any plaintiff who might benefit from the performance of the duty should have the right to enforce it. In some circumstances, the most desirable scheme might be to permit standing broadly, conferring the right to sue on "private attorneys general" who, for reasons of public policy, should be per-

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24. Note an early use of the word "stand" in *Mississippi & Mo. R.R. v. Ward*, 67 U.S. (2 Black) 485 (1862). A part-owner of three steamboats sued to abate a nuisance caused by a bridge obstructing navigation. The defendant railroad argued that plaintiff did not "stand" in a position to bring suit because his co-owners were not joined as plaintiffs. *Id.* at 491. The Court held that the plaintiff was acting as a "public prosecutor," and that so long as he showed damage to himself he could maintain the suit without joining others whose interests would also be served by the suit. *Id.* at 492.

25. 262 U.S. 447 (1923).

26. *Id.* at 487.

27. We may loosely define a "public value" as a widely shared value concerning a matter of societal importance. Professor Vining has described the connection between standing and public values: "[I]n the very recognition of a 'person' who is 'harmed,' courts formally capture the formulation of a value . . . , confirm it in our language and our thought, and permit a full and continuous search for its realization to begin." J. VINING, *supra* note 20, at 171.

28. For sophisticated and comprehensive contemporary treatments of the problems posed by administrative agencies, see FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941); W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941). For a modern perspective, see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1723-60 (1975) (describing emerging model of "interest representation").

mitted to sue as appropriate guardians of the public interest.<sup>29</sup> In other circumstances, the most desirable scheme might be to grant standing narrowly, refusing to give it even to some of those directly affected by the actions of the agency.<sup>30</sup> The issue was further complicated by the fact that standing in administrative cases could mean a variety of things: It could determine who might participate in agency rulemaking or adjudicatory proceedings,<sup>31</sup> who might bring original proceedings to challenge agency actions,<sup>32</sup> or who might appeal from agency adjudicatory proceedings.<sup>33</sup>

Both before and after the enactment of the Administrative Procedure Act,<sup>34</sup> standing determinations were based on an amalgam of statutory interpretation and common law assumptions. In some cases, the substantive statute clearly denied standing. For example, the act providing for veterans' benefits prohibited judicial review of the agency's denial of such benefits, even when sought by the veteran whose claim was at stake.<sup>35</sup> In other cases, the statute explicitly conferred standing. For example, the Communications Act of 1934 conferred standing on "any . . . person . . . aggrieved or whose interests [are] adversely affected by any decision of the [Federal Communications] Commission complained of," whether or not that person alleged an interest that the Commission was legally required to consider in making its decision.<sup>36</sup> In still others, where the statute was

29. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.) (granting standing to consumer group under Bituminous Coal Act of 1937: "Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers . . . . Such persons, so authorized, are, so to speak, private Attorney Generals [sic]"), *vacated on suggestion of mootness*, 320 U.S. 707 (1943); *see also* *Scripps-Howard Radio, Inc. v. Federal Communications Comm'n*, 316 U.S. 4 (1942) (granting standing under Federal Communications Act of 1934); *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (same).

30. *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (denying standing to milk consumers to challenge marketing orders of Secretary of Agriculture under Agricultural Marketing Agreement Act of 1937); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (denying standing to challenge allegedly illegal loans made to competitors under National Industrial Recovery Act of 1935).

31. *See, e.g.*, *Office of Communication of the United Church of Christ v. Federal Communications Comm'n*, 359 F.2d 994 (D.C. Cir. 1966) (granting standing under Federal Communications Act to listening groups to intervene in licensing proceeding before Federal Communications Commission).

32. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (standing upheld to challenge administrative rulemaking under Administrative Procedure Act and National Traffic and Motor Vehicle Safety Act of 1966); *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*, 412 U.S. 669 (1973) (standing upheld to challenge surcharge on railroad freight rates under National Environmental Policy Act on ground that Environmental Impact Statement had not been prepared); *National Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1975) (standing upheld to challenge administrative inaction).

33. *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

34. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-706 (1982)).

35. Act of March 20, 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8, 9 (1933). This statute was invoked as the sole example of explicit statutory preclusion of judicial review in *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 94 (1947) [hereinafter *ATTORNEY GENERAL'S MANUAL*].

36. Pub. L. No. 73-416, § 402(b)(2), 48 Stat. 1064, 1093 (1934) (codified as amended at 47 U.S.C. § 402(b)(6) (1982)); *see* *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

silent, the Court looked to see if the right was analogous to a recognized common law right of property, contract, or tort.<sup>37</sup> The Administrative Procedure Act, enacted in 1946, provided judicial review of agency actions to a “person . . . adversely affected or aggrieved by [agency] action within the meaning of [a] relevant statute,”<sup>38</sup> but it is fairly clear that the reference to “relevant statute” was intended not only to continue the flexibility and variation in response to particular statutory grants and purposes, but also to continue the reliance on common law analogies and assumptions to provide texture and meaning to the statutes.<sup>39</sup>

The increase in litigation over public values is more difficult to pinpoint in time because litigation in this country has always been used to articulate and enforce public values. But, generally speaking, federal litigation in the 1960's and 1970's increasingly involved attempts to establish and enforce public, often constitutional, values by litigants who were not individually affected by the conduct of which they complained in any way markedly different from most of the population.<sup>40</sup> The most prominent

37. See, e.g., *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137–38 (1939) (denying standing to private utilities to bring constitutional challenge to Tennessee Valley Authority Act: “The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government . . . may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938) (denying standing to private utility to challenge allegedly illegal federal loans and grants to competing municipal utilities: “What petitioner anticipates, we emphasize, is damage to something it does not possess—namely, a right to be immune from lawful municipal competition. . . . It is, in principle, as though an unauthorized loan were about to be made to enable the borrower to purchase a piece of property in respect of which he had a right, equally with a prospective complainant, to become the buyer. While the loan might frustrate complainant’s hopes of a profitable investment, it would not violate any legal right; and he would have no standing to ask the aid of a court to stop the loan.”); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (“A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. . . . Or standing may be . . . created by the Constitution or a statute. . . . But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially.”).

38. Pub. L. No. 79-404, § 101(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702 (1982)).

39. The Attorney General’s Manual indicates that this section of the Administrative Procedure Act was designed to preserve the existing law.

The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) [5 U.S.C. § 702] was a restatement of existing law. More specifically, he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *The Chicago Junction Case*, 264 U.S. 258 (1924); *Sprunt & Son v. U. S.*, 281 U.S. 249 (1930); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); and *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). . . . This construction of section 10(a) was not questioned or contradicted in the legislative history.

ATTORNEY GENERAL’S MANUAL, *supra* note 35, at 96.

40. The availability of standing in “public actions” was the subject of considerable, sometimes heated, academic debate. See, e.g., Berger, *supra* note 19 (using original English practices to argue that standing requirements should be relaxed); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970) [hereinafter Davis, *Liberalized Law*] (calling for simplification of standing requirements through focus on “injury in fact”); Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353 (1955) [hereinafter Davis, *Governmental Action*] (arguing that reading sec-

example is probably *Flast v. Cohen*,<sup>41</sup> in which the Court granted standing to a federal taxpayer to challenge federal expenditures of funds for parochial schools allegedly in violation of the establishment clause. Mrs. Flast's interest in the dispute was not markedly different from that of most of the rest of the population, and the impact of the expenditures on her federal tax bill was as "minute and indeterminable" as in Mrs. Frothingham's case.<sup>42</sup> Yet the Court granted standing because it sensed, without being able to articulate it fully, that a broad grant of standing was an appropriate mechanism to implement the establishment clause interest at stake.<sup>43</sup>

In both categories of litigation, the Supreme Court has had to confront what have become, in scope and implication, new questions. The movement away from the earlier common law formulations that governed the ability to sue for judicial relief has been disorganized, at times chaotic, and the newer doctrinal formulations, particularly those that govern current law, have proved unsatisfactory. Yet the task of constructing a new intellectual framework for standing law should be within our capacity. In the material that follows, I propose and explain a framework that will permit us to respond in a principled way to the forces responsible for the abandonment of the old formulations, and to handle with sensitivity the problems to which the current doctrine should be, but often is not, responsive.

## II. THE ESSENTIAL NATURE OF THE STANDING QUESTION

For purposes of the discussion that follows, I put to one side cases that do not involve genuine standing issues in the sense in which I am using the concept. It is common knowledge that from time to time the Supreme Court has used standing and other justiciability doctrines as mechanisms to control its appellate docket, particularly in constitutional cases. I do not regard standing decisions based on such considerations as relevant to the

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tion 10(a) of Administrative Procedure Act to include "injury in fact" requirement serves principles of justice and simplicity, and follows congressional intent); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) (arguing for relaxation of taxpayer standing requirements); Jaffe, *Public Actions*, *supra* note 19 (suggesting framework for relaxation of standing requirements in public actions).

41. 392 U.S. 83 (1968).

42. See *supra* text accompanying notes 25-26.

43. The answer given by the Court in *Flast* is, of course, not the only answer possible to a standing question posed by a federal taxpayer who challenges federal actions. For example, the Court in *United States v. Richardson*, 418 U.S. 166 (1974), denied standing to a federal taxpayer who sought to compel the Central Intelligence Agency to reveal detailed information about its expenditures under the "statement and account clause" of the Constitution. Nor indeed is the answer given in *Flast* the only answer possible to a standing question under the establishment clause, as the Court demonstrated recently in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), when it denied federal taxpayer standing to challenge a grant of federally owned real property to a religious school allegedly in violation of the establishment clause. See *infra* text accompanying notes 213-40.



analysis presented here. Based on this rationale, I put to one side standing cases such as *Tileston v. Ullman*,<sup>44</sup> in which the Court avoided dealing with the then-controversial issue of contraception by denying standing to a doctor, and perhaps also *Laird v. Tatum*,<sup>45</sup> in which the Court avoided deciding the proper scope of the Army's domestic intelligence gathering activities by denying standing to those who had been the subjects of surveillance.

A true standing decision determines whether a plaintiff has a right to judicial relief in any federal court,<sup>46</sup> not just the Supreme Court. The essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty? This question should be seen as a question of substantive law, answerable by reference to the statutory or constitutional provision whose protection is invoked. Viewing standing this way requires a reexamination of five ideas embedded in current law: that plaintiff must have suffered injury in fact; that standing is a jurisdictional determination rather than a determination "on the merits"; that plaintiff's injury must have been caused by the conduct complained of, and can be redressed by the remedy sought; that so-called third party standing law properly may consist of largely discretionary rules developed by the Court for its own governance; and that current standing doctrine is an essential protection against federal courts issuing advisory opinions. I examine each of these ideas in turn.

### A. *Injury in Fact*

Properly understood, standing doctrine should not require that a plaintiff have suffered "injury in fact." I shall elaborate on this view, using as my point of departure a case that specifically disavows it. In *Association of Data Processing Service Organizations v. Camp*,<sup>47</sup> an association of data processors sued to invalidate a rule promulgated by the Comptroller of the Currency permitting national banks to provide data processing services to other banks and to bank customers. More damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision.<sup>48</sup> The issue was whether the association

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44. 318 U.S. 44 (1943).

45. 408 U.S. 1 (1972).

46. I argue elsewhere that a standing decision in fact determines whether a plaintiff has a right to judicial relief in any court, state or federal. This conclusion follows from the argument that a standing determination is a determination on the merits. See W. Fletcher, "The 'Case or Controversy' Requirement in State Courts (1988) (unpublished manuscript, available from author).

47. 397 U.S. 150 (1970).

48. I am not alone in this view of the case. See, e.g., Stewart, *Standing for Solidarity*, 88 YALE L.J. 1559, 1569 (1979) (reviewing J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* (1978)) (characterizing *Data Processing* as "unredeemed disaster"). *Data Processing* is not without competitors, however. Professor Davis' preferred candidate is Warth v. Seldin, 422 U.S. 490 (1975). 4 K. DAVIS, *supra* note 1, § 24:34, at 332 ("The Warth opinion probably has done more harm to the law of standing than any other opinion.").

was entitled to judicial review under section 10(a) of the Administrative Procedure Act<sup>49</sup> and two substantive statutes, the Bank Service Corporation Act<sup>50</sup> and the National Bank Act.<sup>51</sup> Justice Douglas, writing for the Court, set forth a two-fold test requiring that plaintiffs allege "injury in fact" and that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>52</sup> I shall discuss both requirements of the test, beginning in this subsection with the "injury in fact" requirement.

It has become part of the received wisdom since *Data Processing* that a plaintiff must show "injury in fact" in order for an Article III federal court to hear the dispute. Even the *Data Processing* dissenters, who rejected the "arguably within the zone of interests" part of the test, agreed that "injury in fact" was a constitutional requirement.<sup>53</sup> The idea that a plaintiff must suffer some kind of injury before a federal court can provide relief was, of course, already at large in the Supreme Court's cases. For example, in *Baker v. Carr*,<sup>54</sup> the Court asked whether the plaintiff "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."<sup>55</sup> But *Data Processing* was the first case to state that "injury in fact" was required, and to formulate the issue of plaintiff's standing as a factual (and therefore an ostensibly non-normative) matter.<sup>56</sup>

Since *Data Processing*, the Court has treated the "injury in fact" requirement as part of the basic conceptual scheme of Article III, both inside and outside the administrative law setting in which the term had its origin.<sup>57</sup> Further, the Court has characterized the Article III requirement of injury as something that Congress cannot satisfy by the creation of a statutorily protected interest. For example, in *Warth v. Seldin*,<sup>58</sup> the Court stated a strong version of the requirement: "Congress may grant an

49. 5 U.S.C. § 702 (1982).

50. 12 U.S.C. § 1864 (1964) (current version at 12 U.S.C. § 1864 (1982)).

51. 12 U.S.C. § 24 (1982).

52. 397 U.S. at 153.

53. See *Barlow v. Collins*, 397 U.S. 159, 167-68 (1970) (Brennan, J., and White, J., concurring in result and dissenting) (companion case to *Data Processing*).

54. 369 U.S. 186 (1962).

55. *Id.* at 204.

56. The "injury in fact" test owes its life at least in part to Professor Davis, who had urged that section 10(a) of the Administrative Procedure Act be construed to require only that plaintiff show "injury in fact." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.06, at 232 (1958); see *infra* text accompanying notes 159-69.

57. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498-99, 501 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1974); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973).

58. 422 U.S. 490 (1975).

express right of action to persons who otherwise would be barred by prudential standing rules. Of course Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself . . . ."<sup>59</sup> Despite the Court's uncritical acceptance of the "injury in fact" requirement, it is a singularly unhelpful, even incoherent, addition to the law of standing.

Professor Jaffe argued in the 1960's that the federal courts were not, as a historical matter, constitutionally forbidden to entertain "public actions."<sup>60</sup> I am inclined to agree with him as a historical matter, but I will not argue against the "injury in fact" test on that ground here. Rather, I wish to show that the "injury in fact" requirement cannot be applied in a non-normative way. There cannot be a merely factual determination whether a plaintiff has been injured except in the relatively trivial sense of determining whether plaintiff is telling the truth about her sense of injury.<sup>61</sup>

If we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint. If this is so, there can be no practical significance to the Court's "injury in fact" test because all people sincerely claiming injury automatically satisfy it. This should be so because to impose additional requirements under the guise of requiring an allegation of "injury in fact" is not to require a neutral, "factual" showing, but rather to impose standards of injury derived from some external normative source. There is nothing wrong with a legal system imposing such external standards of injury; indeed, that is what a legal system must do when it decides which causes of action to recognize as valid legal claims. However, in employing such standards, we measure something that is ascertainable only by reference to a normative structure.

A homely example can be used to illustrate the point. Imagine two siblings who compare, as children will, the treatment they receive from their parents. If one child receives a new bicycle, the other child may complain if he does not also receive a new bicycle or some equivalent. A parent who has just bought a bicycle for one child is likely to say (or at least I have

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59. *Id.* at 501.

60. L. JAFFE, *supra* note 18, at 459-500; Jaffe, *supra* note 40, at 1039-41; Jaffe, *Public Actions*, *supra* note 19, at 1269-92. Raoul Berger agrees with Professor Jaffe that "injury in fact" was not required under English practices prior to the adoption of our Constitution. Berger, *supra* note 19, at 827.

61. For an early article suggesting that *Data Processing's* "injury in fact" test is necessarily normative, see Dugan, *supra* note 18, at 262-71. See also Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1918 (1986) ("Injury analysis demands the exploration of not only the directness or actuality of the litigant's claimed injury, but also the judicial cognizability of the interest alleged to be injured.") (emphasis in original); Note, *supra* note 18, at 1670 ("If the Court does not recognize plaintiff's injury as sufficient to confer standing, it is thereby injecting normative notions into the concept of injury in fact . . . ."). For an analogous insight with respect to who can be a party to a suit, see R. COVER, O. FISS & J. RESNIK, *PROCEDURE* 428 (1988) ("Too often proceduralists use the concept of 'party' as if it were a natural, rather than a legal, concept.").

found myself saying) to the complaining child, "It doesn't hurt you that I got a bicycle for your sister." Of course, I am wrong if I say that. The child *is* feeling hurt. What I really mean, or should mean if I think about it, is that the child should not feel hurt; or that the child has no "right" to feel hurt; or that I do not wish to recognize the feeling as a hurt (perhaps because if I so recognized it, I would feel some obligation to avoid doing what has caused it). The complaining child is invoking a sort of familial equal protection clause: What the parents give to one child, they must give to the other. The parent, in denying that injury exists, is not denying the sense of injury but is, rather, denying the existence of such a family norm.

Another example can be used, this time from law. Imagine someone who is seriously concerned about federal government cutbacks in welfare payments, but who is not himself a welfare recipient. He feels so strongly about the matter that he occasionally loses sleep after walking past homeless people sleeping in the streets, and he spends money he would not otherwise spend to support a private charity providing aid to the homeless. If such a person brings suit challenging the cutback as contrary to the governing statute, we might be inclined to say that he is not "injured in fact." We are wrong here, too. The person *is* injured "in fact." We may be led to see this if we imagine a case in which my neighbor's dog is chained in his back yard, close to my bedroom window, and barks all night. I lose sleep, and I spend money on earplugs and a double glazed window. In other words, my injuries are comparable to those of the person in the homeless example, for I lose sleep and spend money. In this context, we say quite readily that I have been injured "in fact." Indeed, the law agrees with the assessment of injury and protects me with a cause of action for nuisance.

The case of my neighbor's dog should force us to rethink the conclusion in the homeless example that there was no "injury in fact." A statement that a plaintiff in such a case suffered no "injury in fact" was based on some normative judgment about what ought to constitute a judicially cognizable injury in the particular context, not whether an actual injury occurred. What we mean, or should mean if we think about it, is that he is not hurt in a way that we wish the courts to recognize—perhaps because it is obvious that other people (the homeless) are hurt in what we conceive to be a more direct and serious way, because we may not wish to help the homeless when the claim of injury comes from someone whom we consider to be a bystander, or even because we simply do not wish to help the homeless.

I am not suggesting that the nature and degree of a person's injury should be irrelevant to a determination of whether that person should have a cause of action to protect the asserted right. Quite the contrary, for the nature and degree of injury are critical issues in deciding whether to provide legal protection. But it cannot be seen as a merely "factual" ques-

tion. Rather, it must be seen as part of the question of the nature and scope of the substantive legal right on which plaintiff relies.

If this is so, it impedes rather than assists analysis to insist that “case or controversy” under Article III requires as a minimum threshold an “injury in fact,” in the words of *Data Processing*,<sup>62</sup> or a “distinct and palpable injury,” in the words of *Warth v. Seldin*.<sup>63</sup> If such a requirement of injury is a constitutional minimum that Congress cannot remove by statute, the Court is either insisting on something that can have no meaning beyond a requirement that plaintiff be truthful about the injury she is claiming to suffer, or the Court is *sub silentio* inserting into its ostensibly factual requirement of injury a normative structure of what constitutes judicially cognizable injury that Congress is forbidden to change.

Although the Court is not accustomed to thinking of its Article III standing doctrine this way—indeed, those who have insisted most strongly on the “injury in fact” requirement are accustomed to thinking of the proper judicial role in quite the opposite way<sup>64</sup>—superimposing an “injury in fact” test upon an inquiry into the meaning of a statute is a way for the Court to enlarge its powers at the expense of Congress. To use a phrase that is particular anathema to those members of the Court most anxious to tell us that there are Article III limitations on statutory grants of standing, one may even say that the “injury in fact” test is a form of substantive due process. For the Court to limit the power of Congress to create statutory rights enforceable by certain groups of people—to limit, in other words, the power of Congress to create standing—is to limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against.

Where standing to enforce statutorily established duties is at issue, an “injury in fact” requirement operates as a limitation on the power normally exercised by a legislative body. One may couch the limitation in relatively old-fashioned terms and say that it restricts the power of the legislature to create causes of action. Or one may couch it in more modern language and say that it limits the power of the legislature to articulate public values and choose the manner in which they may be enforced. In significant part, a debate over what constitutes “injury in fact” sufficient for Article III is thus a debate about separation of powers and the respective responsibilities of Congress and the Court. Behind the Court’s insistence on “injury in fact” as a constitutional test lies a desire to avoid “an overjudicialization of the processes of self-governance.”<sup>65</sup> Yet, as I have

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62. 397 U.S. at 152.

63. 422 U.S. at 501.

64. See, e.g., *id.* at 498 (standing inquiry “founded in concern about the proper—and properly limited—role of the courts in a democratic society”); Scalia, *supra* note 9, at 881 (“[S]tanding is a crucial and inseparable element of [the principle of separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the process of self-governance.”).

65. Scalia, *supra* note 9, at 881.

just suggested, the "injury in fact" requirement, if seriously insisted on, may have quite the opposite consequence. If there is a problem of excessive "judicialization," the solution lies elsewhere. As I argue below, it lies in paying careful attention to the nature of the substantive right at issue in the particular case, and in distinguishing between standing to enforce statutorily and constitutionally defined duties.

### B. *Standing as a Question of Law on the Merits*

Under the second part of the *Data Processing* test, a plaintiff has standing if she is "arguably within the zone of interests" protected by the law in question. Justice Douglas' opinion explicitly denied that the issue of plaintiff's standing goes to the merits of the claim: "The 'legal interest' test goes to the merits. The question of standing is different."<sup>66</sup> In accordance with this view, the Court in *Data Processing* refused to decide whether plaintiff was actually protected by the statutes in question after it found that plaintiff had standing. The issue of whether plaintiff was actually entitled to sue—part of what the Court termed "the merits"—was to be determined on remand.<sup>67</sup> Seen in this way, standing is a jurisdictional question, involving a preliminary look at the merits—a sort of nibble at the apple before plaintiff takes a real bite.

The standing question in *Data Processing* relates to the merits of whether plaintiff has a legal right to sue as a motion to dismiss for want of federal question jurisdiction in *Bell v. Hood*<sup>68</sup> relates to a motion to dismiss for failure to state a claim. Both the standing issue and the federal question jurisdiction issue are preliminary looks at the merits. There is standing under *Data Processing* if plaintiff is "arguably" within the protected zone of interests; there is federal question jurisdiction under *Bell v. Hood* if plaintiff's claim is not "wholly insubstantial or frivolous." If a plaintiff has standing, she can then try to show that she is actually protected and can therefore proceed to that part of the merits dealing with plaintiff's right to enforce an asserted duty. If there is federal question jurisdiction, plaintiff can try to show that she has stated a cause of action

66. 397 U.S. at 153.

67. *Id.* at 157-58 ("Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a 'legal interest' that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.")

68. 327 U.S. 678, 682-83 (1946) (federal court has federal question jurisdiction unless federal claim is "wholly insubstantial and frivolous"; whether plaintiff has stated good cause of action under federal law goes to merits of claim rather than to court's jurisdiction to adjudicate claim); *see also* *Wheeldin v. Wheeler*, 373 U.S. 647 (1963) (same). The analogy to *Bell v. Hood* is made explicit in *City of Chicago v. Atchison, Top. & Santa Fe Ry.*, 357 U.S. 77, 83-84 (1958) ("It seems to us that [defendant's] argument confuses the merits of the controversy with standing of [plaintiff] to litigate them. Cf. *Bell v. Hood*, 327 U.S. 678. [Plaintiff's] standing could hardly depend on whether or not it is eventually held that [defendant] can lawfully operate without a certificate of convenience and necessity.") (footnote omitted).

and can therefore proceed to the merits as to both plaintiff's right and defendant's duty.

In fact, it is not clear that we need *Bell v. Hood*. The Court itself has characterized the doctrine as based on "a maxim more ancient than analytically sound,"<sup>69</sup> and has pointedly refused to endorse it on one other occasion.<sup>70</sup> It would probably be quite workable to discard *Bell v. Hood* and to require that any objection to the sufficiency of plaintiff's legal argument be raised in the district court<sup>71</sup> as a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim.<sup>72</sup> But if we assume for a moment that the two-step analysis of *Bell v. Hood* is desirable,<sup>73</sup> we may be inclined to think that the analogous two-step analysis of *Data Processing* is similarly desirable. Yet even then, precisely because *Bell v. Hood* exists, *Data Processing* is unnecessary, for *Data Processing*'s "arguably within the zone of interests" test accomplishes in federal law standing cases what *Bell v. Hood* accomplishes for all cases under federal law. That is, it is unnecessary for *Data Processing* to duplicate, in the subset of federal question cases that comprise federal law standing cases, the jurisdiction-determining function that is already served for all federal law cases under *Bell v. Hood*.

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69. *Rosado v. Wyman*, 397 U.S. 397, 404 (1970).

70. *Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (noting that *Bell v. Hood* "has been questioned," but stating that "it remains the federal rule and needs no re-examination here").

71. The Supreme Court's jurisdictional dismissals of appeals from state courts "for want of a substantial federal question" rest on a different basis. *Zucht v. King*, 260 U.S. 174 (1922). The desirability of the Supreme Court's practice of dismissing insubstantial appeals on jurisdictional grounds is a matter of debate, but arguments against district court jurisdictional dismissals do not transfer readily to this context. For an introduction to the debate, see P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 726-34 (3d ed. 1988) [hereinafter *HART & WECHSLER'S THIRD*]; R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* 239-55 (6th ed. 1986).

72. Unlike a subject matter jurisdiction objection under 28 U.S.C. § 1331 (1982), *see, e.g., Louisville & Nash. R.R. v. Mottley*, 211 U.S. 149, 152 (1908), a rule 12(b)(6) objection is waivable. Federal Rule of Civil Procedure 12(h)(2) provides: "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." A rule 12(b)(6) objection may not be made for the first time in a motion for judgment notwithstanding the verdict, *Black, Sivalls & Bryson, Inc. v. Shondell*, 174 F.2d 587, 590-91 (8th Cir. 1949), nor may it be made for the first time on appeal, *Brule v. Southworth*, 611 F.2d 406, 409 (1st Cir. 1979). *See* 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1392, at 862 (1969); *id.* at 415 (Supp. 1987). Given the leniency of the federal rules on the timing of 12(b)(6) motions, however, this change from the regime of *Bell v. Hood* does not seem great. Indeed, it seems that the resulting increased pressure on defendant to make more timely objections argues for such a change rather than against it.

73. Of course, the desirability of *Bell v. Hood* depends on the alternative. In the actual case, the district court had dismissed a non-frivolous federal claim on subject matter jurisdiction grounds. 327 U.S. at 680. If the alternative rule to *Bell v. Hood* were the rule applied by the district court rather than a rule requiring the objection to be made in a 12(b)(6) motion, *Bell v. Hood* would be both important and desirable. The Supreme Court did not justify its decision on this ground, but from this perspective we may see *Bell v. Hood* as permitting someone with an arguable but by no means certain federal claim to come into federal court for a determination of the merits of that claim. If the district court's rule were correct, plaintiffs alleging unusual federal claims would be forced to test those claims in state court, thus giving to the state courts primary responsibility for developing federal law.

Several commentators, led by Professor Albert, have argued even without resort to *Bell v. Hood* that the second part of the *Data Processing* test serves no useful purpose, and that it is nothing more than an unnecessary "surrogate" for a determination on the merits of whether plaintiff has stated a cause of action.<sup>74</sup> As Professor Stewart and Judge Breyer put it in the context of statutorily granted standing, "When a plaintiff seeks standing on the basis that an interest is protected by statute, the question whether that interest is legally protected for standing purposes is the same as the question whether plaintiff (assuming his or her factual allegations are true) has a claim on the merits."<sup>75</sup>

While a standing determination is, as Professor Albert argues, merely a surrogate for a determination on the merits, "cause of action" is an awkward term because it includes within its scope the two distinct questions of defendant's duty and plaintiff's right to enforce that duty. One might be tempted to think that the question of defendant's duty goes to the merits and that plaintiff's right to sue does not.<sup>76</sup> The Supreme Court sometimes encourages this way of thinking. For example, in *Clarke v. Securities Industry Association*,<sup>77</sup> the Court recently decided that plaintiff had standing to seek judicial review of a decision of the Comptroller of the Currency, and then announced that it was turning to "the merits."<sup>78</sup> What the Court meant, or should have meant, was that having decided the legal question of whether plaintiff was entitled to seek judicial review of defendant's actions under the Administrative Procedure Act, it was now turning to the legal question of whether the defendant had violated any duty. Both questions are part of the merits of plaintiff's legal claim.

One may see in some of the behavior, if not always the language, of the Court a recognition that standing questions are questions on the merits. Parallel to the Court's standing cases is a remarkable series of implied private cause of action cases. For all the Court is usually willing to say, and perhaps to see, the implied cause of action cases are unrelated to the standing cases. In fact, they raise a comparable issue. In *Cort v. Ash*,<sup>79</sup> the Court outlined a four-part test for determining whether a cause of action for damages for a private plaintiff could be inferred from the Federal

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74. Albert, *supra* note 18, at 1144-54; *see also* Currie, *supra* note 4 (agreeing with Professor Albert that standing depends on nature of plaintiff's claim). If carried to its logical extreme, such an argument would also lead us to condemn *Bell v. Hood* on the same ground. Neither commentator argues for such a result, or for that matter even discusses *Bell v. Hood*, but I suspect they would think such a result desirable.

75. S. BREYER & R. STEWART, *supra* note 18, at 1094 (footnote omitted).

76. Note that the Court in *Data Processing* does not make this mistake. Under *Data Processing's* view of the matter, whether plaintiff *actually* has the right to sue is a question of law on "the merits." 397 U.S. at 158.

77. 107 S. Ct. 750 (1987).

78. *Id.* at 759 ("We conclude, therefore, that respondent was a proper party to bring this lawsuit, and we now turn to the merits.").

79. 422 U.S. 66 (1975).



Elections Campaign Act without once noting that its decision could be characterized as a standing decision.<sup>80</sup> Four years later, in *Cannon v. University of Chicago*,<sup>81</sup> the Court applied the *Cort* criteria to determine whether an unsuccessful applicant for admission could bring suit to enforce Title IX of the Education Amendments of 1972 against a medical school that had received federal funds. The Court wrote: “[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent.”<sup>82</sup> What the Court failed to say in *Cannon*—and indeed in a whole series of implied right of action cases<sup>83</sup>—was that the issue was the same as that presented in standing cases. The issue was whether the particular plaintiff had a right to judicial enforcement of a legal duty of the defendant.<sup>84</sup>

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First, is the plaintiff “one of the class for whose *especial* benefit the statute was enacted”—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally subjected to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

*Id.* at 78 (citations omitted, emphasis in original).

81. 441 U.S. 677 (1979).

82. *Id.* at 688.

83. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) (inferring private cause of action for damages under Commodity Exchange Act); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (refusing to infer right of contribution for anti-trust defendant under federal anti-trust law or under federal common law); *Carlson v. Green* 446 U.S. 14 (1980) (inferring private cause of action for damages under Eighth Amendment); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (inferring private rescission remedy but refusing to infer private cause of action for damages under Investment Advisors Act); *Davis v. Passman*, 442 U.S. 228 (1979) (inferring private cause of action for damages under Fifth Amendment for sex discrimination against member of House of Representatives); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (refusing to infer private cause of action for damages under Securities Exchange Act of 1934); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (refusing to infer private cause of action for declaratory or injunctive relief under Indian Civil Rights Act of 1968); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (inferring private cause of action for damages under Fourth Amendment); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (inferring private cause of action for damages and equitable relief under section 14(a) of Securities Exchange Act of 1934).

84. In a footnote to a recent opinion, the Court has compared administrative review standing cases and private right of action cases, saying that plaintiffs in the latter category of cases have to meet a higher threshold test in showing that judicial protection of their interests is intended by the statute in question. *Clarke v. Securities Indus. Ass'n*, 107 S. Ct. 750, 758 n.16 (1987). The *Clarke* footnote may reflect a nascent recognition that private right of action cases are a species of standing cases, and may signal a movement away from an earlier footnote in *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979), in which the Court explicitly differentiated between standing and cause of action:

The Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action. . . . [U]nder the criteria we have set out [concerning the nature of a petitioner's injury], petitioner clearly has standing to bring this suit. . . . Whether petitioner has asserted a cause of action, however, depends not on the quality or extent of her injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue.

For a discussion of *Clarke*, see *infra* text accompanying notes 195–210.

One may see elsewhere in the law that standing determinations are actually determinations on the merits. For example, the state law of Louisiana has a vocabulary that distinguishes between the two questions of defendant's duty and plaintiff's right. The question of defendant's duty is covered by the term "cause of action"; the question of the plaintiff's right to enforce the duty is covered by the term "right of action."<sup>85</sup> Both questions are seen under Louisiana law, as they ought to be under federal law, as going to the merits.

Two examples from the common law, long predating the development of federal standing law, make the same point. One is from contracts law, and the other is from property law. The question from contracts is whether a third party beneficiary has a legal right to enforce a contractual duty. If this question were translated into the language of the federal courts and federal law, it would become a question of the third party's "standing" to enforce the conceded legal duty of the obligee under the contract. The question from property is whether a remainderman has a right to an injunction to prevent waste by the holder of the life estate. If this question were translated into the federal formulation, it would become a question of the remainderman's "standing" to enforce the conceded legal duty of the life tenant.

In the contracts example, the common law has generally focused on the intent of the contracting parties rather than on the degree of injury felt by the plaintiff.<sup>86</sup> In the property example, the law has focused on the likelihood of the plaintiff actually coming into possession of the estate and thus on the likelihood of the plaintiff being injured, rather than on the intent of the grantor, except as the grantor is presumed to know the law governing life tenants and remaindermen when she decided how to structure the grant.<sup>87</sup> In both examples, the courts have been able to address the question of plaintiff's "standing" on the merits of whether plaintiff is actually protected by the law, free from any talk about whether his interest is "arguably within a protected zone of interests." And, as is obvious from

85. See, e.g., *Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 1095-96, 262 So. 2d 328, 333-34 (1972); *Pons v. Pons*, 327 So. 2d 561, 562-63 (La. App. 1976); McMahon, *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17, 29-30 (1934) ("The [exception of no cause of action] is used to raise the issue as to whether the law affords a remedy to anyone for the particular grievance alleged by plaintiff; the [exception of no right of action] is employed . . . to raise the question as to whether plaintiff belongs to the particular class in whose exclusive favor the law extends the remedy. . . .").

86. Under the approach of the First Restatement, "donee" and "creditor" beneficiaries could maintain a cause of action against a breaching party; "incidental" beneficiaries could not. RESTATEMENT OF CONTRACTS §§ 133-147 (1932). Under the approach of the Second Restatement, an "intended" beneficiary can maintain a cause of action; an "incidental" beneficiary cannot. RESTATEMENT (SECOND) OF CONTRACTS §§ 302-315 (1979).

87. The long-settled rule is that a contingent remainderman cannot bring an action for damages for waste during the continuation of the life estate, but that a vested remainderman may do so: "[T]he true reason for denying damages to the [contingent] remainderman is that it is impracticable to determine the extent of his damages, because of the uncertain character of his interest." 1 AMERICAN LAW OF PROPERTY § 4.102, at 579 (1952).

the doctrines developed in these two areas, the courts have been able to draw distinctions between different kinds of cases, permitting plaintiffs to enforce legal duties in some cases and denying them the ability to enforce in others, without having to resort to any of the rest of the vocabulary and conceptual apparatus of federal standing law.

But whether the term "standing" is employed, as in *Clarke*; "implied cause of action," as in *Cannon*; "right of action," as in *Louisiana*; or "legal right," as in the common law examples, the important point to notice is that the question of whether plaintiff "stands" in a position to enforce defendant's duty is part of the merits of plaintiff's claim. It is the sort of claim that can be tested in federal district courts under a rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted,<sup>88</sup> or the sort of issue that is determined in the federal courts of appeals in deciding whether section 10(a) of the Administrative Procedure Act gives plaintiff the right to seek judicial review of administrative action. And it is the sort of claim whose contours are determined by looking to the substantive law upon which plaintiff relies.

The essence of a standing inquiry is thus the meaning of the specific statutory or constitutional provision upon which the plaintiff relies rather than a disembodied and abstract application of general principles of standing law. This is not to say that in each standing case a court must begin from scratch. The ideas that the Court now invokes as controlling principles of standing law—for example, that a plaintiff must have suffered direct injury, or that a plaintiff must have suffered in some way different from the general population—are relevant to a standing decision. They are useful as presumptions or aids for construction, often providing important interpretive context, but they can never be more than presumptions. The actual provision at issue must be the controlling authority, for the merits of a standing claim must always depend, in the end, on the meaning of the statute or constitutional clause upon which the plaintiff relies.

### C. *Causation and Redressability*

Under current doctrine, a plaintiff must show that her injury is caused by the legal violation of which she complains, and that the injury is redressable by the legal remedy she seeks. For example, in *Warth v. Seldin*, the Court wrote that a federal court has jurisdiction only "when the plaintiff himself has suffered 'some threatened or actual injury resulting

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88. I anticipate a procedural consequence to be that a failure to make a timely 12(b)(6) motion will result in a waiver of a standing objection. The federal rules are lenient on the timing of such motions, however, and the burden on defendants would not be great. See *supra* note 72. As suggested above in the context of *Bell v. Hood*, the pressure on defendant to make a timely motion to dismiss for lack of standing argues for such a change rather than against it. See *id.* I also anticipate that a standing decision under rule 12(b)(6) will have the same res judicata consequences as any other 12(b)(6) decision.

from the putatively illegal action. . . .'<sup>89</sup> And in *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>90</sup> the Court wrote: "[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation."<sup>91</sup> What the Court means, or should mean, by the causation and redressability requirement is not made clear in its opinions.

### 1. *What Causation and Redressability Cannot Mean*

The causation and redressability requirement can best be explained by first noting what it cannot mean. I will take as my example the Court's decision in *Linda R.S. v. Richard D.*<sup>92</sup> Linda R.S. was the mother of an illegitimate child whose father refused to make child support payments required under Texas civil law.<sup>93</sup> She alleged in her complaint that the state district attorney systematically refused to prosecute delinquent fathers of illegitimate children because he construed the Texas criminal statute as inapplicable to such fathers, but that he routinely prosecuted delinquent fathers of legitimate children under the statute. Linda R.S. brought a class action against the state on behalf of all mothers similarly situated, seeking an injunction "requiring the State of Texas and its officials to cease their alleged discriminatory application of the child support laws."<sup>94</sup> The Supreme Court chose to treat the complaint as a demand for an injunction requiring the district attorney to bring criminal prosecutions against delinquent fathers of illegitimate children.<sup>95</sup> The Court denied standing on the ground that "if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will . . . result in payment of support can, at best, be termed only speculative."<sup>96</sup>

89. 422 U.S. 490, 499 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

90. 426 U.S. 26 (1976).

91. *Id.* at 38.

92. 410 U.S. 614 (1973). For further discussion of *Linda R.S.*, see *infra* text accompanying notes 241-49.

93. Although it does not affect my analysis, I should point out that the situation was slightly more complicated than I state in the text. In a case argued on the same day as *Linda R.S.*, the Court decided that the equal protection clause required that a Texas civil statute requiring child support payments by fathers of legitimate children be applied to fathers of illegitimate children. *Gomez v. Perez*, 409 U.S. 535 (1973). It is unclear whether the father of Linda R.S.'s child would have refused to pay once it had become clear that the civil statute applied to him. However, the Court did not discuss, or perhaps even see, this issue in deciding *Linda R.S.*, and I will disregard it here.

94. *Linda R.S. v. Richard D.*, 335 F. Supp. 804, 805 (N.D. Tex. 1971).

95. At the beginning of the opinion, the Court characterized Linda R.S.'s complaint as merely seeking an end to discrimination. 410 U.S. at 614-15 ("[T]he mother of an illegitimate child[] brought this action . . . to enjoin the 'discriminatory application' of Art. 602 of the Texas Penal Code."). But later in the opinion, the Court characterized her complaint as seeking prosecution of the father as the means of ending the discrimination. *Id.* at 618.

96. *Id.* at 618.

It is possible to read the Court's opinion to mean that since Linda R.S. "really" wanted child support payments, she did not have standing to seek something which might or might not have resulted in her getting them. In other words, the Court may be read as saying that it denied standing in Linda R.S.'s particular case on the ground that her child's father was unlikely to pay even if going to jail was the alternative (with the corollary that she would have had standing if he was likely to do so).<sup>97</sup> But the Court cannot have meant that a person with a legal right to a particular remedy loses that right when she seeks to achieve something else indirectly by means of that remedy and when it is unlikely that the ultimate goal will be achieved. If the Court meant that, we would have to reevaluate the very essence of the role played by legal rights in our society.

People often feel injured in ways that do not match precisely what the law considers to be an injury. When a client comes into a lawyer's office and tells his tale of woe, the lawyer's job is to translate the client's grievances into the language of legal rights and remedies, but the translation is often imperfect. For example, the client may wish to prevent the owner of a vacant lot next door from building a house on the lot. The house now on the drawing board would violate the zoning ordinance in a number of ways, including set-back requirements, height limitations, and the like. The client frankly says to the lawyer that his "real" aim is to prevent the building of the house at all, and that he hopes that if the zoning ordinance is enforced strictly, the owner will decide not to build. Suppose that the client's hope is wildly optimistic, and the lawyer advises that in her experience lot owners forced to comply with zoning restrictions ordinarily go forward and build anyway, albeit in a modified form. The client nevertheless brings suit because he is willing to take the chance that the enforcement of the zoning ordinance will result in the owner not building. One might question the wisdom of the client's bringing suit in such a case, but no one would suggest that because the client "really" wants something that might not result from the enforcement of the ordinance, he has no standing to ask that it be enforced.

I will take it as true that Linda R.S. "really" wanted to receive the child support payments to which she was entitled under Texas law, and that she sought the prosecution of the father in the hope that this would result in his making the payments. Of course, the failure to receive the payments did constitute a kind of injury. Indeed, Linda R.S. also sued the child's father,<sup>98</sup> and his failure to make the payments did constitute a legal

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97. The second edition of the *Hart and Wechsler* casebook gives a sophisticated version of this reading, suggesting that sufficient casual connection for standing was shown since the suit was brought as a class action. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 53 (2d ed. Supp. 1981) ("Since the suit was brought as a class action, is the Court's position tenable when it asserts that the results of granting relief, i.e., prosecution of non-supporting fathers, 'can at best, be termed only speculative?').

98. 335 F. Supp. at 805.

injury in that suit. But in the suit brought against the state, Linda R.S. did not allege as her legal injury the failure to receive the payments. Rather, she asserted that her legal injury was the violation of her equal protection rights under the Fourteenth Amendment.<sup>99</sup> The critical question is not what Linda R.S. "really" wanted. Rather, the question is whether she has a right under the equal protection clause to force the prosecutor to stop discriminating between the fathers of legitimate and illegitimate children.

## 2. *What Causation and Redressability Should Mean*

What the class of mothers wants, and what the class of fathers is likely to do, may be relevant to whether Linda R.S. should have standing. But it is relevant at the level of general law formulation rather than at the level of prediction in the particular case before the Court. The determination of who has standing is made, as it were, at wholesale rather than at retail. That is, the determination is made as to what categories of people have standing under the clause as part of the process of defining the right at issue, including the definition of both defendant's duty and the class of plaintiffs. Once the right is defined, it cannot be a valid standing objection in a particular case that a plaintiff who is otherwise entitled to enforce the clause wants something beyond that which is provided directly by the clause, or that the enforcement of the clause is unlikely to provide it in her particular case. In determining how to write or read a statutory or constitutional provision, the lawmaking body—whether the legislature, the Court, or some other body—should consider what forms of harm can be effectively prevented or cured by enforcement of that provision. In that sense, the causal link between the injuries people believe they have suffered (and what they "really" want) and the remedies available under a particular provision is important, for a legal right must always be formulated and understood by reference to the needs that can be satisfied by its enforcement.

The Court does not appear to have recognized that the causation and redressability question should be asked at the level of general rule formulation, rather than at the level of predictions made in individual cases. It has also failed to see that the causation and redressability question is meaningful only at the level of determining whether a cause of action should exist for a certain group of plaintiffs under a particular statutory or constitutional provision, and that the question therefore takes different forms when asked with respect to different statutory or constitutional rights. In other words, the Court has not recognized in its analysis that the closeness of the fit between the legal right and the interests sought to

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99. See *infra* note 247.

be protected by the enforcement of that right need not be the same for every statutory or constitutional provision.

There is considerable variation in the rigor with which the causation and redressability requirement has been applied in actual cases. Indeed, the variation is so great that these cases have been used repeatedly to illustrate the essential lawlessness of the Court's approach to standing.<sup>100</sup> But given the different purposes of different statutory and constitutional provisions, some variation is entirely appropriate from one provision to another. One cannot infer simply from variations in the strictness with which the causation and redressability requirement is applied that the Court's decisions are wrong or unprincipled. The question is whether, under the statutory or constitutional provision at issue, the particular provision should be read to protect against the injury asserted by the kind of person who is seeking to bring suit. Any argument about the lawlessness of the Court's decisions must be grounded in an argument about the meaning of the particular clauses at issue, and the difference in what causation and redressability mean from one substantive provision to another is not in itself a ground for criticism. I am not prepared to defend the Court against all charges of lawlessness in the way it has applied the causation and redressability requirement, but the seriousness of the charge should be evaluated in the context of particular provisions rather than measured against a norm of uniform application across all possible causes of action.

#### D. *Third Party Standing*

The apparent lawlessness of so-called third party standing is an enduring and notorious problem under current standing doctrine. A number of academic commentators have attempted to construct analytic frameworks for understanding and organizing the results in third party standing cases,<sup>101</sup> but the subject remains difficult and confused. The Court has conceived of third party standing cases as distinct from other cases, insisting that they are governed by a "rule of self-restraint" developed by the Court "for its own governance,"<sup>102</sup> and deciding them in an ad hoc, case-

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100. See, e.g., Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68, 79-82 (1984); see also Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 199-200 (1981) (arguing that causation and redressability are separate requirements; causation provides "'essential dimension of specificity' that informs judicial decision-making," and redressability is concerned with "appropriate role of the judiciary in a democratic society").

101. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981); Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308 (1982) [hereinafter Sedler, *Substantive Approach*]; Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974) (authored by Daniel Meltzer).

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

by-case basis.<sup>103</sup> Properly understood, however, third party standing cases are not conceptually different from other standing cases. In third party standing cases, as in all standing cases, the issue is a question of law on the merits: Does the plaintiff have the right to enforce the legal duty in question?<sup>104</sup>

As a preliminary matter, one should distinguish between overbreadth and so-called third party standing.<sup>105</sup> Someone who makes an overbreadth challenge to a statute is arguing that a properly drawn statute could prohibit or regulate the conduct, but that the actual statute at issue is not properly drawn because it sweeps within its scope conduct that cannot be forbidden.<sup>106</sup> The defendant whose conduct can be forbidden is not directly asserting the other person's rights to engage in protected conduct; rather, she is asserting her right to be free from control by an invalid statute. The argument of invalidity is based on a combination of two arguments: first, that the statute cannot be applied to certain conduct to which it now applies; and second, that if the statute applies to the protected conduct, the statute as a whole must fall because the permissible and impermissible parts of the statute are not severable. A person seeking standing to assert the rights of a third party, on the other hand, is challenging the application of a statute that is invalid as to her regardless of how it is drafted, as well as invalid as to third parties.

We may see that third party standing cases are not conceptually different from other standing cases by comparing "ordinary" standing cases with what are now thought to be "third party" cases. Cases considered by the Court only to involve ordinary standing issues include, for example, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,<sup>107</sup> in which a group of law students sought to require the preparation of an Environmental Impact Statement that would describe the consequences of a railroad rate increase. But one might think of the students as asserting third party standing, since the shippers who had to pay the increased rates were more directly and seriously affected than the stu-

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103. See, e.g., Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 280 (1988) (general rule that litigant may not assert right of others "riddled with exceptions"); Monaghan, *supra* note 101, at 279 (referring to "confusion over the nature of third party standing").

104. Others have previously suggested that plaintiffs seeking to assert third party standing are, in at least some circumstances, asserting their own rights. See Monaghan, *supra* note 101; Sedler, *Substantive Approach*, *supra* note 101, at 1329 ("Violation of third-party rights will implicate the litigants' own rights when: (1) the litigants and the third parties have some relationship; (2) the relationship is the source of the deprivation of the third parties' rights by the invalid law; and (3) for the same reason that the invalid law violates the rights of third parties, it violates the rights of the litigants.").

105. In this paragraph, I am following the useful discussions of Professors Monaghan and Meltzer. Monaghan, *supra* note 101, at 282-86; Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Note, *supra* note 101.

106. Overbreadth challenges are typically made in First Amendment cases. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Gooding v. Wilson*, 405 U.S. 518 (1972).

107. 412 U.S. 669 (1973).



dents. Further, in *Havens Realty Corp. v. Coleman*,<sup>108</sup> a black professional "tester" was granted standing to sue under the Federal Fair Housing Act of 1968 after he was falsely told that an apartment was not available to rent. But one might think of the tester as a third party plaintiff, since blacks who actually want to live in an apartment and are falsely told it is unavailable would have a more direct and serious injury than the tester. Finally, in *Trafficante v. Metropolitan Life Insurance Co.*,<sup>109</sup> a white resident of an apartment complex was granted standing under the Civil Rights Act of 1968 to challenge the landlord's racial discrimination against prospective non-white tenants. But one might think of a white resident as a third party plaintiff, since one might think that the prospective non-white tenants had a more direct and serious stake in the landlord's behavior.

The foregoing cases cannot be meaningfully distinguished from cases commonly thought to involve third party standing. Examples of such third party standing cases include *Pierce v. Society of Sisters*,<sup>110</sup> in which the Court permitted a private parochial school to challenge a state law that required all children to go to public school, even though one might think that the more immediate and direct interest at stake was that of the parents and children to go to whatever school they chose. Further, in *Craig v. Boren*,<sup>111</sup> the Court granted standing to a vendor to challenge a state law that permitted sales of beer to females beginning at age eighteen but not to males until age twenty-one, even though one might think that males between the ages of eighteen and twenty-one had a more direct stake in the matter. Finally, in *Barrows v. Jackson*,<sup>112</sup> the Court granted standing to a white seller of real property to challenge a racially restrictive covenant, even though the Court thought that the primary interest at stake was that of the black would-be purchaser. More cases could be listed, but the point should already be clear: There is no conceptual difference between the first and second groups. In each of the six cases, the plaintiffs had some interest at stake; in each case, there were other people who might have been thought to have an even stronger interest.

Whether standing should be granted in third party standing cases should depend on the nature of the statutory or constitutional provision at issue, just as it does in all standing cases. In a few instances, third party standing cases have become first party standing cases with the passage of time. For example, in *Barrows*, decided in 1953, the Court assumed that a third party standing rationale was necessary to justify the grant of standing to the white seller, for it assumed that the fundamental interest

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108. 455 U.S. 363 (1982).

109. 409 U.S. 205 (1972).

110. 268 U.S. 510 (1925).

111. 429 U.S. 190 (1976).

112. 346 U.S. 249 (1953).

at stake was that of the black would-be buyer to live in an integrated neighborhood. In *Trafficante*, decided almost thirty years later, the Court was willing to assume that the white resident was asserting his own right to live in an integrated environment. When the Court in *Barrows* protected the interests of the black buyer, it did not conceive of itself as significantly protecting the interests of whites. Aided by the passage of time, and significantly informed by the Civil Rights Act of 1968, the Court in *Trafficante* had come to think of the right to live in a racially integrated environment, where interests in real estate changed hands freely without regard to race, as a right belonging to both white and black people.

The transition seen in *Barrows* and *Trafficante* from "third party" to "ordinary" standing is unusual. It is much more common that the Court's ideas of whose rights are primarily at stake are relatively stable over time. In such cases, the issue of whether the plaintiff has standing to assert the interest of a non-party remains as the Court conceived it to be in *Barrows*: Should the plaintiff be permitted to serve purposes beyond himself, acting in a fashion similar to plaintiffs in private attorney general cases?<sup>113</sup> If we were so inclined, we could call almost all cases in which standing is seriously contested third party standing cases. That is, difficult standing cases are almost always third party standing cases in the sense that the direct interests of the plaintiff are viewed as less important than the interests of non-parties, and the plaintiffs are seen as seeking to serve not only their own interests but those of others as well.

So-called third party standing cases, like all standing cases, should be seen as a determination of whether plaintiffs have the legal right to enforce the duty in question. In such cases, standing is granted or denied based on a number of factors, including the nature of the relationship between the plaintiff and the non-party whose interests are being protected, and the ease with which the non-party may assert her own interests.<sup>114</sup> But the grant of standing in such cases is not based on these factors considered in isolation. Rather, the touchstone is the nature of the underlying right, and these factors merely help inform the judgment of the Court as to whether a grant of standing will further the values inherent in that right. Such determinations should not be seen as discretionary decisions; rather, they should be seen as determinations on the merits of the claim asserted by plaintiff. Their resolution should depend on the nature of the statutory or constitutional right in question, and on whether the

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113. See *supra* text accompanying notes 28-33 (discussion of private attorney general concept); *infra* text accompanying notes 141-50 (same).

114. Vendors are often permitted to protect the interests of their purchasers. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Barrows v. Jackson*, 346 U.S. 249 (1953). Doctors are often permitted to protect the interests of their patients. See, e.g., *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Doe v. Bolton*, 410 U.S. 179 (1973). Associations are often permitted to protect the interests of their members. See, e.g., *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977); *NAACP v. Alabama*, 357 U.S. 449 (1958).

grant of standing is an appropriate means of implementing or protecting that right.

### E. *Advisory Opinions*

Supreme Court opinions often suggest that standing requirements prevent the federal courts from giving advisory opinions forbidden by Article III of the Constitution.<sup>115</sup> A moment's reflection will reveal, however, that standing doctrine as presently formulated is not an essential, or even a particularly good, protection against advisory opinions. We know that standing law has not been used to provide such protection until recently, for Article III federal courts have always been forbidden to give advisory opinions, and an articulated separate law of standing did not exist until the 1930's. Moreover, if we examine the practices of the federal courts since the 1930's, we see that the Court has been more and more willing to decide cases that in earlier times might have been considered requests for forbidden advisory opinions.<sup>116</sup> If the effectiveness of standing law is judged by its success in confining the federal courts to controversies presented by plaintiffs seeking to vindicate traditional interests, it has been notably unsuccessful.

Careful thinking about the issues involved should lead us to make much less grand claims for the function of standing law in preventing the federal courts from giving advisory opinions. As currently formulated, the label "advisory opinion" comprises at least three different phenomena. Only the second and third are related to standing. First, a decision of a federal court must be final in the sense that neither of the other two branches should have the authority to overturn a judicial decision. For example, we read *Hayburn's Case*<sup>117</sup> to stand for the proposition that an Article III federal court could not award a pension to a Revolutionary War veteran because the Secretary of War had the statutory authority to refuse to request an appropriation for the award.<sup>118</sup> Second, a plaintiff must have a

115. See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979) ("In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. Otherwise, the exercise of federal jurisdiction 'would be gratuitous and thus inconsistent with the Art. III limitation.'") (citations omitted) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

116. Compare, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968) with *Frothingham v. Mellon*, 262 U.S. 447 (1923) and *Doremus v. Board of Educ.*, 342 U.S. 429 (1952); compare *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976) with *Muskrat v. United States*, 219 U.S. 346 (1911). See the discussion of *Flast*, *infra* text accompanying notes 220-32, and of *Hollowbreast* and *Muskrat*, *infra* text accompanying notes 278-84.

117. 2 U.S. (2 Dall.) 409 (1792).

118. See also *Gordon v. United States*, 117 U.S. 697, 702 (1864) (revision by legislative branch).

Another type of non-final decision is a United States Supreme Court holding on a question of federal law that may be ignored by a state court in later proceedings in the same case because an independent and adequate state law ground supports the decision. In recent years, the Court has been less insistent on protecting against this kind of advisory opinion. Compare *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any

“personal stake in the outcome”<sup>119</sup> or have sustained a “particular concrete injury”<sup>120</sup> in order to request a decision from a federal court. For example, in *United States v. Richardson*,<sup>121</sup> the Court denied standing to a federal taxpayer in an action to require the Director of the Central Intelligence Agency to publish a statement of the accounts of the agency on the ground that the taxpayer had not presented a “case or controversy.” Third, the executive and legislative branches may not seek the advice of the federal courts except through a dispute presented in the form of a “case or controversy.” For example, in *Correspondence of the Justices*,<sup>122</sup> the Court refused to answer questions about international law and the status of neutral countries posed in a letter from Secretary of State Jefferson.

The second strand of the advisory opinion prohibition prevents a plaintiff from litigating a question that does not concern him. This strand may, in turn, be broken down into what Professor Monaghan has called the “when” and the “who.”<sup>123</sup> The “when” requirement ensures that the plaintiff present a dispute in which he currently has an interest. Thus, a dispute cannot be presented before it is clear that the plaintiff has suffered an injury; that is, a dispute may not be “unripe.”<sup>124</sup> Moreover, a dispute cannot be presented when events have progressed so far that the relief sought no longer matters to the plaintiff; that is, a dispute may not be “moot.”<sup>125</sup> The “when” requirement, however, is not a standing requirement in the ordinary sense, for a plaintiff for whom a case is now unripe or moot may have in the future, or may once have had, a dispute that can be, or could have been, presented to an Article III court. We may therefore, for present purposes, disregard the “when” part of the requirement; and we may agree, without effect on our standing analysis, that Article III contains ripeness and mootness requirements as part of the “case or controversy” requirement.

The “who” portion of the strand is the standing requirement, but it should not be part of a “case or controversy” requirement. As already seen, “injury in fact” is a meaningless concept when applied to a plaintiff who is telling the truth about the injury she feels she has suffered, for injury can only be assessed against some normative structure. In the legal

possible state law ground is not clear from the face of the opinion,” Supreme Court will decide federal question) *with* *Minnesota v. National Tea Co.*, 309 U.S. 551, 555-56 (1940) (when federal or state basis for state court decision is unclear, Supreme Court will remand to state court for clarification).

119. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

120. *United States v. Richardson*, 418 U.S. 166, 177 (1974).

121. *Id.*; see *infra* text accompanying notes 234-36.

122. Reprinted in part in HART & WECHSLER'S THIRD, *supra* note 71, at 65-66.

123. Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363 (1973).

124. See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-56 (1967); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 86-94 (1947).

125. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

system, injury is assessed against the normative structure provided by particular legal rights. Thus, the “personal stake” required by *Baker v. Carr*<sup>126</sup> and the “particular concrete injury” required by *United States v. Richardson*<sup>127</sup> can only be assessed against the particular legal right at issue. If a plaintiff complains of injury to the environment in violation of a particular statute, whether the plaintiff has a stake in the matter can only be determined by ascertaining whether the statute has conferred that stake on the plaintiff.<sup>128</sup> If a plaintiff alleges that federal expenditures violate the establishment clause, whether the plaintiff has suffered an injury can only be determined by ascertaining whether the establishment clause recognizes that injury in the plaintiff.<sup>129</sup>

To argue that there is no “who”—or no standing—component of the “case or controversy” requirement for a truth-telling plaintiff<sup>130</sup> is not to argue that all persons should have the right to litigate all matters. A plaintiff has standing only if she can show that she is entitled to sue under the particular statutory or constitutional provision at issue. Some plaintiffs who have suffered injury by a conventional definition are unable to obtain judicial relief because no legal right has been invaded.<sup>131</sup> In the language of the common law, they have suffered *damnum absque injuria*, or harm without legal injury. On the other hand, plaintiffs who have not suffered direct injury in a conventional sense may be able to sue if some statutory or constitutional provision gives them that legal right.<sup>132</sup> We may say that they have suffered *injuria absque damno*, or legal injury without harm.

To look at standing in this fashion—and to avoid looking at it as part of a generalized “case or controversy” requirement—is not to abandon the proper restrictions on the judicial role. Rather, it is to analyze and enforce those restrictions with greater sensitivity to the particular right at issue and to the proper definition of the plaintiff class for that right. For those who think that this is a revolutionary and unworkable concept, I point out that standing was much like this well into this century. If any concept of standing can be called revolutionary and unworkable, it is the concept that

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126. 369 U.S. 186, 204 (1962).

127. 418 U.S. 166, 177 (1974).

128. See *infra* text accompanying notes 154–56, 171–210.

129. See *infra* text accompanying notes 220–32.

130. Plaintiffs who lie about their sense of injury, pretending to suffer when in fact they do not, are barred from Article III federal courts under the rationale forbidding feigned suits. See, e.g., *United States v. Johnson*, 319 U.S. 302 (1943).

131. See, e.g., *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (milk consumers do not have standing to challenge milk marketing order of Secretary of Agriculture despite its effect on milk prices).

132. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (residents of Washington, D.C. granted standing to sue under National Environmental Policy Act); *Flast v. Cohen*, 392 U.S. 83 (1968) (federal taxpayer granted standing to challenge federal expenditures allegedly in violation of establishment clause); *infra* text accompanying notes 171–89, 220–32.

the Court employs today under which all standing cases are forced into a single mold.

The third strand of the advisory opinion prohibition prevents the other two branches from soliciting the advice of the judiciary on legal questions except in the context of a "case or controversy." This strand is not ordinarily thought to involve standing issues, and in the majority of cases it does not. In some circumstances, however, a congressional grant of standing can amount to a request for a forbidden advisory opinion. These circumstances are analyzed in detail below,<sup>133</sup> but the outline of the analysis can be easily summarized. There is no danger of an advisory opinion when Congress grants standing to enforce a statutory right because Congress is creating the right and designating the people entitled to enforce it. When Congress grants standing to enforce a constitutional right, however, Congress may be granting standing more broadly than the constitutional clause contemplates. In such a case, Congress may be attempting to grant standing when it has no power to do so, and thereby to cast in the form of a lawsuit a forbidden request for advice on a constitutional question. As will be seen below, the Court does not appear to be fully aware of the dangers of advisory opinions in that circumstance.

In sum, the relationship between standing and advisory opinions looks quite different from what an uncritical reading of the Court's opinions suggests. At present, the Court's concerns about advisory opinions are misdirected under both the second and third strands of the advisory opinion rationale. When the issue is whether a truth-telling plaintiff has alleged a sufficient "stake" or "injury," the Court's invocation of the "case or controversy" requirement of Article III is unnecessary, for the question of plaintiff's stake is fully answered, and can only be answered, by reference to the particular right at issue. When Congress tries to confer standing on a plaintiff to enforce a constitutional right, the Court should be more concerned than it has been about the possibility that Congress is disguising a request for a forbidden advisory opinion as an ordinary lawsuit.

### III. STANDING TO ENFORCE STATUTORY AND CONSTITUTIONAL RIGHTS

If standing to sue is seen as a question of law on the merits, a determination of who should be entitled to judicial enforcement depends on the particular legal right at issue. In many respects, this way of looking at standing applies without differentiation to both statutory and constitutional causes of action, for in both cases standing depends on the nature of the legal right conferred by the provision. But in one critical respect, stat-

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133. See *infra* text accompanying notes 271-309.

utory rights (and non-constitutional common law rights) are distinct from constitutional rights. In the case of a statutory right, Congress is the source both of the legal obligation and of the definition of the class of those entitled to enforce it. (Or, in the case of a non-constitutional common law right, Congress is the potential source of the right.) So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them, including the creation of causes of action in plaintiffs who act as "private attorneys general." In the case of a constitutional right, by contrast, the Constitution is the primary, and perhaps in some cases the sole, source of both the right and of the definition of the class of those entitled to enforce it. Thus, in the case of a constitutional right, the power of Congress to confer standing beyond the standing already conferred by the constitutional provision itself may be more limited than in the case of a statutory right. Indeed, in some cases, it is possible that Congress should have no power to confer standing beyond that already conferred by the constitutional provision in question.

The Court now perceives only dimly, if at all, the distinction between standing to enforce statutory rights and standing to enforce constitutional rights. For example, the Court's frequent statement that Congress may confer standing by statute, limited only by the "injury in fact" requirement of Article III, does not distinguish between cases in which the underlying duty of the defendant is based on a statute and those in which it is based on the Constitution. The Court has failed to make this distinction primarily because its analysis of a plaintiff's injury independent of the legal right asserted has diverted attention away from what ought to be the central inquiry: What is the nature and extent of the protection provided by the statutory or constitutional guarantee in question? In the material that follows, I separate the two kinds of standing. I first discuss standing to enforce statutory rights. I then discuss standing to enforce constitutional rights.

## A. *Standing to Enforce Statutory Rights*

### 1. *Prudential Standing*

Before entering into a detailed discussion of the power of Congress to confer standing to enforce statutory rights, we should understand what the Court means, or should mean, when it refers to "prudential" standing. The Court has often stated that Congress can confer standing by statute, limited only by the Article III requirement that a plaintiff suffer "injury in fact"<sup>134</sup> or "distinct and palpable injury."<sup>135</sup> It has also indicated,

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134. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970).

135. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

sometimes in the same breath, that standing can be granted or denied as a "prudential" matter.<sup>136</sup> The idea appears to be that in the exercise of "prudence," the Court may decline to grant standing to a plaintiff, but if Congress explicitly confers standing on such a plaintiff, then the Court's "prudential" hesitation is overcome.

The Court uses prudential standing to determine whether, in the absence of a clear statutory directive, a plaintiff has standing to seek judicial relief. The term appears to be derived from Professor Bickel's invocation of prudence as a guiding principle for the Supreme Court in practicing the famous "passive virtues,"<sup>137</sup> but it is significantly different. Although Bickel never clearly differentiated between the functions served by standing in the Supreme Court and standing in the lower federal courts,<sup>138</sup> he invoked prudence primarily as a guide for the Supreme Court in the delicate task of determining the shape of its appellate docket. "Prudential standing," in the current usage, serves a different purpose and is less tinged with the mysteries of Supreme Court statecraft. In the sense the Court employs the term, it determines whether a plaintiff has a federal cause of action.

Although the Court does not appear to recognize it, the roles of the federal courts and Congress with respect to "prudential" standing can be better described, and more easily understood, using the relatively familiar vocabulary of statutes, inferences from statutes, and common law. When the Court refuses to find prudential standing, it, in effect, refuses to infer a cause of action from existing legal materials. As Justice, then Judge, Scalia put it, "[T]he courts [invoke] . . . 'prudential' factors, not by virtue of their own inherent authority to expand or constrict standing, but rather as a set of presumptions derived from common-law tradition designed to determine whether a legal right exists."<sup>139</sup> In some contexts, the idea can be best understood as the Court refusing to infer a cause of action as a matter of common law; in others, we may see the Court as unwilling to infer a cause of action from existing statutes. When the Court says that Congress may create standing when prudential factors lead the Court not to find standing,<sup>140</sup> the Court says nothing more complicated than that it will not infer a cause of action absent a clear statutory directive. Whether a plaintiff's standing to sue is "prudentially" derived from a set of statu-

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136. See, e.g., *id.*

137. A. BICKEL, *supra* note 9.

138. As Professor Amar points out, Professor Bickel is not alone in mistaking the part for the whole, analyzing the Supreme Court as if it were the entire judicial branch instead of merely part of that branch. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 238 n.115 (1985).

139. Scalia, *supra* note 9, at 886.

140. Congress may have the power to grant "prudential" standing to enforce statutory and constitutional provisions, but the extent of its power for constitutional provisions is uncertain. See *infra* text accompanying notes 285-309.



tory or common law inferences, or whether it results directly from the clear command of a statute, standing to enforce non-constitutional duties cannot be reasonably seen as requiring more than that a clear command be present or an inference be fairly derivable from the legal materials.

## 2. *Standing Based Directly on a Statute*

When Congress passes a statute conferring a legal right on a plaintiff to enforce a statutorily created duty, the Court should not require that the plaintiff show "injury in fact" over and above the violation of the statutorily conferred right. The Court has often stated that the power of Congress to grant standing is limited by the Article III requirement that a plaintiff suffer "injury in fact." But when the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself. Two fairly recent examples illustrate the point.

In *Havens Realty Corp. v. Coleman*,<sup>141</sup> a black professional "tester" pretended that he wished to rent an apartment from the defendant. The tester was told, falsely, that no apartment was available. He then sued for damages under the Fair Housing Act of 1968,<sup>142</sup> which makes it unlawful to "represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."<sup>143</sup> The Court construed the statute as protecting a person against being told a lie about the availability of housing, whether or not the person actually wanted to live there. Thus, the black tester had standing to sue because the statute "protected" him against racially motivated false statements.<sup>144</sup> The Court said, "As we have previously recognized, '[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" <sup>145</sup>

In *United States Parole Commission v. Geraghty*,<sup>146</sup> a federal prisoner attempted to bring a class action challenging federal Parole Release Guidelines whose application had resulted in the denial of his parole. Geraghty's class certification motion was denied by the district court, and he appealed. Geraghty was released from prison before the appeal was heard, and the Parole Commission moved to dismiss the appeal as moot on the ground that Geraghty no longer had any personal interest in the dispute. The Court held that Geraghty had standing to appeal the denial

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141. 455 U.S. 363 (1982).

142. A white tester who had been told, truthfully, that an apartment was available also brought suit. Since he had been told the truth, the Court denied him standing. *Id.* at 374-75.

143. 42 U.S.C. § 3604(d) (1982).

144. 455 U.S. at 373.

145. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) and *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

146. 445 U.S. 388 (1980).

of the class certification motion due to the nature of the right conferred by Congress through the Federal Rules of Civil Procedure: "[The Rules] give the proposed class representative the right to have a class certified if the requirements of the Rules are met. This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."<sup>147</sup>

In neither *Havens* nor *Geraghty*, one may assume, would the Court have granted standing if Congress had not done so by statute. It is also fair to assume that in neither case would the Court have concluded that there was "injury in fact" absent the statutes. The plaintiff in *Havens* did not want the apartment, and therefore was not prevented by the lie from obtaining something he wanted. The plaintiff in *Geraghty*, in his initial suit, sought relief from the operation of the Parole Guidelines. At the time of the appeal, he was out of prison and no longer needed that relief.<sup>148</sup> What then has become of the "injury in fact" requirement of Article III that limits Congress' power to confer standing?

The nature of the rights in both *Havens* and *Geraghty* is such that in both cases the plaintiffs were serving purposes beyond themselves. In the words of the *Geraghty* opinion, they were each serving as a sort of private attorney general. But instead of rejecting the suits on that account as outside the "case or controversy" limitation of Article III, the Court concluded that Congress had decided to permit these litigants to perform such a function. That is not to say that the plaintiffs in these two cases suffered no "injury in fact," for the concept of injury cannot be meaningfully considered except in connection with some normative structure in which the gap between "ought" and "is" constitutes injury. It is, rather, to admit that the concept of an objectively determined, non-normative "injury in fact" is not a workable limitation on Congress' power to create legal interests by statute.

Nor is the recognition of standing in these cases a threat to the appropriate division of power between Congress and the judiciary. In both cases, the duty asserted by the plaintiffs was statutory rather than constitutional. Assuming the Court was correct in interpreting congressional intent, Congress intended that certain persons not directly injured in a conventional sense be empowered to enforce those statutory duties. I see no reason to conclude in such cases that Congress acted improperly in conferring standing, or that the Court acted improperly in giving effect to Congress' intent. Indeed, the Court would have acted improperly and in derogation of congressional power if, on grounds of no "injury in fact," it had refused to give effect to Congress' intent to confer a legal right on these plaintiffs.

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147. *Id.* at 403.

148. *Id.* at 394.

### 3. *Standing Based on the Administrative Procedure Act*

Both *Havens* and *Geraghty* are relatively simple cases in which the right to sue is based directly on a statutory right. For reasons that are somewhat unclear, suits involving challenges to administrative action under the Administrative Procedure Act (APA) have often been seen as presenting greater difficulties. Section 10(a) of the APA provides that “a person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”<sup>149</sup> The reason for drafting the APA in this way is fairly obvious: Agency actions are taken under a wide range of statutes that are enacted and implemented with different administrative schemes and review processes in mind. When the APA was adopted, it was well-established that standing to challenge administrative action was not governed by a single, uniform standard. Standing was denied in some cases despite clear adverse effects on would-be plaintiffs or appellants, and standing was granted in other cases to permit plaintiffs to act as private attorneys general.<sup>150</sup> The APA’s solution was to adopt a formulation that would preserve the flexibility of response to the particular statutory commands and policies that had existed prior to the APA’s enactment.<sup>151</sup>

Section 10(a) should be understood as a relatively straightforward provision. The open-textured nature of the formula preserves the range of standing results in the pre-APA law, and it permits the same flexibility and variation for statutes enacted and agencies created after the APA’s adoption. The touchstone is that anyone whom a “relevant statute” considers to be adversely affected or aggrieved by agency action has standing to seek review of the action under that statute. Such “relevant statutes” might be anything from the National Environmental Policy Act<sup>152</sup> to the Internal Revenue Code.<sup>153</sup> Some statutes contemplate that standing be widely available. The Clean Water Act, for example, provides that “any citizen” may enforce provisions of the Act.<sup>154</sup> The Marine Protection, Research and Sanctuaries Act of 1972 provides that “any person” may seek

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149. 5 U.S.C. § 702 (1982).

150. See *supra* notes 34–39 and accompanying text.

151. It is fairly clear from the legislative history, as well as from the statutory text, that the APA was designed to preserve existing standing law. See, e.g., ATTORNEY GENERAL’S MANUAL, *supra* note 35, at 96 (“The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. . . . This construction of section 10(a) was not questioned or contradicted in the legislative history.”). An excellent short treatment of the legislative history of section 10(a) may be found in Note, *Competitors’ Standing to Challenge Administrative Action under the APA*, 104 U. PA. L. REV. 843, 856–60 (1956).

152. 42 U.S.C. §§ 4321–4370 (1982).

153. I.R.C. §§ 1–9602 (West 1986 & Supp. 1987).

154. The Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (1982). “Any citizen” is defined in the Act more narrowly than the bare words suggest; the phrase means “a person or persons having an interest which is or may be adversely affected.” 33 U.S.C. § 1365(g) (1982); see *Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 16 (1981).

injunctive relief,<sup>155</sup> as does the Clean Air Act.<sup>156</sup> Others contemplate a more restrictive grant of standing. For example, the Agricultural Marketing Agreement Act of 1937<sup>157</sup> has been read to provide that milk handlers have the right to seek review of administrative pricing orders but that milk consumers do not.<sup>158</sup> Thus described, the APA's standing scheme seems, as a conceptual matter, to be both obvious and simple. Any individual case can be difficult, for it may not be clear whether the "relevant" statute or statutes at issue contemplate that a given plaintiff has the right to seek judicial review; but the potential difficulty of the individual case does not interfere with the simplicity and conceptual elegance of the overall APA scheme.

Unfortunately, section 10(a) is clouded and difficult in actual operation. In part, the fault lies with Professor Davis, although it is ironic that this should be so given his eloquent and persistent pleas for clarity and simplicity in the law of standing.<sup>159</sup> And in part the fault lies with the Supreme Court, which has been anything but clear in explaining the interrelation of the APA and "relevant" substantive statutes, often to the point of failing to mention the statutory provisions on which standing is premised.

Professor Davis' contribution to the confusion stems from his insistence that the language in the House and Committee Reports to the APA should control over the language of the APA itself, and in his insistence on "injury in fact" as the touchstone for standing to review administrative agency action.<sup>160</sup> In the 1958 edition of his *Administrative Law Treatise*, Professor Davis wrote, "[The APA] provides that 'any person adversely affected' shall be entitled to judicial review, and the reports of the committees of both House and Senate said that this means 'any person adversely affected *in fact*.'" <sup>161</sup> Professor Jaffe pointed out, however, that the statute itself (as opposed to the committee reports) did not contain the words "in

155. 33 U.S.C. § 1415(g)(1) (1982); see *Sea Clammers*, 453 U.S. at 7 n.11.

156. 42 U.S.C. § 7604(a) (1982).

157. 7 U.S.C. §§ 601-659 (1982).

158. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 348 (1984) ("Allowing consumers to sue . . . would severely disrupt this complex and delicate administrative scheme."). For a number of additional statutory grants of standing, see 4 K. DAVIS, *supra* note 1, § 24:5, at 219-22.

159. See, e.g., 4 K. DAVIS, *supra* note 1, §§ 24:1-24:36, at 207-348; Davis, *Liberalized Law*, *supra* note 40; Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968); Davis, *Governmental Action*, *supra* note 40.

160. Davis' definition of "injury in fact," however, is not entirely clear. For example, he writes:

The concept of "injury in fact" need not be pushed to its outer limits. The guide in marking out its limits should be whatever legislative intent is discernible, and in absence of such intent the guide should be a judicial judgment as to whether the interest asserted is in the circumstances deserving of judicial protection. A holding that a person is not "injured in fact" when the government confers a benefit on his competitor would be reasonable. The concept of "injury in fact" need not be rigid either as to what it includes or what it excludes. It can be kept both flexible and simple.

Davis, *Liberalized Law*, *supra* note 40, at 473.

161. 3 K. DAVIS, *supra* note 56, § 22.06, at 232. Professor Davis has continued to insist on the point. See 4 K. DAVIS, *supra* note 1, § 24:35, at 338.

fact," and that the section qualified "adversely affected or aggrieved" by adding the words (which Davis failed to quote) "within the meaning of any relevant statute."<sup>162</sup> For Jaffe, injury sufficient to entitle a person to judicial review under section 10(a) could be found only by referring to a particular substantive statute (a "relevant statute") to determine who was legally protected against what kind of injury.<sup>163</sup>

The Court provided a very unsatisfactory resolution to the Davis-Jaffe debate in 1970. The petitioners in *Barlow v. Collins*,<sup>164</sup> a companion case to *Data Processing*, essentially adopted Jaffe's position as to the meaning of section 10(a),<sup>165</sup> but were willing to concede that "injury in fact" was a constitutional requirement under Article III.<sup>166</sup> The *Data Processing* Court, majority and dissenters alike, adopted the "injury in fact" language

The House and Senate Committee Reports, in discussing judicial review under section 10(a), both say, in identical wording:

[SECTION 10(A). RIGHT OF COURT REVIEW] *Any person suffering legal wrong because of any agency action, or adversely affected [or aggrieved by such action] within the meaning of any [relevant] statute, is entitled to judicial review.*

This [sub]section confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute.

S. Doc. No. 248, 79th Cong., 2d Sess. 212 (Senate), 276 (House) (1946) (emphasis in original). The italicized sentence was intended by the reports to reproduce the text of the Act. I have added the words "or aggrieved by such action" and "relevant" in brackets above. These words were part of the actual statute, Pub. L. No. 79-404, § 101(a), 60 Stat. 237, 243 (1946), but are missing from the language in the committee reports. So far as I am aware, no one has pointed out this discrepancy. It suggests that the report's drafters either were not careful with their language, or that the text of the Act was amended after the reports were written. Under either explanation, the discrepancy should increase our suspicion that the reports are less-than-authoritative glosses on the meaning of the Act.

The word "any" in the original statute was changed in 1966 to "a," Pub. L. No. 89-554, § 702, 80 Stat. 378, 392 (1966). The phrase "by such action" was also omitted in the 1966 recodification. These changes were not designed to alter the meaning of the section. See *id.* § 7(a), 80 Stat. 378, 631 (1966). Section 10(a), now 5 U.S.C. § 702 (1982), was supplemented in 1976 by language designed to waive some of the sovereign immunity of the United States. Pub. L. No. 94-574, § 702, 90 Stat. 2721, 2721 (1976). Congress has never taken the opportunity while making these amendments to add the words "in fact" to the section.

162. L. JAFFE, *supra* note 18, at 528-30; see also S. BREYER & R. STEWART, *supra* note 18, at 1090 n.134 (disagreeing with Professor Davis); W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, *ADMINISTRATIVE LAW* 1044-45 & n.5 (8th ed. 1987) (quoting Professor Jaffe's argument and citing to what it calls, in quotation marks, Professor Davis' "reply").

163. L. JAFFE, *supra* note 18, at 530. This, to Davis, was anomalous, for it meant that Jaffe would "[open] the judicial doors to citizens without special interests, and clos[e] the same judicial doors to parties who are 'adversely affected in fact.'" Davis, "*Judicial Control of Administrative Action*": *A Review*, 66 COLUM. L. REV. 635, 667 (1966). Jaffe responded that he would not oppose an amendment to the APA that would have the effect of granting standing to seek review to anyone injured "in fact," so long as "judicial discretion could curb abuse of the jurisdiction" by denying standing in appropriate cases. L. JAFFE, *supra* note 18, at 530. But he emphasized that the APA as then written did not so provide. *Id.*

164. 397 U.S. 159 (1970).

165. Petitioners' Brief at 16.

166. Petitioners' Reply Brief at 3 ("The basic requirement . . . of standing . . . is that the litigant be 'adversely affected in fact' by the administrative action he challenges. . . . Actual harm from administrative action . . . satisfies the constitutional requisite of a 'case or controversy' . . .") (citations omitted); see also Brief for the Petitioners, *Data Processing*, at 6 ("[W]henver there is presented to the courts a constitutional case or controversy, where the claimant has been injured in fact, and where important public issues are involved, that case should be heard unless Congress has barred judicial review."). *But cf. id.* at 24-25 (suggesting that constitutional requirement is distinct from "injury in fact" requirement).

and stated that it was a basic constitutional requirement under Article III.<sup>167</sup> And, in a gesture toward Jaffe's position, the Court construed the APA to grant standing if plaintiff were "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>168</sup> Although the Court after *Data Processing* has often neglected the zone of interests part of the test,<sup>169</sup> it has frequently focused on the injury part of the test. In so doing, it has assumed, with Professor Davis, that proof of injury is sufficient to establish standing without regard to the substantive statute whose protection was invoked, and that injury can be defined independently of the substantive statute. Probably the most egregious example of this approach is *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.<sup>170</sup>

In *SCRAP*, several environmental groups and a group of law students in Washington, D.C. sought an injunction against a railroad freight rate increase approved by the Interstate Commerce Commission. Plaintiffs claimed that the preparation of an Environmental Impact Statement (EIS) was required under the National Environmental Policy Act (NEPA)<sup>171</sup> prior to the implementation of the increase, arguing that the increased freight rates would make recycling of discarded materials less financially attractive, "thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities."<sup>172</sup> Plaintiffs claimed that they would be obliged to pay higher prices for finished products, that the natural environment around Washington would be harmed because non-recycled materials would accumulate in greater amounts, that air pollution would be increased, and that taxes would be increased because of the need to spend government funds to dispose of materials that would otherwise have been recycled.<sup>173</sup>

The Court noted that "pleadings must be something more than an ingenious academic exercise in the conceivable,"<sup>174</sup> and added, quoting Professor Davis, that the APA requirement that a person seeking review be "adversely affected or aggrieved" meant only that a person must be "injured in fact."<sup>175</sup> According to the Court, the nature of plaintiffs' injury

167. 397 U.S. 150, 152 (1970) (Douglas, J., for the Court); *Barlow v. Collins*, 397 U.S. 159, 167-68 (1970) (Brennan, J., and White, J., dissenting).

168. 397 U.S. at 153.

169. The Court noted in *Clarke v. Securities Industries Association*, 107 S. Ct. 750, 758 n.16 (1987), that the zone of interest test has been infrequently employed outside the context of the Administrative Procedure Act.

170. 412 U.S. 669 (1973).

171. 42 U.S.C. §§ 4321-4370 (1982).

172. 412 U.S. at 676.

173. *Id.* at 678, 680 n.9.

174. *Id.* at 688.

175. *Id.* at 689 n.14. The Court wrote: "Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved'. . . ." *Id.* After citing several non-APA cases in which small injuries had sufficed for standing, the Court continued: "While these cases were not dealing specifically with [section 10(a)] of the APA, we see no reason to adopt a more restrictive interpretation

was a factual question, and if defendants in *SCRAP* thought plaintiffs' allegations were untrue, they should have moved for summary judgment on the factual issue.<sup>176</sup> Under this analysis, the Court granted standing.<sup>177</sup>

*SCRAP* has come to be regarded as something of a sport. One way of putting the common criticism is to say that plaintiffs' allegations constituted precisely what the Court said was insufficient—an "ingenious academic exercise in the conceivable." The Court's analytical method in *SCRAP* does little to dispel such criticism. Yet if the standing issue in *SCRAP* is understood properly, the result, while perhaps not compelled, is easily defensible.

The issue in *SCRAP* was whether under NEPA an EIS had to be prepared before the rate increase could be implemented. The standing question was whether plaintiffs were entitled to insist that NEPA be followed. This question is not easy because NEPA does not contain, as many environmental statutes do, a provision granting standing to "any person" or to "any citizen" to enforce its provisions. In the absence of such a provision, we are left to infer from the statute who is entitled to enforce it. A perfectly plausible—and I believe the best—reading of NEPA is that anyone who can make a colorable claim that the proposed actions may possibly affect her should have standing, even if the effect is remote or speculative and even if the person's sense of what constitutes injury is somewhat idiosyncratic.<sup>178</sup> This should be so because of the nature of the remedy plaintiff is seeking. She wishes to compel an investigation and the preparation of a report that spells out in detail what she has claimed will be the likely environmental consequences of the proposed federal action. To require a greater showing by plaintiff of actual effect would be to require, as a condition of bringing suit, that plaintiff show much of what she claims should be investigated.<sup>179</sup> And to require that plaintiff show that her sense of injury is not idiosyncratic is to require that plaintiff argue to a court

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of 'adversely affected' or 'aggrieved.' As Professor Davis has put it: 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing . . . .' *Id.*

176. *Id.* at 689-90.

177. The Court then held that ICC orders permitting rate increases were not within the scope of NEPA, and that therefore the district court had no jurisdiction to enjoin the rate increase. *Id.* at 690-99.

178. The current reading of NEPA appears to be that anyone who uses or lives in the environment allegedly affected by the proposed action has standing to require the preparation of an EIS. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972); *College Gardens Civil Ass'n, Inc. v. Department of Transp.*, 522 F. Supp. 377 (D. Md. 1981). The only qualification is that competitors who seek only to further their competitive advantage do not have standing under NEPA. *See, e.g., Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976).

179. Judge Breyer and Professor Stewart agree with this reading of *SCRAP* and NEPA. They write:

What purpose is served by conducting a threshold hearing, directed at the question of standing, on whether the ICC's rate increase will generate more litter in Washington, D.C., parks where plaintiffs are likely to view such litter? Such a procedure seems bizarre because NEPA has been judicially construed as an essentially procedural statute designed to generate, through an EIS, information on the environmental effects of a proposed action. To require plaintiffs to show what those effects are as a prerequisite to requiring that an EIS be performed seems

about the nature and severity of this injury when the design of NEPA is to require the preparation of a report that will facilitate the making of such arguments in the administrative or political process.

The *SCRAP* Court may have sensed that standing should be granted liberally in a NEPA case in light of the nature of the statutory right at issue. But its opinion fails entirely to explain the grant in these terms, for it adopts Professor Davis' view of the "injury in fact" requirement under the APA, and it treats plaintiffs' standing as a question arising in the abstract rather than in the context of an attempt to enforce a particular statute. The nature of the Court's approach in *SCRAP* may be seen in its attempt to distinguish the *SCRAP* plaintiffs from those in *Sierra Club v. Morton*.<sup>180</sup> In *Sierra Club*, plaintiff Sierra Club sought to enjoin commercial development on National Forest land that would have required the construction of an access road and power lines across adjacent Sequoia National Park. The Court in *Sierra Club* denied standing on the ground that the club had failed to allege that any of its members used the land that would be affected by the development.<sup>181</sup> The *SCRAP* Court, looking back at *Sierra Club*, said that the club had alleged no "specific injury," whereas the law students had alleged "illegal action of the Commission [that] would directly harm them in their use of the natural resources of the Washington Metropolitan Area."<sup>182</sup> This distinction is not only somewhat implausible. It also misses the point.

What the Court failed to discuss in *SCRAP*, and perhaps to see, was that the underlying statutes in the two cases were different. But this flaw did not originate in *SCRAP*, for the Court did not engage in serious statutory analysis in *Sierra Club* either. In *Sierra Club*, the club sought to enforce several statutes regulating the use of National Park and National Forest lands.<sup>183</sup> For example, one of the statutes provided that the Park Service "shall promote and regulate the use of the . . . national parks . . . [so as to] conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . by such means as will leave them unimpaired for the enjoyment of future generations."<sup>184</sup> A well-established environmental group possibly should be permitted to bring suit under this statute even if it has no members who use the park land.<sup>185</sup> Indeed, Professor Sax argues that such an environmental group could have been a better plaintiff than a present user

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inconsistent with the basic purpose of NEPA.

S. BREYER & R. STEWART, *supra* note 18, at 1107.

180. 405 U.S. 727 (1972).

181. *Id.* at 735.

182. 412 U.S. at 687.

183. *See* 405 U.S. at 730 n.2 (referring to 16 U.S.C. § 1 (National Park Service); §§ 41, 43, 45c (Sequoia National Park); § 497 (commercial use of National Forest lands)).

184. 16 U.S.C. § 1 (1982).

185. I do not address the question whether the project in question would have interfered with the duty prescribed in the statute. For purposes of the standing argument, we may assume that it does.



of the area, given the statutory purpose of protecting parks against the demands of present users in order to conserve them for the "enjoyment of future generations."<sup>186</sup> I am sympathetic to Professor Sax's argument, but I do not wish to engage in a lengthy discussion of how this statute should have been read. For present purposes, I say only that the Court should have examined this statute carefully before deciding whether to grant standing.<sup>187</sup>

Had the Court in *Sierra Club* focused on the statute and concluded that its general language should not be read to confer standing on an environmental organization absent an allegation of use by one of its members, it would have laid the foundation for a discussion in *SCRAP* focusing on the different wording and underlying purposes of the statutes relating to the National Parks and National Forests on the one hand, and of NEPA on the other. And it could easily have justified standing in *SCRAP* without pretending that the critical difference between the two cases was that, unlike the *Sierra Club*, the students in *SCRAP* had alleged "illegal action [that] would directly harm them."<sup>188</sup> For the Court to analyze the standing questions independently of the underlying statutes, as it did in *Sierra Club* and *SCRAP*, is to misunderstand the APA. As Professor Jaffe pointed out, the APA grants standing to a person "adversely affected or aggrieved . . . *within the meaning of a relevant statute*."<sup>189</sup> Neither Professor Davis nor the Court attached significance to the italicized words, but it should be clear that they are crucial.

An explanation of *SCRAP* that focuses on the National Environmental Policy Act not only permits us to salvage the result, but also helps us to construct a theory of standing that will explain later standing cases that otherwise seem inconsistent or flatly contradictory. For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>190</sup> decided three years later, the Court denied standing to indigents to challenge a change in Internal Revenue Service policy, under which charitable hospitals were permitted to provide less free care to "those not able to pay" and still to retain their status as tax exempt organizations. The Court in *Simon* denied standing on the ground that there was an insufficient causal relation between a predicted failure by the hospital to provide free treatment and the challenged change in IRS policy. It distinguished *SCRAP* by stating that "although [in *SCRAP*] the injury was indirect and 'the Court was

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186. Sax, *supra* note 18, at 82.

187. The only mention of the statute was at 405 U.S. at 730 n.2, where the Court enumerated four "categories" of alleged violations of law: "Second, [the complaint] challenged the proposed permit for the highway . . . on the grounds that the highway would not serve any of the purposes of the park, in alleged violation of 16 U.S.C. § 1, and that it would destroy timber and other natural resources protected by 16 U.S.C. §§ 41 and 43."

188. 412 U.S. at 687.

189. 5 U.S.C. § 702 (1982) (emphasis added).

190. 426 U.S. 26 (1976).

asked to follow [an] attenuated line of causation,' . . . the complaint nevertheless 'alleged a specific and perceptible harm' flowing from the agency action. . . . But in this case the complaint . . . fails to allege an injury that fairly can be traced to petitioners' challenged action."<sup>191</sup> With all due respect, this is nonsense. The single greatest problem in *SCRAP* was that the harm alleged by the students was probably *not* fairly traceable to petitioners' challenged action. In *Simon*, by contrast, the causal relationship between tax status as a charitable hospital and actions required to maintain that status was fairly direct, and indeed was the very premise of the tax policy in question.

The difference between the two cases did not lie in the causal relationship considered in the abstract. Rather, it lay in the underlying causes of action. If the Court had seen that standing depended on an analysis of the specific statute sought to be enforced rather than on general and abstract principles, it could have written coherent and easily defensible opinions in both cases. Whereas the *SCRAP* plaintiffs sued under the APA and NEPA,<sup>192</sup> the *Simon* plaintiffs sued under the APA and the tax code.<sup>193</sup> Although the *Simon* Court was unwilling (or unable) to explain its result in these terms, it is a deep-rooted principle of tax law that, absent exceptional circumstances, the tax code does not grant the right to individuals to challenge the tax status of others.<sup>194</sup>

One may argue about the meaning of NEPA and about the question of whether, in the absence of language granting standing to "any person," plaintiffs like the law students should be permitted to bring suit to require the preparation of an EIS. One may argue about whether environmental organizations should have the right to enforce statutory requirements for use of National Forest and National Park lands. And one may argue about whether individuals should have the right under the Internal Revenue Code to challenge the tax status of others. But the existence of such arguments does not detract from the power of the analytic scheme I am suggesting. Indeed, the analytic scheme of the APA directs us to engage in precisely these arguments: Are the plaintiffs in these cases "adversely affected or aggrieved . . . within the meaning of a relevant statute"?

191. *Id.* at 45 n.25 (citations omitted).

192. 412 U.S. at 678-83.

193. 426 U.S. at 33-34.

194. I construe Justice Stewart's statement in his concurrence to be a reference to the principle. *Id.* at 46 (Stewart, J., concurring) ("I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."). *But cf.* *International Business Machs. Corp. v. United States*, 343 F.2d 914, 924-25 (Ct. Cl. 1965) (standing granted under Internal Revenue Code to sue to obtain equal treatment with similarly situated taxpayer), *cert. denied*, 382 U.S. 1028 (1966). See generally Bittker & Kaufman, *Taxes and Civil Rights: 'Constitutionalizing' the Internal Revenue Code*, 82 YALE L.J. 51, 53-56 (1972). The principle helps to explain the result in *Allen v. Wright*, 468 U.S. 737 (1984) (denying standing to parents of schoolchildren who sought to litigate tax exempt status of private schools that allegedly discriminated on basis of race), although *Allen* is complicated by the fact that a claim of racial discrimination lies in the background.

*Clarke v. Securities Industry Association*<sup>195</sup> may help focus the Court's attention on what ought to be the issue in standing cases under the APA. A trade association representing firms in the securities industry challenged the Comptroller of the Currency's approval of two banks' applications to offer discount brokerage services to the public. The Court held that the association had standing under section 10(a) of the APA and sections 36 and 81 of the National Bank Act<sup>196</sup> to challenge the decision by the Comptroller.<sup>197</sup> Having granted standing to seek review, the Court then ruled against the trade association, holding that the anti-branching provisions of the Bank Act did not forbid the banks' operation of the contemplated discount brokerage businesses.<sup>198</sup> Without more, the Court's decision in *Clarke* would have little enduring interest to anyone outside the banking and securities industries. But in Part II of the opinion, the Court tried to transform the zone-of-interest test from a mischief-making derelict into a useful citizen.<sup>199</sup>

The opinion makes it clear that a court should focus on the underlying "relevant statute" in determining whether a plaintiff has standing to sue to enforce the statute's provisions. In *Clarke* itself, the Court focused on "Congress' overall purposes in the National Bank Act."<sup>200</sup> In providing a general framework for analyzing standing cases under the APA, the Court emphasized that "at bottom the reviewability question turns on congressional intent."<sup>201</sup> For example, in *Investment Company Institute v. Camp*,<sup>202</sup> the Court had granted standing to investment companies to challenge a Comptroller's ruling that would have allowed banks to underwrite securities. The *Clarke* Court explained this decision by noting that in the Glass-Steagall Banking Act of 1933, "Congress, for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs,"<sup>203</sup> and that the scheme of the Act, read through the filter of the APA, required that the plaintiffs be granted standing. In *Block v. Community Nutrition Institute*,<sup>204</sup> the Court had denied standing to consumers to challenge a marketing order by the

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195. 107 S. Ct. 750 (1987).

196. 12 U.S.C. §§ 36, 81 (1982).

197. 107 S. Ct. at 754-59.

198. *Id.* at 759-62.

199. Justice White's opinion was joined by Justices Brennan, Marshall, Blackmun, and Powell. Justice Stevens, joined by Chief Justice Rehnquist and Justice O'Connor, declined to join this part of the opinion, calling it a "wholly unnecessary exegesis on the 'zone of interest' test." 107 S. Ct. at 763 (Stevens, J., concurring in part and concurring in the judgment). Justice Scalia, who had dissented from the court of appeals' grant of standing while a member of that court, did not participate. See *Securities Indus. Ass'n v. Comptroller of the Currency*, 758 F.2d 739, 740 (D.C. Cir. 1985) (Scalia, J., concurring in part, dissenting with respect to standing); 765 F.2d 1196 (D.C. Cir. 1985) (Scalia, J., dissenting from denial of rehearing en banc).

200. 107 S. Ct. at 758.

201. *Id.*

202. 401 U.S. 617 (1971).

203. 107 S. Ct. at 757.

204. 467 U.S. 340 (1984).

Secretary of Agriculture even though the order would have had an effect on consumer prices. The *Clarke* court explained that the Agricultural Marketing Agreement Act of 1937 did not give standing to consumers to challenge marketing orders because suits by consumers “‘would severely disrupt [the] complex and delicate administrative scheme.’”<sup>205</sup> According to *Clarke*, the “essential inquiry” is not whether plaintiff is adversely affected by the action in question, but rather “‘whether Congress intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.’”<sup>206</sup>

*Clarke* provides a welcome transformation of *Data Processing*'s “arguably within the zone of interests” test. Under *Data Processing*, standing was a question of whether plaintiff was “arguably” entitled to sue rather than whether plaintiff was actually entitled to do so.<sup>207</sup> In *Clarke*, the “arguably” language becomes a presumption in favor of standing in APA cases rather than a signal that the standing determination is only a preliminary and tentative decision about whether plaintiff is actually entitled to sue: “[T]he test is most usefully understood as a gloss on the meaning of [section 10(a) of the APA].”<sup>208</sup> Within the context of the APA, “the test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.”<sup>209</sup> One may argue about the strength of the presumption in favor of standing that should be found in, or read into, the APA.<sup>210</sup> But the Court's rejection of *Data Processing*'s two-step inquiry into the existence of standing must be regarded as a significant clarification, and improvement, of standing law. When this aspect of *Clarke* is combined with the explicit focus on congressional intent in the relevant statute, we may see in *Clarke* the potential for a welcome, if belated, adoption of Professor Jaffe's view of the APA.

#### 4. Summary

In the end, statutory standing cases need not be conceptually difficult. If a suit is founded directly on a statute, one looks to that statute to determine whether the would-be plaintiff has standing. This is true whether the suit is characterized by the Court as a standing case, as in *Havens*, or as an implied private cause of action case, as in *Cannon*. If a suit is filtered through section 10(a) of the APA, one looks to the underlying

205. 107 S. Ct. at 757 (quoting *Block*, 467 U.S. at 348).

206. *Id.* (quoting *Block*, 467 U.S. at 347).

207. See *supra* text accompanying notes 66–67.

208. 107 S. Ct. at 758 n.16. The Court appears to limit the zone of interest test to APA cases: “We doubt . . . that it is possible to formulate a single inquiry that governs all statutory and constitutional claims.” *Id.*

209. *Id.* at 757.

210. For example, Justice Scalia has made clear that he does not think the APA should be used to create such a strong presumption of reviewability. Scalia, *supra* note 9, at 887–90.

“relevant” statute to determine whether the would-be plaintiff has standing, reading the statutory language in light of the APA’s presumption in favor of reviewability. In either event, the touchstone is statutory intent: Does the statute confer on plaintiff the right to enforce the asserted duty?

In many cases, the relevant statute may be silent or unclear on the question of who should have standing. For example, NEPA, the act creating the National Parks, and the Internal Revenue Code are all silent about who should be entitled to sue to enforce the duties they create. In such cases, the Court may properly invoke background assumptions about the functions of judicial review in certain areas, and about traditional categories of recognized injuries and permissible plaintiffs in those areas. This is what the Court did, more or less explicitly, in administrative law cases in the 1930’s and 1940’s when it invoked analogies to common law injuries to infer congressional intent, and this is what the Court has done more recently, although silently and awkwardly, in *SCRAP*, *Sierra Club*, and *Simon*. In other words, standing questions need not be seen as coming into the world naked and newborn with each new statute. The framework suggested here cannot answer a standing question, whether difficult or easy, in any particular case. Even with the help of background assumptions, a statutory standing case often will be fiercely difficult. This framework, does serve, however, to focus the attention of the parties and the court on the issues about which they should be arguing.

### B. *Standing to Enforce Constitutional Rights*

Standing to enforce statutory rights is, or at least should be, a relatively straightforward topic. Standing to enforce constitutional rights, however, is not always such an easy matter. A number of difficulties arise in trying to construct an analytic framework for standing to enforce constitutional rights. The most obvious is that constitutional provisions are generally much more open-ended and ambiguous than statutory provisions, both as to the duties they impose and as to whom they authorize to enforce those duties. A less obvious but equally important difficulty is that the scope of Congress’ power to authorize suits to enforce constitutional provisions is not always clear. Finally, the Court opinions necessary to construct a coherent and relatively complete framework are not available in a fully usable form, mostly because the Court has not perceived the issue of standing to enforce constitutional rights in anything approaching its full complexity.

For these reasons, any attempt to construct a complete analytic framework for standing to enforce constitutional rights must necessarily fail. Yet we may begin to sketch out a partial framework, and the analysis suggested here may encourage the Court to see and to take more seriously the

questions that are necessarily involved.<sup>211</sup> I divide the discussion into two parts. First, I discuss standing based directly on constitutional provisions. Second, I discuss the scope of Congress' power to confer standing to enforce constitutional provisions.

### 1. *Standing Based Directly on the Constitution*

Standing to enforce constitutional rights is often based directly on the Constitution in the sense that a plaintiff relies on no more than the Constitution itself as the source of the asserted right, and on a general jurisdictional statute as the source of a court's authority to hear the suit. Cases that readily come to mind under such a description are so-called "*Bivens* actions," in which private causes of action for damages are inferred directly from the Constitution.<sup>212</sup> But *Bivens* actions generally focus on the availability of a damage remedy. More central to our purposes are cases in which the question is whether there is standing to seek *any* remedy; or, to put the issue somewhat differently, cases in which the question is whether a person has suffered an injury against which the Constitution is designed to provide any judicial protection.

As in cases where a plaintiff seeks to enforce statutory rights, a plaintiff's standing to enforce a constitutional right must depend on the nature of the underlying right. Constitutional standing cases are unlike statutory standing cases, however, in that I cannot as readily form them into a coherent whole merely by providing different explanations than the Court has been able to provide. I frankly find some constitutional standing cases irreconcilable. But this fact may, in a backhanded way, help elaborate my thesis. Standing decisions, whatever the Court chooses to call them, are decisions on the merits. While some constitutional standing cases are in fundamental conflict, the reasons may have more to do with deep ideological divisions in the Court over the meaning of specific constitutional clauses than with a dispute over a separate and independent standing doctrine.

I examine two clusters of constitutional cases, traditionally analyzed under the headings of "federal taxpayer standing" and "causation and redressability." I regard these headings as misleading, for they encourage the Court to focus on the wrong questions. That is, these headings encourage the Court to view questions of taxpayer status and of causation and redressability in isolation, abstracted from the underlying constitu-

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211. A helpful beginning may be found in Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37.

212. See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980) (cause of action for damages inferred directly from Eighth Amendment for failure to provide adequate medical care in federal prison); *Davis v. Passman*, 442 U.S. 228 (1979) (cause of action for damages inferred directly from due process clause of Fifth Amendment for discriminatory discharge from employment by member of Congress); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (cause of action for damages inferred directly from Fourth Amendment for unlawful search by federal narcotics officials).

tional claims asserted. To analyze properly the standing issues presented in these cases, we should focus on the particular constitutional claims at issue.

a. *Federal Taxpayer Standing*

Four cases are typically grouped under the heading of "federal taxpayer standing." In *Flast v. Cohen*,<sup>213</sup> the Supreme Court granted standing to a federal taxpayer to seek an injunction against spending federal funds allegedly in violation of the establishment clause of the First Amendment.<sup>214</sup> In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,<sup>215</sup> the Court denied standing to federal taxpayers to challenge a grant of federally owned real property to a religious college, also allegedly in violation of the establishment clause. In *United States v. Richardson*,<sup>216</sup> the Court denied standing to a federal taxpayer to require the Central Intelligence Agency to provide an account of its expenditures under the "statement and account clause" of the Constitution.<sup>217</sup> Finally, in *Schlesinger v. Reservists Committee to Stop the War*,<sup>218</sup> the Court denied standing to federal taxpayers to enjoin members of Congress from simultaneously sitting in Congress and holding positions in the military reserve allegedly in violation of the "incompatibility clause" of the Constitution.<sup>219</sup>

In *Flast*, the majority formulated a two-part test designed to separate those cases in which federal taxpayer standing should be granted from those in which it should not. Under *Flast*, a federal taxpayer has standing to challenge a federal expenditure if (1) the challenged expenditure is an exercise of the federal government's taxing and spending power under Article I, section 8, of the Constitution, and (2) the challenged expenditure exceeds specific constitutional limitations on the taxing and spending power.<sup>220</sup> Justices Stewart and Fortas each concurred separately, arguing that standing should be granted because of the special nature of the establishment clause and its relationship to the use of federal tax moneys.<sup>221</sup> I suspect that Stewart's and Fortas' position (which I will here treat as one) was not adopted by the majority of the Court because it was seen as unseemly and "result oriented." Yet Stewart and Fortas asked precisely the

213. 392 U.S. 83 (1968).

214. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

215. 454 U.S. 464 (1982).

216. 418 U.S. 166 (1974).

217. U.S. CONST. art. I, § 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

218. 418 U.S. 208 (1974).

219. U.S. CONST. art. I, § 6, cl. 2 ("[N]o person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

220. 392 U.S. at 102-03.

221. *Id.* at 114 (Stewart, J., concurring); *id.* at 115-16 (Fortas, J., concurring).

question that was before the Court: Is the nature of the establishment clause guarantee such that a federal taxpayer should be permitted to sue to enforce it?

The Court's more recent decision in *Valley Forge* denied standing to federal taxpayers to challenge a grant of federally owned real property to a sectarian school as a violation of the establishment clause. It would be somewhat naive to argue that the result in *Valley Forge* would have been different if only *Flast* had been written differently. But it is at least apparent that the doctrinal formulation in *Flast* facilitated a thoroughgoing wrongheadedness in the Court's explanation of why it denied standing in *Valley Forge*.

In both *Flast* and *Valley Forge*, federal taxpayers asserted that federal actions violated the establishment clause. The difference between the two cases is that in *Flast* federal funds were spent, whereas in *Valley Forge* federally owned real property was granted. Although Justice Brennan argued in dissent in *Valley Forge* that the critical issue was the meaning of the establishment clause,<sup>222</sup> the majority took the *Flast* test at face value. In an opinion by Justice Rehnquist, the Court held that the first part of the test was not satisfied because plaintiffs were challenging an action by the Department of Health, Education, and Welfare rather than a "congressional action,"<sup>223</sup> and because the grant of real property was an exercise of power under the property clause<sup>224</sup> rather than an exercise of the taxing and spending power.<sup>225</sup> The Court denied that plaintiffs' establishment clause claim was any more "fundamental" than the statement of account clause and incompatibility clause claims in *Richardson* and *Schlesinger*, and it repeated the statement in *Flast* that "the requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'"<sup>226</sup>

Perhaps I should not dignify *Valley Forge* by pretending that it is anything more than an intellectually disingenuous way to undercut *Flast* and to return to the status quo ante. But it should be clear that either *Flast* or *Valley Forge* is wrongly decided. In each case, federal taxpayers alleged that something of economic value had been transferred by the United States to a religious institution in violation of the establishment clause. It is possible to argue, of course, that federal taxpayers should not be allowed to bring establishment clause challenges to federal expenditures; in-

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222. "The opinion of the Court is a stark example of this unfortunate trend of resolving cases at the 'threshold' while obscuring the nature of the underlying rights and interests at stake. . . . [N]ot one word is said about the Establishment Clause right that the plaintiff seeks to enforce." 454 U.S. at 490-91 (Brennan, J., dissenting) (emphasis in original).

223. *Id.* at 479.

224. U.S. CONST. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . .").

225. 454 U.S. at 480.

226. *Id.* at 484 (quoting *Flast*, 392 U.S. at 99).



deed, this was the state of the law before *Flast*.<sup>227</sup> Whether a federal taxpayer should be permitted to bring such a challenge depends, and must depend, as Justices Stewart and Fortas said in their separate concurrences in *Flast*, and as Justice Brennan said in dissent in *Valley Forge*, on how one reads the establishment clause. The meaning of the clause, both as to what it prohibits and as to whom it permits to bring suit, is not irrelevant, as the *Flast* and *Valley Forge* Courts both suggested. It is, rather, the crux of the argument.

I believe that standing should have been allowed in both cases. My reasoning is much like that of Justices Stewart, Fortas, and Brennan—that the protection provided by the establishment clause cannot be fully realized unless there is easy and unrestricted access to the courts to challenge federal expenditures or grants that might violate the clause. Justice Brennan, like Justice Rutledge forty years earlier,<sup>228</sup> has concluded that federal taxpayers should be given special status to challenge expenditures as violative of the establishment clause, based on the historical argument that the clause was enacted to prevent the forced exaction of moneys for the support of state-sponsored religion.<sup>229</sup> There is much to be said for this argument, but I would prefer to read the establishment clause as protecting all members of our society, not merely taxpayers, from excessive entanglement of church and state. Federal taxpayer standing is, therefore, in my view, at once too narrow and too broad. It is too narrow in that a member of the society should not have to show that he pays federal taxes to invoke judicial enforcement of the clause. It is too broad in that a foreigner should not have standing to bring a challenge under the clause merely on the happenstance that he paid a federal tax.<sup>230</sup>

I nevertheless would be willing to employ taxpayer status as the criterion to separate those who can bring establishment clause challenges from those who cannot, for as a practical matter the lack of fit between federal taxpayer standing and the intended protection of the clause is not serious. The narrowness of the taxpayer category is not a significant problem since virtually all adults in the country are federal taxpayers.<sup>231</sup> Nor, in the absence of a showing that foreigners are flooding our courts with establishment clause litigation, am I greatly concerned about the overbreadth of the taxpayer category. Moreover, other general categories designed to encompass those who have sufficient stake in our society to warrant judicial protection by the clause may also turn out to have problems of fit. For

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227. See, e.g., *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

228. *Everson v. Board of Educ.*, 330 U.S. 1, 28 (1947) (Rutledge, J., dissenting).

229. *Valley Forge*, 454 U.S. at 504 (Brennan, J., dissenting) (“*The taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion.*”) (emphasis in original).

230. See Bitker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen*, 36 U. CHI. L. REV. 364 (1969); Davis, *The Case of the Real Taxpayer: A Reply to Professor Bitker*, 36 U. CHI. L. REV. 375 (1969).

231. See Bitker, *supra* note 230.

example, one could argue that even general citizen standing is insufficiently broad for establishment clause purposes, given the stake that resident aliens and other non-citizens might be thought to have in our society.<sup>232</sup>

In the end, however, I am less concerned with the proper reading of the establishment clause and the definition of the class of people entitled to its judicial enforcement, than with making the point that whether taxpayer standing should be permitted is not a question that can be answered in the abstract. It can be answered only by reference to the meaning and purposes of the particular clause at issue. A reader should not think that she should reject my general thesis because she disagrees with my reading of the establishment clause. Indeed, if she disagrees with my conclusion about standing because she argues that the establishment clause should be construed differently, she is agreeing with my thesis, for such an argument is precisely what I say should take place.

The Court's other two decisions in the taxpayer standing cases, *Richardson* and *Schlesinger*, further illustrate that the question of taxpayer standing cannot be considered in the abstract. In *Richardson*, plaintiff sought to compel the production of detailed information by the Central Intelligence Agency about its expenditures. Plaintiff contended that the Central Intelligence Agency Act, which allowed the CIA to account for its expenditures "solely on the certificate of the Director,"<sup>233</sup> violated the statement and account clause of the Constitution, which requires that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."<sup>234</sup> The Supreme Court applied the *Flast* test and held that the plaintiff lacked standing as a federal taxpayer because there was "no 'logical nexus' between the asserted status of taxpayer" and the claimed constitutional violation.<sup>235</sup>

The Court's decision in *Richardson* makes sense only if the statement and account clause should be read not to permit a member of the body politic—whether a federal taxpayer, a voter, or a citizen<sup>236</sup>—to require, through judicial process, the production of the CIA's secret accounts. The Court seems to have sensed this, but its statement that there is "no logical nexus" between plaintiff's taxpayer status and the constitutional claim

232. For a version of such an argument, see A. BICKEL, *THE MORALITY OF CONSENT* 33-54 (1975) (Chapter 2: "Citizen or Person? What is Not Granted Cannot Be Taken Away"). See also *Plyler v. Doe*, 457 U.S. 202 (1982) (state withholding of funds for education of illegal alien children violates equal protection clause).

233. 50 U.S.C. § 403j(b) (1982).

234. U.S. CONST. art. I, § 9, cl. 7.

235. 418 U.S. at 175.

236. Plaintiff asserted in his complaint that he was a voter and a citizen. The court of appeals held that he had standing as a federal taxpayer, and the United States sought certiorari on the question of taxpayer standing. Plaintiff, as respondent in the Supreme Court, did not "challenge the formulation of the issue contained in the petition for certiorari." *Id.* at 167 n.1 (quoting Respondent's Brief in Opposition to Petition for Certiorari at 1).

under the clause only hints at the reasoning that should support its decision. An explanation of the decision must be based, as the Court's opinion is not, on an explicit analysis of the purposes of the clause, and on whether those purposes would be served by granting standing to a member of the general public.

In *Schlesinger*, plaintiffs sought to prevent members of Congress from simultaneously serving as members of the United States military reserves on the ground that such simultaneous membership violated the incompatibility clause of the Constitution, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."<sup>237</sup> The Supreme Court denied standing to plaintiffs, both as citizens and as taxpayers. As in *Richardson*, the Court's decision in *Schlesinger* can be justified based on an analysis of the constitutional provision whose protection is invoked by the plaintiffs, but the Court failed to provide that analysis. In eleven pages devoted to the question of citizen standing, the Court mentioned the purpose of the incompatibility clause briefly, in only two places, and in both instances the Court appears to have considered such discussion irrelevant to the standing issue before it.<sup>238</sup> The Court's denial of taxpayer standing was brief and similarly divorced from any consideration of the purpose of the incompatibility clause.<sup>239</sup> Finally, at one point, the Court hinted that the clause was meant to be binding but not judicially enforceable,<sup>240</sup> suggesting that plaintiffs had sought to adjudicate a political question. If this is so, the Court's decision means that no person has standing to enforce the clause, but argument about this issue is conspicuously absent.

In sum, *Flast*, *Valley Forge*, *Richardson*, and *Schlesinger* should not be seen as a group of "federal taxpayer cases." Rather, they should be seen as cases involving three different provisions of the Constitution. We may have a presumption that federal taxpayers ordinarily should not have standing to challenge activities of the federal government on constitutional grounds. But we should not make the mistake of thinking that there is something about federal taxpayer status, considered in isolation, that will allow us to arrive at the correct standing decision in particular cases. Nor, when federal taxpayers are granted standing, as in *Flast*, should we make the related mistake of thinking that the decision has changed the essence of federal taxpayer standing. Rather, we are dealing only with a pre-

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237. U.S. CONST. art. I, § 6, cl. 2.

238. See, e.g., 418 U.S. at 226 ("[T]o have reached the conclusion that respondents' interests as citizens were meant to be protected by the Incompatibility Clause because the primary purpose of the Clause was to insure independence of each of the branches of the Federal Government, similarly involved an appraisal of the merits before the issue of standing was resolved.").

239. *Id.* at 227-28.

240. *Id.* at 227 ("Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

sumption, which may be overcome when the purposes of the particular clause at issue will be best served by permitting federal taxpayers to sue to enforce its obligations.

b. *Causation and Redressability*

The cluster of cases typically grouped under the heading of "causation and redressability" also can be used to illustrate the proposition that a plaintiff's standing should depend on the nature of the underlying claim rather than on a free-standing and abstract requirement. I take as my two primary examples *Linda R.S. v. Richard D.*<sup>241</sup> and *Warth v. Seldin*,<sup>242</sup> in which the constitutional claim rested on the equal protection clause.<sup>243</sup> Because of the broad, encompassing character of the equal protection clause and the enormous variety of dissimilar claims that can be brought under it, however, we cannot expect as compact and easily summarized a body of standing law as under a statutory provision or even most constitutional provisions. In both *Linda R.S.* and *Warth*, standing to raise equal protection challenges was denied because, according to the Court, there was an insufficient causal connection between the injury suffered and the remedy sought. I think the decision in *Linda R.S.* is almost certainly wrong, while the decision in *Warth*, although not obviously correct, is at least rational and defensible.

In *Linda R.S.*, the Court held that plaintiff lacked standing because the causal relationship between the injury she suffered (the father's failure to make child support payments) and the remedy the Court said she sought (criminal prosecution of the father because of that failure) was "at best . . . only speculative."<sup>244</sup> The Court's statement in *Linda R.S.* that the relationship between the injury and the remedy sought was too speculative must be understood in a special way. If the Court defines injury as failure to receive child support payments, the relationship is indeed somewhat speculative, for the threat (or even the reality) of criminal prosecution will not necessarily lead to the payment. But if injury is defined simply as unequal treatment of mothers of legitimate and illegitimate children rather than as failure to receive money, the relationship between the injury alleged and the remedy sought is perfect coincidence.

If we assume that discrimination between legitimate and illegitimate children in enforcing the criminal child support statute violates the equal protection clause, *Linda R.S.* should be an easy case. An equal protection

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241. 410 U.S. 614 (1973). For an earlier discussion of *Linda R.S.*, see *supra* text accompanying notes 92-99.

242. 422 U.S. 490 (1975).

243. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."). Plaintiffs also claimed violations of First and Ninth Amendment rights in *Warth*, 422 U.S. at 493, but I do not regard either claim as sufficiently serious to warrant analysis here.

244. 410 U.S. at 618.

violation can be cured in one of two ways. The claimant can be given the same treatment as that given to those in the advantaged class, or those in the advantaged class can have their advantage taken away.<sup>245</sup> The special context of *Linda R.S.* might be thought to produce a different result because of the deference traditionally accorded prosecutorial discretion.<sup>246</sup> Whether this is a problem, however, depends on the sort of order Linda R.S. sought.<sup>247</sup> I will take it as correct that a court generally does not have the power to order that a particular person be prosecuted, and that therefore Linda R.S. could not get an injunction requiring prosecution of her child's father. But two other forms of relief should have been available, either of which would have cured an equal protection violation. First, a court could have ordered the district attorney not to rely on grounds that would violate the equal protection clause in deciding whom to prosecute. This would restrict the district attorney's discretion by eliminating a con-

245. See *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) ("The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced."). The Court cast this principle in the standing mold in *Heckler v. Mathews*, 465 U.S. 728 (1984), holding that a man whose Social Security benefits were reduced (when the benefits of a similarly situated woman were not) had standing to assert an equal protection claim even if the Court had no power to order that he be paid increased benefits. The result of equal treatment "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.

246. It is unclear from the Court's opinion whether the state statute did not authorize the prosecutor to proceed against fathers of illegitimate children, or whether the prosecutor had discretion to prosecute. Compare 410 U.S. at 615-16 & n.2 ("The district attorney refused to take action for the express reason that, in his view, the fathers of illegitimate children were not within the scope of [the Texas Penal Code provision].") with 410 U.S. at 619 ("[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."). The Court later appeared to characterize the decision of the prosecutor in *Linda R.S.* as discretionary. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ("[P]etitioners analogize the discretion vested in the IRS . . . to the discretion of a public prosecutor as to when and whom to prosecute. They thus invoke the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution. See *Linda R.S. v. Richard D.*").

247. The kind of order Linda R.S. sought is unclear from the various judicial opinions. The district court, at the beginning of its opinion, wrote that Linda R.S. sought "a declaratory judgment that two Texas child support laws [one of which was the criminal statute] are unconstitutional in their exclusion of children of unwed parents, [and] a permanent mandatory injunction requiring the State of Texas and its officers to cease their alleged discriminatory application of the child support laws in question." *Linda R.S. v. Richard D.*, 335 F. Supp. 804, 805 (N.D. Tex. 1971). The district court later wrote that Linda R.S. sought "a mandatory injunction . . . against Henry Wade, the Dallas County District Attorney, ordering him to prosecute Richard D." *Id.* at 806. The Supreme Court, at the beginning of its opinion, wrote that Linda R.S. sought to "enjoin the 'discriminatory application' of Art. 602 of the Texas Penal Code." 410 U.S. at 614-15. Later in the opinion, the Court assumed that Linda R.S. sought an injunction that would require the prosecution of Richard D.: "Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father." *Id.* at 618.

It appears from Linda R.S.'s complaint that she sought only the cessation of discriminatory treatment, not the issuance of a mandatory injunction. In her request for relief against the state, she asked only that "a Declaratory Judgment be issued holding the Texas Child Support laws unconstitutional in their exclusion of children of unwed parents," and that "a permanent mandatory injunction issue, requiring the State of Texas and its state officers to cease their discriminatory application of Child Support laws." She did not seek an injunction requiring the State to prosecute Richard D. Appellant's Brief app. at 55, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (No. 71-6078) (quoting Plaintiff's Third Amended Complaint at § VI paras. 2, 3).

stitutionally impermissible factor from the set of factors that could be considered, but it would not result in an order requiring that a particular person be prosecuted. Second, a court could have ordered the district attorney to cease all prosecutions under the statute. If a court has the power to issue either of the latter two injunctions,<sup>248</sup> the decision in *Linda R.S.* seems clearly wrong.

If we see *Linda R.S.* in this way and nevertheless wish to sustain the result, we must recognize that the problem posed by the case was not that the complaint failed to allege a close enough connection between the remedy sought and the injury alleged. Rather, we must read *Linda R.S.* as holding that the equal protection clause does not give to mothers of illegitimate children the legal right to equal treatment in the enforcement of a child support statute imposing criminal sanctions.<sup>249</sup>

The heart of the case is thus the meaning of the equal protection clause. It is quite possible, of course, to argue that the inherent dignitary value of equal treatment should require that mothers of illegitimate children be treated equally with mothers of legitimate children. But the further practical value of receiving child support payments also can be relevant. Here, finally, is the appropriate place to make an argument about the causal relationship between the equal protection right asserted and the interest that mothers of illegitimate children have in receiving child support payments. It is always possible that a particular clause should be narrowly construed because the interests that would be protected by a broader version are related in too tangential or speculative a manner to the purposes of the clause to justify a broad reading. Thus, it might be argued in *Linda R.S.* that the likelihood of child support payments actually being made as a result of criminal prosecution (or the threat of prosecution) is so small that to find an equal protection right would be largely meaningless. But at the general level of right formulation (as distinct from prediction in an individual case), it is hard to make a persuasive argument that the relationship is too speculative. If a court can enjoin the district attorney to decide to prosecute without regard to the legitimacy or illegitimacy of the child, a broad definition of the right will presumably make fathers of illegitimate children as vulnerable to prosecution as fathers of legitimate children. And we know from the statute itself that the Texas legislature relied on the relationship between prosecution and ultimate payment by the father as the rationale for criminal prosecution of delinquent fathers.

In the end, I think *Linda R.S.* is simply wrong. It is probably too much to hope that the case would have been decided differently if the

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248. Indeed, it appears that either of these two injunctions would have fully satisfied *Linda R.S.*'s request for relief. See *supra* note 247.

249. In *Gomez v. Perez*, 409 U.S. 535 (1973), argued the same day as *Linda R.S.* but decided a month and a half earlier, the Court had already held that Texas could not discriminate between legitimate and illegitimate children in terms of civil entitlement to support from their fathers.

Court had understood the argument in the way I have just made it. But even if the case had not been decided differently, the Court should at least have engaged in some version of this argument, for this would have made it clear that what was at stake was the meaning of the equal protection clause, rather than the application of a general and abstract causation requirement.

The Court's holding that there was no standing in *Warth* raises somewhat different issues. In *Warth*, a number of plaintiffs brought an equal protection challenge to an allegedly exclusionary zoning scheme of the town of Penfield, New York. Plaintiffs<sup>250</sup> included low-income minority individuals who alleged that they wished to live in Penfield but were prevented from doing so by the lack of affordable housing, two associations with home-building companies as members that allegedly would build in Penfield if permitted to do so, several property owners in nearby Rochester whose taxes were allegedly higher as a result of low-income people living in Rochester rather than Penfield, and a non-profit corporation whose purpose was to "alert ordinary citizens to problems of social concern."<sup>251</sup> The Court denied standing to everyone. I will focus on the first two groups—the individuals who alleged that they wished to live in Penfield, and the two associations—because they had the strongest claim to standing.<sup>252</sup> The individuals were denied standing because there was an insufficient showing that even absent Penfield's zoning practices they would have been able to live there.<sup>253</sup> The associations were denied standing on the ground that none of their members had specific low-income projects currently planned or proposed for Penfield.<sup>254</sup> In other words, standing was denied because there was an insufficient causal relation between the injury alleged and the remedy sought.

If no exclusionary zoning challenge by would-be residents and builders of low-income housing had ever been permitted by the Court, *Warth* might be seen as very similar to *Linda R.S.* in the sense that the equal protection clause simply does not protect would-be residents and builders against the injuries they allege. If this were true, it would probably be fair to say that there is no such thing as an exclusionary zoning claim. But the Court's later decision in *Village of Arlington Heights v. Metropolitan*

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250. I include in the term "plaintiffs" the actual plaintiffs, a would-be intervenor, and a party sought to be joined as plaintiff. See 422 U.S. at 493-97.

251. *Id.* at 494 (quoting Plaintiff's Appendix at 8-9).

252. Justice Brennan, in dissent, focused on these plaintiffs, who in his view "clearly" had standing. *Id.* at 520, 521 (Brennan, J., dissenting).

253. *Id.* at 504 (citing *Linda R.S.*).

254. *Id.* at 516-17. Penfield Better Homes Corp., a member of one of the associations, had previously proposed a moderate-income project, but the project was not alleged to be "viable" when the complaint was filed. *Id.* at 517. O'Brien Homes, Inc. had a pending low- and moderate-income project, but O'Brien does not appear to have been a member of either of the two associations. *Id.* at 505 n.15, 516-17.

*Housing Development Corp.*<sup>255</sup> makes it clear that such a claim does exist. By comparing *Warth* and *Arlington Heights*, we may understand the functional nature of *Warth*'s causation requirement.

In *Arlington Heights*, a specific low- and moderate-income project was proposed and a zoning change requested. Three public meetings on the proposal were held, and the village's Plan Commission eventually denied the requested zoning change.<sup>256</sup> The Court sustained the standing of a low-income minority plaintiff, who would "probably" move into the project if it were built, to bring an exclusionary zoning challenge under the equal protection clause.<sup>257</sup> The Court then held that the plaintiff had to show "discriminatory intent or purpose" in order to sustain his claim,<sup>258</sup> and noted that a determination of such a claim in any particular case "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."<sup>259</sup>

Given the nature of the substantive right enunciated in *Arlington Heights*, it is understandable (although not inevitable) that the Court required a fairly tight causal connection between the alleged violation of equal protection through exclusionary zoning and redress of that violation by a particular project actually being proposed. Zoning decisions are highly particularistic and are often embedded in drawn-out and complex administrative procedures. Since discriminatory intent is necessary to prove an equal protection exclusionary zoning violation, a record showing the sort of housing project that is likely to be built and the sort of person likely to live in it, and showing reasons (as well as permitting inferences about other reasons) why the project was turned down, will often be necessary to a finding of liability. The best way to obtain such a record is to require that anyone challenging a zoning scheme as exclusionary have as a premise for the litigation a project that is actually at issue. If we see the causal requirement in *Warth* and *Arlington Heights* in this way, it is obvious that it is not a requirement in the abstract, any more than it was in *Linda R.S.* Instead, the tightness of the causal relation required is directly dependant on the fact that an equal protection exclusionary zoning claim, rather than some other claim, is at issue.<sup>260</sup>

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255. 429 U.S. 252 (1977).

256. *Id.* at 256-58.

257. *Id.* at 264. Given its holding that the individual plaintiff had standing, the Court did not decide whether the would-be builder of the project, and other additional plaintiffs, had standing. *Id.* at 263-64 & n.9.

258. *Id.* at 265.

259. *Id.* at 266.

260. Professor Scharpf makes this point broadly for "non-constitutional rules of standing, ripeness and adversariness." Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 529-30 (1966) ("If these rules are understood as functional requisites for the responsible performance of the constitutional-court function, then it seems entirely reasonable to expect that the stringency of these requirements might vary considerably with the character of the constitutional questions which are in issue. The more abstract or absolute the constitutional standards, the less will their application turn upon close and difficult questions of fact and upon a weighing of competing



## 2. *Statutory Grants of Standing to Enforce Constitutional Rights*

In his widely admired dissent in *Flast*, Justice Harlan argued that federal courts should not entertain a federal taxpayer challenge brought under the establishment clause to federal expenditures assisting religious schools even if such a suit was within the "case or controversy" limitation.<sup>261</sup> Justice Harlan noted, however, that a different case would be presented if Congress had by statute authorized taxpayer plaintiffs to bring such a suit. In that event, Harlan would have permitted a taxpayer suit, for "[a]ny hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President."<sup>262</sup> Although the Court appears to be largely unaware of them, a number of complex issues are raised by an approach under which Congress has the power to grant standing to enforce a constitutional right when the Constitution alone would not do so.

### a. *In General*

Analytic structures permitting lawmaking bodies to build on legal guarantees established by other lawmaking processes are familiar in other areas of law. For example, states sometimes build on a federal standard in establishing a state law cause of action,<sup>263</sup> often by granting a private cause of action to enforce a federal standard that the federal law itself does not grant.<sup>264</sup> But the analogy to the states' building on federal law cannot take us very far. First, the states have general power to enact legislation, limited only by specific prohibitions, whereas, in theory at least, Congress' power to enact a statute must be derived from its enumerated powers. Second, the supremacy clause<sup>265</sup> makes clear the relationship between the powers of the state and the federal government when there is disagreement between the two, whereas the relationship between the powers of Congress and the Court over the nature and extent of the constitu-

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values in the light of empirical data, and the less will the Court depend upon the suitability of the case and upon the qualifications of the parties.").

261. 392 U.S. 83, 130-33 (1968) (Harlan, J., dissenting).

262. *Id.* at 131-32.

263. *See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (violation of federal drug labelling standard provides rebuttable presumption of negligence under state law).

264. *See, e.g., Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934) (private cause of action under state law to enforce standards of Federal Safety Appliance Act (FSAA) for railroad workers engaged in intrastate commerce; FSAA and implementing Federal Employers Liability Act apply of their own force only to interstate commerce); Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289, 296-305 (1969) (discussing state created remedies for violations of federal standards).

265. U.S. CONST. art. VI, § 2, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

tional guarantees is, in critical places, troubled and ambiguous.<sup>266</sup> A closer analogy to Congress' power to grant standing to enforce constitutional provisions may be Congress' power to provide details of implementation and remedies for the enforcement of constitutional guarantees.<sup>267</sup> But the analogy is still not perfect, for in these cases congressional power is exercised on behalf of someone whose injury from the constitutional violation is not in question, and hence whose standing to seek *some* redress is not an issue.

To make matters more complex, the relationship between Congress' and the Court's power to grant standing to enforce constitutional guarantees can vary from one clause to another. In some instances, the clause in question may not be judicially enforceable, whether or not Congress passes a statute purporting to grant standing. To put it another way, the clause may pose a political question. For example, it may be that no private citizen should have the power to enforce the guarantee of republican government, even if Congress passes a statute purporting to grant standing to enforce it.<sup>268</sup> In other instances, a broadened congressional grant of standing might undercut the right of those who are the most directly concerned and to whom the Constitution clearly grants standing. This issue would arise, for example, if Congress granted standing to relatives of

266. It has become particularly apparent in the last fifteen or twenty years that the relationship between Congress' and the Court's powers to construe and enforce the Constitution is a complicated matter. See, e.g., Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Role of Congress in Constitutional Adjudication*, 40 U. CIN. L. REV. 199 (1970); Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). All of these articles, however, focus on defendants' duties rather than on plaintiffs' rights to enforce these duties.

267. As to details of implementation, see, for example, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (prescribing Fifth Amendment warnings that police officials must provide, but noting: "Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."). As to remedies, see, for example, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (inferring private cause of action for damages against federal officials for violation of Fourth Amendment). I agree with Professor Monaghan's view of *Bivens*: "But, unless the Court views a damage action as an indispensable remedial dimension of the underlying guarantee [which the Court does not], it is not constitutional interpretation, but common law." Monaghan, *supra* note 266, at 24 & n.124; see also *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (damage remedy for constitutional violation defeated if there are "special factors counselling hesitation in the absence of affirmative action by Congress," or if "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective").

268. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."); see *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912) (whether state has ceased to be "republican in form" is political question "not cognizable by the judicial power"). For an excellent discussion, see Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597, 607-13 (1976).

those convicted of crimes to appeal convictions or sentences on grounds of unreasonable search and seizure, coerced confession, lack of due process, or cruel and unusual punishment, in the event that the person convicted did not bring such an appeal. A strong argument could be made that some or all of these constitutional rights are personal to the accused, and that therefore an outsider (even a relative) should not be able to interfere with the decision of the person actually convicted about how best to manage his affairs.<sup>269</sup>

In still other instances, Congress may have a sort of subconstitutional power to change the contours of certain constitutional protections, including who may be deemed a beneficiary of a constitutional provision. For example, Congress has granted standing to persons eligible to vote for President to bring First Amendment challenges to federal election laws.<sup>270</sup> These laws may be seen as a form of subconstitutional law; indeed, they must be so seen if these voters would otherwise be unable to bring such challenges. Further, in some instances, Congress may be able to rely on power under one clause to enact a statute that furthers values it finds in another clause. For example, at a time when Congress was more uncertain than it is today about its power under the Fourteenth Amendment to remedy racial discrimination, it passed a statute creating duties and granting standing to enforce those duties under the commerce clause.<sup>271</sup> Finally,

269. An example would be a statute giving to relatives of a defendant in a capital case the right to raise constitutional objections on appeal or otherwise if the defendant himself failed or refused to pursue these avenues for relief. In the absence of such a statute, Gary Gilmore's mother was denied the right to seek a stay of execution when the lower court had made a "firmly grounded" determination that Gilmore had made a "knowing and intelligent waiver of any and all federal rights." *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976); see also *Rosenberg v. United States*, 346 U.S. 273, 289 (1953) (Jackson, J., concurring) ("discountenancing" appearance for Rosenbergs of attorneys representing self-described "next friend"). Brilmayer, *Perspectives*, *supra* note 7, at 310-13, discusses the *Gilmore* case and the "ideal of self-determination" without discussing the possibility that Congress might try to alter the result by passing a statute conferring standing on Gilmore's mother. For reproductions of the documents in which Gilmore explicitly and repeatedly stated that he wished to abandon all appeals, see R. COVER, O. FISS & J. RESNIK, *supra* note 61, at 437-43.

270. Federal Election Campaign Act of 1971, 2 U.S.C. § 437(h) (1982 & Supp. 1985); Presidential Election Campaign Fund Act, 26 U.S.C. § 9011(b)(1) (1982); see *infra* text accompanying notes 285-302.

271. In considering what became of Title II of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a to 2000a-6 (1982), Congress was uncertain how far and on what theory the Supreme Court would permit federal regulation of racial discrimination in privately owned public accommodations. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Civil Rights: Public Accommodation: Hearings Before the Senate Commerce Comm. on S. 1732*, 88th Cong., 1st Sess., pts. 1, 2 (1963); *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States*, 88th Cong., 1st Sess. (1963); *Civil Rights: Hearings Before the House Judiciary Comm. on H.R. 7152, as amended*, 88th Cong., 1st Sess. (1963); see also G. GUNTER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 158-64 (11th ed. 1985) (discussing constitutional issues in Act). Because of its doubts about the reach of the Fourteenth Amendment, Congress decided to rely substantially on the commerce clause, even though the underlying issues were essentially Fourteenth Amendment concerns. See 42 U.S.C. § 2000a(b) (1982) ("Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action.") (emphasis added); see also *id.* § 2000a(c) (defining "affecting commerce").

in some instances, Congress has the explicitly granted power to "enforce" by statute the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>272</sup> But that power does not include anything close to the full range of constitutional guarantees, for it deals only with federal constitutional limitations on the states. Thus, for example, the enforcement power cannot be invoked to justify the sort of statute Justice Harlan wished to see, since expenditures by the federal rather than a state government were at issue in *Flast*. Even against the states, the scope of the power is a matter of some ambiguity, both as to how far Congress may go in providing statutory enforcement of constitutional guarantees, and as to what happens when Congress and the Court disagree as to the scope of the constitutional right in question.<sup>273</sup>

At one level, the Court has seen and articulated the special relationship between standing and constitutional litigation. *Baker v. Carr*,<sup>274</sup> for example, refers to the "personal stake" necessary for the "illumination of difficult constitutional questions."<sup>275</sup> But the Court has not felt the necessity to differentiate carefully between grants of standing to enforce statutory and constitutional rights, and it seems largely unaware of the issues that such a differentiation would bring to the surface. I do not attempt here to deal systematically with all the questions that would arise from congressional grants of standing to enforce a broad range of constitutional rights, in part because the scope of Congress' power is probably quite broad. Further, such a systematic analysis would be very difficult (or at least highly conjectural) because Congress has in any event not actually passed many statutes conferring standing where the Constitution, read alone, would not do so.

One kind of case, however, deserves attention. More than once in recent years, Congress has granted standing as a mechanism to obtain the judgment of the federal judiciary on constitutional questions troubling to members of Congress. In these cases, Congress has come perilously close to, and in one case has crossed, the line between permissible grants of standing and impermissible solicitation of legal advice from the judicial branch. Although the Court has often (and in my view unnecessarily) seen danger to the "case or controversy" requirement of Article III in other standing cases,<sup>276</sup> it has been oddly unconcerned about that danger here.

272. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

273. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); Burt, *supra* note 266; Carter, *supra* note 266; Choper, *supra* note 266; Cohen, *supra* note 266; Cox, *supra* note 266.

274. 369 U.S. 186 (1962).

275. *Id.* at 204 (emphasis added).

276. See *supra* text accompanying notes 57-65, 123-32.

b. *A Grant of Standing as a Device to Obtain an Advisory Opinion*

The political branches have from time to time desired judicial advice about the constitutionality of their actions, but the Court has made it clear from the beginning that it would refuse requests for advisory opinions.<sup>277</sup> The problem of how to recognize such a request, however, has not been a simple one in this century. In order to provide some context for the problem, I first discuss statutes that facilitate early judicial resolution of constitutional questions but do not purport to create a substantive right that would not exist absent the statute. I then discuss statutes that create new substantive rights.

(1) *Statutes Facilitating Prompt Judicial Resolution*

At the beginning of the century, an attempt to obtain an early constitutional determination from an Article III court was struck down in *Muskrat v. United States*.<sup>278</sup> Congress had increased the size of the group entitled to share in the allotment of certain tribal property, but because of concerns about the consequent diminution of the share of those already in the group, it passed a statute authorizing several named individuals to bring suit to obtain a declaratory judgment on the constitutionality of the enlargement. The Court held that the statute authorizing suit was an unconstitutional attempt to obtain an advisory opinion. In the Court's view, the United States in such a suit had "no interest adverse to the claimants."<sup>279</sup> I take this to be an elliptical way of saying that the only interest of the United States—at least in a case in which a declaratory judgment was sought—was in obtaining an authoritative judgment on the constitutionality of a questionable statute. If the case is seen in that way, the Court was being asked by Congress "to give opinions in the nature of advice concerning legislative action."<sup>280</sup>

*Muskrat* continues to be cited for the general proposition that Article III courts cannot render advisory opinions, but today it is regarded as a period piece. Declaratory judgments are no longer forbidden to Article III federal courts (as they were until the 1930's), and the Supreme Court is now willing to decide cases brought pursuant to special jurisdictional statutes comparable to that in *Muskrat*. The distance we have come from *Muskrat* is most clearly apparent in *Northern Cheyenne Tribe v. Hollowbreast*.<sup>281</sup> Congress passed a statute that would have taken future interests of individual tribal members in certain mineral rights and revested them

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277. See *Correspondence of the Justices* (1793), reprinted in part in HART & WECHSLER'S THIRD, *supra* note 71, at 64-66; *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

278. 219 U.S. 346 (1911).

279. *Id.* at 361.

280. *Id.* at 362.

281. 425 U.S. 649 (1976).

in the tribe as a whole. But the operation of the statute specifically was made contingent on the tribe first obtaining a declaratory judgment that the reversioning in the tribe did not violate the Fifth Amendment rights of the individual tribal members.<sup>282</sup> The Court addressed the merits (finding the substantive statute constitutional) without adverting to any advisory opinion problem and without mentioning *Muskra*.

*Hollowbreast* is a startling case, for the Court was willing to decide whether a statute was constitutional not only before the statute went into effect, but as a *precondition* to its going into effect.<sup>283</sup> Although the request for the judgment of the Court was couched in the form of a lawsuit, in substance it was a request by Congress and the President to advise them about the constitutionality of a statute they were considering putting into effect, accompanied by an explicit statement that they would not put it into effect if the Court thought it unconstitutional.

I have serious doubts about the correctness of *Hollowbreast*, but it is important to note how far the case does *not* go. In *Hollowbreast* there is no difficulty, even in traditional terms, about the nature of the interest of the parties seeking the Court's judgment. The plaintiff tribe stood to gain if the legislation were deemed constitutional, for the consequence of the statute was to revert the mineral rights in the tribe. In other words, the only role of the special statute was to confer jurisdiction on the federal courts to hear the cases in an expedited manner. The substantive legal interests sought to be protected by the litigants did not owe their existence to the statutes,<sup>284</sup> and there thus would have been no question about the ability of the tribe in *Hollowbreast* to litigate the substantive question presented, although in a less expeditious way, under existing jurisdictional statutes.

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282.

[In 1968 Congress] terminate[d] the grant to allottees and . . . reserve[d] the mineral rights 'in perpetuity for the benefit of the Tribe.' The termination was, however, expressly conditioned upon a prior judicial determination that the allottees had not been granted vested rights to the mineral deposits by the 1926 Act. . . . The 1968 amendment authorized the Tribe to commence an action against the allottees . . . 'to determine whether . . . the allottees . . . have received a vested right in the minerals which is protected by the fifth amendment' . . . .

*Id.* at 652-53 (citation omitted).

283. See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding section 5 of Voting Rights Act of 1965, under which state can bring suit for declaratory judgment that proposed change in state's voting practices does not violate Constitution, as precondition for putting change into effect). *South Carolina v. Katzenbach* is unlike *Hollowbreast*, however, in that the judgment was sought by a state, whereas the judgment in *Hollowbreast* was sought (in effect) by coordinate branches of the federal government.

284. For example, the same Court that dismissed *Muskra* was willing to entertain a suit by other members of the tribe, with interests comparable to the plaintiffs in *Muskra*, when an injunction was sought against the Secretary of the Interior. *Gritts v. Fisher*, 224 U.S. 640 (1912). None of the *Muskra* plaintiffs was a plaintiff in *Gritts*. For the names of the *Gritts* plaintiffs, see *Gritts v. Fisher*, 37 App. D.C. 473, 474 (1911).

(2) *Statutes Creating New Substantive Rights*

A more difficult question is presented if a statute does more than facilitate prompt resolution of a dispute between parties whose legal interest in the dispute is based on something other than the statute. I take as examples two statutory grants of standing that would not exist absent the special statute: federal campaign contribution statutes granting standing to challenge illegal campaign expenditures; and a statute granting standing to members of Congress to challenge an appointment to the federal judiciary.

The Federal Election Campaign Act of 1971 (as amended in 1974)<sup>285</sup> and the Presidential Election Campaign Fund Act<sup>286</sup> both regulate expenditures made in connection with federal political campaigns. Section 437h of the Federal Election Campaign Act provides that three categories of plaintiffs may "institute . . . actions . . . to construe the constitutionality of any provision of this Act." Those plaintiffs are the Federal Election Commission, the national committee of any political party, and "any individual eligible to vote in any election for the office of President." The Act contemplates that "all questions of constitutionality" are included in the grant of standing.<sup>287</sup> Suits coming within the terms of this provision are tried on an expedited basis before a specially constituted three-judge district court.

During Senate consideration of the bill that resulted in the Federal Election Campaign Act, Senator James Buckley expressed the opinion that the bill's limitation on political expenditures was clearly unconstitutional, and proposed the provision granting standing to bring constitutional challenges to the Act.<sup>288</sup> In Senator Buckley's words, "I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time."<sup>289</sup> The Act came before the Supreme Court in 1976 in *Buckley v. Valeo*,<sup>290</sup> a suit brought by Senator Buckley and a long list of other plaintiffs<sup>291</sup> challenging a number of the Act's provisions.

The Court appeared to have little concern about the standing of Senator

285. 2 U.S.C. §§ 431-442 (1982 & Supp. 1985); 18 U.S.C. §§ 591-607 (1982).

286. 26 U.S.C. §§ 9001-9012 (1982 & Supp. 1986).

287. 2 U.S.C. § 437h(a) (1982). For the analogous provision of the Presidential Election Campaign Fund Act, see 26 U.S.C. § 9011(b)(1) (1982) ("The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions . . . as may be appropriate to implement or con[s]true any provisions of this chapter.")

288. 120 CONG. REC. 10,557-63 (1974).

289. *Id.* at 10,562, *quoted in* Bread Political Action Comm. v. Federal Election Comm'n, 455 U.S. 577, 582 (1982); *see also id.* at 35,140 (remarks of Representative Frenzel to same effect, *quoted in* Bread, 455 U.S. at 582); California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 188 n.7 (1981) (same remarks as above).

290. 424 U.S. 1 (1976).

291. For a full list of the plaintiffs, see *id.* at 7-8.

Buckley (who was suing as an "individual eligible to vote" in a Presidential election), or about the possibility that the suit might be seen as a request for an advisory opinion. After noting that the Act "intended to provide judicial review to the extent permitted by Article III," the Court found that "at least some of the appellants have sufficient 'personal stake'" to have standing.<sup>292</sup> The Court then spent 133 pages of the United States Reports upholding some provisions of the Act and striking down others,<sup>293</sup> answering twenty-two certified questions of constitutional law before it was finished.<sup>294</sup>

In a later case involving the same standing provisions, *Bread Political Action Committee v. Federal Election Commission*,<sup>295</sup> the Court gave only a slight indication that it perceived the statutory grant of standing as posing a more serious problem than it had in *Buckley*. Two trade associations and three political action committees sought to bring suit in *Bread*. In a unanimous opinion, the Court held that these plaintiffs did not come within any of the three statutorily defined classes of plaintiffs. At the same time, however, it indicated that Congress easily could have included them: "Of course, had Congress intended [to designate plaintiffs as having the right to bring suit under section 437h], it could easily have achieved it . . . . Instead, Congress gave no affirmative indication that it meant to include in its grant any parties beyond [those listed in section 437h(a)]."<sup>296</sup>

292. The portion of the Court's opinion dealing with this issue is, in its entirety:

At the outset we must determine whether the case before us presents a "case or controversy" within the meaning of Art. III of the Constitution. Congress may not, of course, require this Court to render opinions in matters which are not "cases or controversies." We must therefore decide whether appellants have the "personal stake in the outcome of the controversy" necessary to meet the requirements of Art. III. It is clear that Congress, in enacting 2 U.S.C. § 437h, intended to provide judicial review to the extent permitted by Art. III. In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient "personal stake" in a determination of the constitutional validity of each of the challenged provisions to present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

*Id.* at 11-12 (footnotes and citations omitted). But having just said that "at least some" of the plaintiffs had standing, the Court then answered the certified question concerning standing by saying that "each" plaintiff had standing: "Has each of the plaintiffs alleged sufficient injury to his constitutional rights enumerated in the following questions to create a constitutional 'case or controversy' within the judicial power under Article III? YES." *Id.* at 12 n.11.

293. *Id.* at 12-144. I do not count the ninety-two page appendix reproducing the statutory provisions. *Id.* at 144-235. Nor do I count the additional sixty pages of separate opinions. *Id.* at 235-94.

294. *Id.* at 59 n.67 (certified questions 3(a)-(f), (h), and 4(a)); *id.* at 84 n.113 (certified questions 7(a)-(d)); *id.* at 108 n.147 (certified questions 5, 6); *id.* at 141 n.177 (certified questions 8(a)-(f)). I also count in this number the two certified questions relating to standing and "case or controversy." *Id.* at 12 n.11 (certified questions 1, 2). The Court declined to provide specific answers to five certified questions, on the ground that the answers either were already provided in the opinion "to the extent urged by the parties" or were unnecessary to "resolve the issues presented." *Id.* at 143 n.178 (certified questions 3(g), (i), 4(b), 7(f), and 9). It is unclear what became of certified question 7(e).

295. 455 U.S. 577 (1982).

296. *Id.* at 584. But consider *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), in which the Democratic National Party, Democratic National Committee, and a private individual sued under the Presidential Election Campaign Fund Act, 26 U.S.C.



There is some ambiguity both in the Court's treatment of standing under the Act and in the Act itself. In essence, the ambiguity lies in whether the Act grants standing to seek judicial review to persons or entities who had no right to seek judicial review absent the statute, or whether the statute merely provides a jurisdictional mechanism whereby judicial review may be sought more quickly. The Act probably does both. In *Bread*, the Court described the statutory system as providing a "unique system of expedited review";<sup>297</sup> but the Court also appeared to regard the existing grant of standing as conferring "prudential" standing on those who might otherwise lack the ability to challenge the Act,<sup>298</sup> and indeed to view Congress as having further power, not yet exercised, to confer standing even more broadly.<sup>299</sup> This suggests that the Court would hold that a person eligible to vote for President, unassisted by any statute except a general jurisdictional statute like 28 U.S.C. § 1331, would have no standing to seek a declaratory judgment that restrictions on campaign contributions contained in the statutes violate the Constitution; but if there were a specific statutory grant, then "prudential" hesitation would be overcome, and the Court would find that the person has standing according to the terms of the statutory grant. If this is the proper understanding of *Buckley* and *Bread*, Congress has passed precisely the sort of statute Justice Harlan wished for, but did not have, in *Flast*.

This reading of the cases would mean that Congress can choose, at least within certain limits, the groups of people who may vindicate constitutional rights by judicial process.<sup>300</sup> If this is what the Court meant, the

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§ 9011(b)(1) (1982) (which has comparably worded standing provisions), for a declaratory judgment that a statutory limitation on the amount a political action committee could contribute was constitutional. The Court held that the plaintiffs were not entitled to bring suit because the relief they sought was not "appropriate" within the meaning of the statute. 470 U.S. at 486-87. Whether the plaintiffs would have had standing under Article III if they had sought "appropriate" relief was a question the Court found unnecessary to reach. *Id.* at 489-90. The three-judge district court below had found that the Democratic National Committee would be harmed by spending over the limit, and that therefore there was Article III standing under the statute. 578 F. Supp. 797, 808-11. (E.D. Pa. 1983); see also *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 187 n.6 (1981) (standing granted to members of state medical association and its political action committee to challenge limitation on contributions by unincorporated associations).

297. 455 U.S. at 581.

298. At this point in the opinion, the text is somewhat difficult. The characterization of the existing statutory grant of standing as conferring prudential standing that plaintiffs would otherwise lack is couched in a description of an argument by the appellant that the Court rejects, but this characterization is used by the Court as a premise for rejecting the argument: "This argument, however, puts the appellants in the awkward position of simultaneously noting that express congressional authorization is required to overcome prudential standing limitations, while urging us to read an implicit grant of standing into congressional silence." *Id.* at 583-84.

299. "[W]e cannot impute to Congress the intention to confer standing on the broadest class imaginable. We do not assume the maximum jurisdiction permitted by the Constitution, absent a clearer mandate from Congress than here expressed." *Id.* at 584.

300. The D.C. Circuit construed the Federal Election Campaign Act to permit certain plaintiffs eligible to vote for President to challenge the action of a corporation in soliciting political contributions from its employees, even though none of these plaintiffs was a corporate employee. *International Ass'n of Machinists & Aerospace Workers v. Federal Election Comm'n*, 678 F.2d 1092 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982). This decision rested on a conclusion that Congress has the power to facilitate

inescapable corollary would be that Congress, by failing to pass a standing statute for the benefit of certain would-be plaintiffs, would have the power to prevent certain groups of people from vindicating constitutional interests (one might even say rights), at least at the periphery of the constitutional guarantee at issue. Congress probably cannot, by failing to provide standing by statute, prevent someone whose expenditures are directly limited by the Act from vindicating her First Amendment rights to make those expenditures.

The statutory grant of standing to plaintiffs in the Federal Election Campaign Act is not only (or even primarily) the granting of a private right. Nor is it a typical private attorney general case in which the plaintiff enforces statutory rights largely for the benefit of others. Rather, it is primarily a mechanism that enables Congress more easily to adopt a statute about which it has serious constitutional doubts because it knows it can obtain prompt judicial answers to constitutional questions created by the statute. Imagine for a moment what would have happened if the twenty-two certified questions answered in *Buckley* had been sent to the Court in a letter from the Senate floor, as the twenty-nine questions in *Correspondence of the Justices*<sup>301</sup> were sent to the Court in a letter from Secretary of State Jefferson. It is unthinkable that the Court would have answered them. Yet, when Congress cast the questions in the form of a lawsuit by granting standing to sue to one of its members, the Court in *Buckley* willingly provided the answers, performing, in Judge Leventhal's words, in "a role resembling that of a super-legislature."<sup>302</sup>

The lessons of *Buckley* are sobering. Not only will the Court answer questions that have proven particularly difficult for Congress (as evidenced by the fact that Congress took the trouble to pass a special standing statute to facilitate their presentation to the Court). It will also answer them in the highly abstract form traditionally thought particularly ill-suited for judicial resolution. Congress, for its part, will be encouraged by *Buckley* to pass statutes that go further into the gray area of unconstitutionality than they would otherwise go, confident that the early judicial review made possible by a special grant of standing will avoid many of the dislocations that would be created if authoritative adjudication were available only after a substantial lapse of time.

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the enforcement of constitutional values by enlarging the category of persons enabled to bring suit to vindicate those values: "We believe Congress did not wish to truncate the presentations of parties entitled to invoke the Section 437h expedited, certification procedures." *Id.* at 1099. "[W]e find no support for the Commission's position that section 437h(a) qualifies voters to raise constitutional issues only in relation to their rights as voters. Neither the language of the statute (*any* eligible voter, *all* constitutional questions) nor its legislative history suggests an interpretation so constricted." *Id.* at 1098 (emphasis in original).

301. There were twenty-nine questions in all. 10 J. SPARKS, THE WRITINGS OF GEORGE WASHINGTON 542-45 (1847). Some of them are reproduced in HART & WECHSLER'S THIRD, *supra* note 71, at 65-66.

302. Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 385 (1977).

The dangers of acquiescence by the Court in congressional creation of standing to raise constitutional challenges are illustrated in a different way by a standing statute passed after Congressman Abner Mikva was confirmed as a judge on the Court of Appeals for the District of Columbia Circuit. During the Senate debate over Mikva's nomination, it had been argued by Senators opposing the nomination that the ineligibility clause<sup>303</sup> prevented the appointment because the salaries of federal judges had been raised while Mikva was a Congressman. After Mikva was confirmed, several of those opponents attached a rider to a defense appropriation bill granting standing to any member of Congress to bring an ineligibility clause challenge in a three-judge district court in his or her home state against any judicial appointment to the District of Columbia Circuit Court during the 96th Congress.<sup>304</sup> The only judicial appointment that fit within the terms of the grant of standing was Mikva's. Senator James McClure of Idaho then brought suit under the statute in the United States District Court for the District of Idaho. The district court held in *McClure v. Carter*<sup>305</sup> that despite the statute, Senator McClure had no standing to challenge Mikva's appointment. The Supreme Court affirmed without opinion.

The problem posed in *McClure* was similar, but not identical, to that posed in *Buckley*. In both cases, Congress conferred standing as a way of permitting prompt judicial review of congressional action. But, in *McClure*, unlike *Buckley*, standing was not conferred as a mechanism to facilitate review of a constitutionally vulnerable statute. Rather, to borrow words used by Judge McGowan to discuss congressional standing generally, the grant of standing was intended to permit Senator McClure to use the federal judiciary "as a higher chamber where a legislator, who has failed to persuade his colleagues . . . can always renew the battle."<sup>306</sup>

Whether the grant of standing in this case should be permitted to have

303. U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall be created, or the Emoluments whereof shall have been increased during such time . . .").

304. Pub. L. No. 96-86, § 101(c)(1), 93 Stat. 656, 657 (1979).

305. 513 F. Supp. 265 (D. Idaho), *aff'd sub. nom.* McClure v. Reagan, 454 U.S. 1025 (1981).

306. McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 266 (1981) (ellipsis in original) (quoting C. MCGOWAN, CONGRESS AND THE COURTS 13 (University of Chicago Law School Occasional Paper No. 10, April 17, 1975)). Standing for legislators has proved to be a fruitful source of litigation in the District of Columbia Circuit in recent years. *See, e.g.*, United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (U.S. Representatives join in suit challenging executive order); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (action by members of Congress challenging U.S. activities in El Salvador), *cert. denied*, 467 U.S. 1251 (1984); Riegle v. Federal Open Market Comm., 656 F.2d 873 (D.C. Cir.) (action by U.S. Senator to prohibit voting by Federal Reserve Bank members of Federal Open Market Committee), *cert. denied*, 454 U.S. 1082 (1981); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979) (action by members of Congress to prevent termination of treaty); Daughtrey v. Carter, 584 F.2d 1050 (D.C. Cir. 1978) (U.S. Representatives join suit challenging presidential proclamation); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) (action by U.S. Representative challenging legality of Central Intelligence Agency activity); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (action by U.S. Senator challenging validity of attempted presidential pocket veto).

this consequence, and whether Congress should be seen to be asking for an advisory opinion, should be informed by the meaning of the incompatibility clause. At a general level, the clause is obviously a broad anti-corruption provision designed to prevent a member of Congress from voting for a salary increase in a government office and then securing an appointment to that office. This, by itself, however, does not tell us who should be entitled to enforce the clause. We may begin a standing inquiry by asking whether a "citizen" is sufficiently connected with the concerns of the ineligibility clause to justify reading the clause to permit him to enforce it. Some time ago, the Court provided an answer to part of this question in *Ex parte Levitt*,<sup>307</sup> where it held that a member of the Supreme Court bar, unassisted by any standing statute, could not bring an ineligibility clause challenge to Justice Black's appointment to the Court.

If *Levitt* is still good law, I take it to mean that people not directly affected by the appointment—the public at large, whether denominated persons, citizens, taxpayers, voters, or even members of the Supreme Court bar—are not empowered by the clause, standing alone, to bring suit to enforce it. Yet *Ex parte Levitt* does not necessarily mean that no one can bring an ineligibility clause challenge without a special standing statute. For example, we know from *Glidden Co. v. Zdanok*<sup>308</sup> that a litigant in an Article III court may challenge a judge sitting in his case on the ground that the judge is an Article I rather than an Article III judge. I read *Glidden* to mean that a litigant has a due process right to have a properly appointed judge, and, further, that the litigant has standing to raise an objection to the judge during the course of his litigation. My conclusion owes nothing to a special standing statute, for in *Glidden* there was none. I would argue that the due process right found in *Glidden* should be extended to protect a litigant from a decision by a judge appointed in violation of the ineligibility clause.

In both *Glidden* and *McClure*, the litigants' interest in receiving fair trials was to some degree affected by the manner of appointment of the judges sitting in their cases.<sup>309</sup> But the litigants' interest in fair trials is not the only reason for granting them standing. In both cases, we should see litigants as acting as private attorneys general, protecting the public at large rather than merely protecting themselves against an incompetent or unsuitable judge. In *Glidden*, the litigant is protecting the structural integrity of the Article III and Article I court systems. In an ineligibility clause case, the litigant is protecting the public against corruption (or the appearance of corruption).

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307. 302 U.S. 633 (1937).

308. 370 U.S. 530 (1962).

309. For example, as Justice Douglas pointed out in dissent in *Glidden*, someone appointed to the Court of Claims does not have life tenure and salary protection, and might never have been appointed to a court of appeals. *Id.* at 589 (Douglas, J., dissenting).

If a litigant has standing to challenge an appointment allegedly in violation of the ineligibility clause, we know that the question can be presented to a court for decision. That is, we know that we do not depend entirely on a special standing statute to make the appointment reviewable. But the fact that a special statute is not strictly necessary does not mean that Congress is necessarily without power to expand the group of those with standing. For example, Congress might conclude that litigants will be hesitant to challenge a judge sitting in their case for fear (whether well-founded or not) that the judge will view their case unfavorably if the challenge is rejected and the judge stays on the case. In that event, Congress might reasonably conclude that the purposes of the clause would be best served by a broad statutory grant of standing to "any citizen." Although I think the matter is not free from doubt, I would be inclined to sustain such a broad grant of standing on the ground that Congress should have the power to provide what is, in its judgment, an effective means of implementing the clause.

In the actual statute, however, Congress did not provide such a broad grant of standing. Rather, it conferred standing only on Representatives and Senators, and it did so in a way that made clear that it was not providing a general mechanism for the enforcement of the ineligibility clause. By limiting the grant of standing to appointments made to the District of Columbia Circuit during the 96th Congress, it provided standing only to challenge the appointment of Mikva. And by granting standing to sue in a three-judge district court of the Representative's or Senator's home state, it provided a mechanism by which a Senator could bring suit before judges who might well have owed their nominations to that Senator. Finally, as the sequence of events makes clear, the grant of standing permitted a Senator to seek the judgment of a court on a question as to which the Senate had just formed its own judgment as part of its "advice and consent" function. In other words, the statute was a mechanism to transfer to the federal judiciary (and a particular part of the judiciary at that) a discrete question that the Senate had just debated and resolved. Under such circumstances, the only possible result in my view is that reached by the district court: Congress, although purporting merely to confer standing to enforce the incompatibility clause, was in fact attempting to obtain an impermissible advisory opinion on a constitutional question.

It is impossible to analyze all questions of constitutional and statutory grants of standing short of undertaking an analysis of each clause of the Constitution. But enough has been said to make it clear that standing to bring constitutional challenges, and statutes purporting to grant standing to bring such challenges, pose serious questions, heretofore largely unacknowledged, about the relation between statutory and constitutional rights and about the appropriate division of powers between the political and

judicial branches. As suggested in the foregoing discussion, such questions are best understood by focusing on the nature of the constitutional clause in question and on the source of congressional power to augment the standing authorized by the clause. It is there, if anywhere, that we will find a framework for analyzing whether a judicial answer to the constitutional question may be obtained by the litigant before the court.

### CONCLUSION

The law of standing cannot be made easy. It is as complex and varied as the law of who may sue to remedy what wrongs across the entire domain of law. Questions of who may sue in various settings share certain common characteristics. But to think, or pretend, that a single law of standing can be applied uniformly to all causes of action is to produce confusion, intellectual dishonesty, and chaos.

Many years ago Professor Hurst, in discussing *Doremus v. Board of Education*,<sup>310</sup> said that the Court in standing cases was "guilty of one of the prime sins of craftsmanship of men of ideas, that of not being conscious of what they are doing."<sup>311</sup> At one level, of course, the Court is quite conscious of what it is doing, as may be inferred from the actual results in many standing cases. But at the level with which I am concerned, Professor Hurst's charge is warranted, for the Supreme Court has failed to articulate an intellectual framework that can satisfactorily explain the results in cases already decided, or that can be usefully employed to shape legal analysis in cases yet to come.

One way of describing the Court's mistake in standing cases is to say that it has tried to formulate standing principles at too high a level of generality. Lawyers and judges usually try to formulate principles at as high a level of generality as the nature of the material will permit, but there is a limit on the generality of any given principle. That limit is passed when too many bad results are obtained by following the principle, or when the principle is too often evaded by subterfuge. It is obvious that the natural limit has long since been passed in standing cases.

Fortunately, the solution is as time-honored in law as the striving for generality. As Justice Iredell wrote in 1793 in his great dissent in *Chisholm v. Georgia*:<sup>312</sup> "I have often found a great deal of confusion to arise from taking too large a view at once . . . ."<sup>313</sup> The solution for Iredell was (as it is here) to break down what might appear to be a single, general question into discrete and particular questions. In seeking to determine whether a particular plaintiff has standing, we should ask, as a

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310. 342 U.S. 429 (1952).

311. SUPREME COURT AND SUPREME LAW 33 (E. Cahn ed. 1954).

312. 2 U.S. (2 Dall.) 419, 429 (1793) (Iredell, J., dissenting).

313. *Id.* at 430.

question of law on the merits, whether the plaintiff has the right to enforce the particular legal duty in question. Standing, if seen in this fashion, is a question of substantive law, and the answers to standing questions will vary as the substantive law varies.

I do not suggest that standing decisions will become easy or noncontroversial if the suggestions made here are followed. Many will remain highly controversial, for they are often critically important decisions about which there is and sometimes can be no complete agreement. But the argument will be focused, as it should be, on the particular statutory or constitutional provision at issue. If the general structure of standing law is seen in the way suggested here, the confusion and obfuscation that have haunted standing law for the past several decades will diminish and, in time, may subside to the amount inescapably present in a legal system that makes significant changes through its judiciary.

