Standing of Third Parties to Challenge Administrative Agency Actions

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This Comment examines the constitutional doctrine of standing to sue in federal courts as it applies to third-party challenges to administrative agency actions. The author suggests a streamlined approach in such cases that would evaluate a plaintiff's stake in the suit based upon whether the actual or threatened injury is to an interest protected by the underlying statute. This approach requires a reevaluation of the constitutional basis of standing; it argues that the determination of standing to assert statutory interests lies solely within the power of Congress. Further, this Comment suggests that examination of causation as part of the standing inquiry should be abandoned. This flexible statute-based approach would allow increased recognition of the legitimate interests of third parties in administrative law. For example, the proposed approach would permit courts to incorporate the policy notions that underlie the contract doctrine of third party beneficiaries into standing decisions, and require judicial consideration of otherwise unreviewable agency discretion where standing is denied. This, the author concludes, would increase the likelihood of judicial review of agency decisions, thereby enhancing the protection of third parties unfairly injured by agency action.

INTRODUCTION

> The Supreme Court has described standing as "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." In more pedestrian terms, it is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: "What's it to you?"
>
> —Antonin Scalia[1]

The doctrine of standing to sue has plagued the Supreme Court for several decades. The Warren and Burger Courts have been criticized for handling this issue inconsistently,[2] and this inconsistency has resulted in

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1. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 882 (1983) (quoting Sierra Club v. Morton, 405 U.S. 727, 731 (1972)) (footnote omitted).

2. *See, e.g.*, Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985) [hereinafter Nichol, *Abusing Standing*]; Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984) [hereinafter Nichol, *Rethinking Standing*]; Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 682 (1977); Note, *"More than an Intuition, Less than a*

a highly manipulable doctrine that has divided the Rehnquist Court along traditional liberal/conservative lines.[3] In recent years, the Court seems to have settled on a two-tiered method for determining whether a plaintiff has standing to sue in federal court. The first level of inquiry is the constitutional core, and the second is the judicially imposed "prudential" limitations.[4] To satisfy the constitutional requirements, a litigant must allege a direct personal injury that is fairly traceable to the defendant's action and likely to be redressed by the requested relief.[5] The prudential concerns prohibit one litigant from raising the rights of another, bar adjudication of "generalized grievances more appropriately addressed in the representative branches," and require that the plaintiff's complaint fall within the "zone of interests" protected by the law invoked.[6]

Standing, at least theoretically, is grounded in article III of the Constitution, which limits the jurisdiction of federal courts to "cases" or "controversies."[7] This "case or controversy" doctrine "seeks to place fundamental limits on the federal judicial power in our system of government"[8] by restricting federal actions to "cases of a Judiciary Nature."[9]

While simply stated, the "case or controversy" concept is not easily applied. As judges have worked to define the parameters of an article III "case," the traditional article III doctrines—standing, ripeness, mootness, and justiciability[10]—have become intertwined with such extraconstitutional doctrines as motions to dismiss for failure to "state a claim upon which relief can be granted,"[11] implied private rights of action

Theory": Toward a Coherent Doctrine of Standing, 86 COLUM. L. REV. 564 (1986) (authored by Eric B. Schaurer).

3. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), which denied standing to third parties challenging agency action as taxpayers, is typical. Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger and Justices White, O'Connor, and Powell joined. Justice Brennan, joined by Justices Marshall and Blackmun, dissented. Justice Stevens dissented separately.

4. Allen v. Wright, 468 U.S. 737, 751-52 (1984).

5. *Id.* at 751.

6. *Id.*

7. U.S. CONST. art III, § 2, cl. 1.

8. *Allen*, 468 U.S. at 750.

9. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 430 (1966) (statement of James Madison to the delegates of the federal Constitutional Convention).

10. Article III doctrines can be roughly divided into three areas: timing issues such as mootness and ripeness, justiciability issues such as political questions, and standing. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 102-241 (2d ed. 1973).

11. FED. R. CIV. P. 12(b)(6); *see also* Indiana State Employees Ass'n v. Indiana Republican State Cent. Comm., 630 F. Supp. 1194, 1195 (S.D. Ind. 1986); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 426 (1974) (the standing determination is "an adjudication of familiar components of a cause of action, resolved by asking whether a plaintiff has stated a claim for relief" (footnote omitted)).

under a regulatory statute,[12] and the contract law doctrine of third party beneficiaries.[13] As a result, the federal judiciary has not succeeded in carving out clear roles for the various article III doctrines, and its treatment of standing, in particular, has come under sustained criticism.[14]

A recurring problem concerns standing to challenge actions of administrative agencies. The rise of the administrative state has led to increased regulation of our economic, social, and political lives, resulting in a broadly powerful "fourth branch" of government.[15] The pervasiveness of agency regulation has engendered substantial litigation; persons affected by agency action have often turned to the federal courts for a determination of the proper scope of agency power. In so doing, they have encountered troublesome standing hurdles. These hurdles have been particularly difficult to overcome in cases where the agency does not directly regulate the affected litigant. These third parties, often directly injured by agency action, have found it difficult to litigate otherwise straightforward questions of statutory interpretation. Consider, for example, the following administrative scheme.

Section 501(c)(3) of the Internal Revenue Code offers tax-exempt status to groups "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."[16] In addition, section 170 of the Code permits a federal income tax deduction for contributions to most section 501(c)(3) organizations.[17] This combination of exemption for the organization and deduction for the donor gives these groups a powerful incentive to achieve section 501(c)(3) status.[18]

The criteria for establishing and maintaining section 501(c)(3) status, however, are not directed solely to the purposes of the organization. The Code also limits the means by which the organization may further those purposes. In particular, the Code prohibits section 501(c)(3) organizations from devoting a "substantial part" of their activity to "carrying

12. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 431-35 (1964) (finding an implied private right of action under section 14(a) of the Securities Exchange Act of 1934); *see also* Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 758 n.16 (1987) (comparing the "zone-of-interests" standing test to implied private right of action analysis); *see also infra* text accompanying notes 146-50.

13. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302; *see also infra* text accompanying notes 200-03.

14. *See infra* note 119.

15. Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

16. I.R.C. § 501(c)(3) (West Supp. 1988). The regulations specify that an organization exempt under section 501(c)(3) must satisfy both an "organizational" and an "operational" test. Under the former, the articles of incorporation must "[l]imit the purposes of such organization to one or more exempt purposes." Under the latter, an organization must "engage[ ] primarily in activities which accomplish one or more" exempt purposes. Treas. Reg. § 1.501(c)(3)-1 (as amended in 1976).

17. I.R.C. § 170 Supp. IV (1986).

18. The practical importance of section 501(c)(3) status is discussed in Bob Jones Univ. v. Simon, 416 U.S. 725, 727-30 (1974).

on propaganda, or otherwise attempting to influence legislation."[19] Moreover, the organization may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[20]

Most of the difficulties encountered in interpreting section 501(c)(3) concern the fine line between political lobbying activity and mere "voter education."[21] The IRS has a great deal of latitude in drawing that line, but the line must be drawn within the statutory bounds. The IRS cannot designate as voter education that which is actually political or lobbying activity under the Code. If it were to do so, it would illegally exceed its authority under the statute.

Unfortunately, such violations by the IRS can be difficult to discover, primarily because the decision is effectively screened from judicial review. Suppose, for example, that the IRS grants a section 501(c)(3) tax exemption to an organization that publishes "educational" pamphlets about a candidate for public office.[22] If that candidate is running for election at the time of publication, the activity could be construed as illegal political campaigning. Yet neither the IRS nor the section 501(c)(3) organization would have an incentive to challenge the determination that the pamphlets are "educational."

On its face, this situation may not seem particularly troublesome. Nevertheless, difficulties arise because this line-drawing process, like most agency action, may adversely affect third parties. If the organization actually uses tax-deductible funds to engage in political activity, the illegal tax exemption acts as a federal subsidy of that organization's lob-

19. I.R.C. § 501(c)(3) (West Supp. 1988).

20. *Id.* Only organizations that devote a "substantial part" of their activity to lobbying are subject to the prohibition. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended in 1976). The prohibition against participation in political campaigns has no "substantial" qualifier. The "substantialness" of an organization's lobbying activity is measured relative to its overall activity, not to the activity of other organizations, or to the overall effect on the lawmaking process. *See* Haswell v. United States, 500 F.2d 1133, 1142 (Ct. Cl. 1974) (noting that "substantial" is determined by balancing the political objectives of the organization against its other objectives and circumstances), *cert. denied,* 419 U.S. 1107 (1975). There is no bright-line test to determine substantial lobbying. The Code, therefore, provides a "safe-harbor" election, I.R.C. § 501(h) (West Supp. 1988), under which certain organizations can elect to become subject to a sliding-scale percentage limitation on lobbying expenditures without violating section 501(c)(3). Loss of section 501(c)(3) status because of excessive lobbyiug or campaigning is particularly harsh, because such a group is not permitted to reorganize under section 501(c)(4) as a social welfare organization. I.R.C. § 504 (West Supp. 1988).

For a discussion of the rationale behind the political aud lobbying restrietions, see *infra* text accompanying notes 214-16.

21. *See e.g.,* Rev. Rul. 78-248, 1978-1 C.B. 154 ("Certain 'voter education' activities conducted in a non-partisan manner may not constitute prohibited political activity under Section 501(c)(3).").

22. *See* Cobb, *We're Not Campaigning Eitherl,* COMMON CAUSE, May/June 1987, at 16 (examining the role of section 501(c)(3) organizations in campaign finance).

bying effort.[23] Arguably, such a subsidy directly increases that organization's chances of political success. Yet by failing to grant an equal subsidy to that organization's political competitors, the IRS arbitrarily diminishes the competitors' chances of achieving their political objectives. Unfortunately, despite the probability of direct harm as a result of the agency's actions, the competitors, as third parties, would have difficulty obtaining judicial review of the IRS decision due to the constitutional requirements of standing.[24]

This Comment examines the doctrine of standing in federal courts as it applies to third-party challenges to administrative action. It is in this situation that the current articulation of standing has the greatest impact. Injured plaintiffs, such as those whose ability to affect the political process is impaired by section 501(c)(3) organizations that lobby, are often barred from obtaining judicial redress. Despite the presence of justiciable questions of statutory interpretation, these plaintiffs find it impossible to meet the constitutional standing requirements. As third parties, they are necessarily removed from the direct causal chain linking the regulatory agency and the regulated organization, and thus are particularly hampered by standing's causation requirements.

This Comment proposes a streamlined standing inquiry in administrative law cases. A litigant's standing to challenge agency interpretation of a statute should be analyzed solely by asking whether the litigant asserts an actual or threatened injury to an interest protected by that statute. Part I of this Comment describes the development and current state of the Supreme Court's standing jurisprudence. Part II then reevaluates the constitutional basis of standing and suggests the elimination of traceability and redressability analysis from the standing inquiry. The concerns addressed by these causation inquiries are more properly considered on the merits of the case.

Part III assumes that with questions of causation left to the merits, the Court can focus on the problems of third parties challenging administrative action. Part III suggests that by incorporating the policy notions underlying third party beneficiary law and by overt examination of the possibility of unreviewable agency discretion to interpret its statute, the Supreme Court can increase judicial sensitivity to the needs of directly injured, statutorily protected third parties. As a paradigm, Part III examines challenges by political competitors to the tax-exempt status of a

23. *See* Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983).

24. The Administrative Procedure Act (APA) expressly authorizes a right of judicial review of agency action by any "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1982). Review under the APA is to a federal court. Consequently, a plaintiff must meet the various requirements of article III, including standing, before the merits can be reached.

section 501(c)(3) organization.[25]

The standing threshold offered by this Comment is unapologetically low. It would admit into the judicial process many litigants who are currently excluded. But it is important to bear in mind that standing is an aspect of a court's subject matter jurisdiction, and recognition of standing in a given case is not tantamount to a trial on the merits. Standing merely gets the litigant's foot in the door; she is still subject to all manner of pretrial exclusion devices. Further, minimizing access to federal courts simply to ease crowded dockets is not a legitimate aim of standing law, from either a constitutional or a fairness perspective.

I
THE DEVELOPMENT OF STANDING

This Comment begins by asserting what should be a fairly uncontroversial premise: Courts should determine the standing of a litigant who raises an issue of statutory interpretation solely by deciding whether the litigant's allegedly injured or threatened interest is protected by that statute. Indeed, the Supreme Court has analyzed standing in more or

25. The campaigning issue has become increasingly relevant because of the highly publicized political activities of religious leaders such as the Reverends Pat Robertson and Jesse Jackson. One report noted that 500 predominantly black congregations have raised at least $100,000 for the 1988 Jackson campaign, and attributed Robertson's huge fundraising edge to contributions from nonprofit religious organizations, including his own Christian Broadcasting Network. Lattin, *IRS Eyes Churches' Ties to Candidates*, San Francisco Exam., Mar. 6, 1988, at A1, col. 4. Other reports have noted the increased use of section 501(c)(3) organizations to finance political campaigns. *See* Cobb, *supra* note 22, at 16.

> In the past several years, at least five would-be presidential candidates have set up tax-exempt organizations—Robertson, Gary Hart, Bruce Babbitt, Jack Kemp and Robert Dole. . . .
>
> Most of these presidential hopefuls claim their organizations are educational and serve the public good by providing a forum for debate and analysis of public policy issues. But it's a pretty good bet that not all of them have been set up for purely altruistic reasons.

Id. at 17. *See generally* Riordan, *Who's Campaigning?*, COMMON CAUSE May/June 1987, at 12 (discussing federal campaign spending law loopholes and excesses).

Representative Jack Kemp's Fund for an American Renaissance (coincidentally located next door to his political action committee) is one example of a tax-exempt organization that has been accused of engaging in forbidden political activity. In 1987, a political opponent of Kemp filed suit against the IRS and the Treasury Department on behalf of the voters of Buffalo seeking revocation of the Fund's 501(c)(3) status for impermissibly promoting Kemp's campaign. The case was dismissed, however, in part on the grounds that the Buffalo voters lacked standing. Keane v. Baker, No. 86-588-E (W.D.N.Y. Mar. 6, 1987) (memorandum of dismissal).

The Second Circuit, however, is currently considering a case that directly raises the issue of the standing of a third party to challenge the section 501(c)(3) status of another. Abortion Rights Mobilization, Inc. v. Regan ("ARM"), 544 F. Supp. 471 (S.D.N.Y. 1982), *on reh'g*, 603 F. Supp. 970 (S.D.N.Y. 1985), *on appeal sub nom. In re* United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987), *cert. granted sub nom.* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 484 (1987), *remanded*, 108 S. Ct. 2268 (1988) (Court remanded case to Second Circuit for resolution of standing issue). In *ARM*, a group of pro-choice organizations and clergy are challenging the tax-exempt status of the Roman Catholic Church over its alleged political involvement in the controversy surrounding the legality of abortions.

less these terms on several occasions.[26] Unfortunately, it has failed to apply this analysis in many other cases, often without any apparent reason for the distinction.[27]

This Part presents the doctrinal development of standing law in an effort to explain this anomaly.[28] As will become apparent, a coherent rationale is ephemeral at best. Nevertheless, the explanation, to the extent that one exists, is that standing law has become detached from its original purpose, so detached that it now creates barriers to adjudication that have no sound doctrinal or normative basis.

The doctrine of standing, in general terms, functions as the gatekeeper of the federal courts.[29] Its purpose is to help regulate the expenditure of judicial resources while maintaining the federal courts as an adequate forum for the vindication of rights. As such, it is an extremely important doctrine, for it profoundly affects both the ability of citizens to resolve often burning disputes and the development of substantive federal law.[30]

Standing, however, is only *part* of the "case or controversy" requirement of article III. It takes its place with ripeness, mootness, and justiciability in defining the parameters of an article III "case." Each of these related doctrines, at least in principle, addresses a separate element of a case. For example, ripeness and mootness generally regulate the timing of a case;[31] justiciability generally examines the suitability of a contested issue for judicial review.[32] Standing, by comparison, focuses on the party bringing the suit. Essentially, standing is a threshold determination that a *particular plaintiff* is entitled to engage the judicial

26. *See, e.g.*, Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750 (1987); Block v. Community Nutrition Institute, 467 U.S. 340 (1984); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977).

27. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150 (1970).

28. A detailed analysis of each important standing case is beyond the scope of this Comment. This survey necessarily focuses on those cases that either significantly develop the doctrine or provide an interesting fact pattern that pertains to the thesis of this Comment.

29. *See* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 684 (1973).

30. *Cf.* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310-14 (1979) (arguing that standing promotes the "ideal of self-determination" of individuals' private lives).

31. *See infra* text accompanying notes 221-26.

32. Justiciability issues generally fall under the rubric of the "political question" doctrine. *See* G. GUNTHER, CONSTITUTIONAL LAW 1608-33 (11th ed. 1985); *see also infra* text accompanying notes 176-77. "Justiciability" has also been used to refer to case or controversy analysis in general. *See* G. GUNTHER, *supra*, at 1541. This Comment, however, uses the term as a convenient shorthand for the question of whether the issue of the dispute is justiciable. *See* Baker v. Carr, 369 U.S. 186, 208-37 (1962) (using "justiciability" to refer to political questions).

machinery to adjudicate the merits of a dispute involving an otherwise justiciable issue.[33]

While conceptually distinct, the article III doctrines are often intertwined in practice.[34] This confusion arises because these doctrines do not exist in a vacuum. Each not only "relate[s] to the same ultimate question of whether the merits of the case should be decided,"[35] but each is also somehow dependent upon the merits of the underlying dispute for its resolution.[36] Early standing cases recognized the importance of the underlying substantive law. For example, in *Tennessee Electric Power Co. v. TVA*,[37] the Supreme Court denied the plaintiff standing to sue under the Tennessee Valley Authority Act[38] because the challenged administrative action did not invade a legal right of the plaintiff—"one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[39]

This so-called "legal interest" test articulated in *Tennessee Power* stemmed from the private rights model of litigation that developed from *Marbury v. Madison*.[40] The private rights model defined the rôle of the courts as that of deciding disputes between private parties. If the government was a party, the model still applied. "Courts recognized claims against a government official . . . only if the official's conduct would have given rise to a cause of action in property, contract, or tort had the defendant been a private person."[41]

The legal interest test thus grounded the standing determination by tying it to the underlying claim. Its premise was that courts cannot be expected to referee any and all disputes that arise between parties. The court needs a framework for decision, whether it be a statute, a contract, or the common law. Further, the test recognized that there are two

33. This is not to say, however, that the Supreme Court has carefully adhered to this conception of standing. Indeed, one of the recurring criticisms of standing is that the Court uses it to resolve other issues. *See, e.g.*, Nichol, *Rethinking Standing*, *supra* note 2, at 70 ("[S]tanding law has been made to serve too many masters.").

34. *See, e.g.*, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 350 (2d ed. 1983) ("In many cases . . . problems of standing and ripeness are merged.").

35. Scott, *supra* note 29, at 684.

36. *See* Fletcher, *The Structure of Standing*, 98 YALE L.J. (forthcoming 1988) (standing itself is a question on the merits); *see also* Albert, *supra* note 11 (arguing that standing is nothing more than an analysis of whether the plaintiff has asserted a claim for relief).

37. 306 U.S. 118 (1939).

38. 16 U.S.C. §§ 831-831dd (1982 & Supp. IV 1986).

39. *Tennessee Power*, 306 U.S. at 137-38.

40. 5 U.S. (1 Cranch) 137, 163 (1803); *see* Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1920 (1986) (describing the legal interest test as "[t]he modern jurisdictional implement of the private rights model" of litigation); *see also infra* text accompanying notes 43-46 (discussing public versus private rights litigation).

41. Nichol, *supra* note 40, at 1920.

aspects to a legal claim: a legal duty and a right to enforce that duty.[42] Just as courts look to the "law" to determine if a duty has been violated, they also look to the "law" to determine if the plaintiff has a right to enforce that duty.

A. The Demise of the Legal Interest Test

As article III jurisprudence developed, it relied increasingly on the private rights, or "Hohfeldian," model as its paradigm of litigation.[43] This model, by definition, asks a court to resolve a dispute between two parties. The tribunal can examine the equities and apply legal rules without acknowledging the effect on parties not before the court. This allows a court to avoid deciding a case based on the effect of its resolution on parties not before the court. The representative branches of government are presumably better equipped to handle these "polycentric" tasks.[44]

The rise of the regulated state, however, began to test the limits of the private rights model.[45] As congressional regulation increased along with the expansion of the commerce clause, more people turned to the courts for resolution of disputes. Courts gradually expanded their out-

42. *See* Fletcher, *supra* note 36. But note that a right to enforce a legal duty is not necessarily the essence of standing. *Id.*

43. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). The Constitution does not express a preference for the Hohfeldian action over so-called "public law" litigation, *see* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing the characteristics of an emerging model of public law litigation), nor does it expressly prohibit advisory opinions. There is some evidence that the "case or controversy" principle was agreed upon by the Framers on the assumption that access would be limited to "cases of a Judiciary Nature," 2 M. FARRAND, *supra* note 9, at 430 (quoting James Madison), seeming to imply that "past practice" would define the role of the courts, Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (arguing that there is no historical basis for "the notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action"). But it is by no means clear that past practice allowed only Hohfeldian actions. For example, Professor Jaffe observes that in preconstitutional English law, there was "overt authority" in the writ of prohibition for "allowing anyone to initiate the proceeding." Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1308 (1961); *see also* Berger, *supra*, at 819 (noting that "strangers" could sue on the writ of prohibition against the government). One commentator has noted, however, that even this was not a "public action," as Jaffe used the term. The writ required the creation of a legal fiction, deeming the plaintiff as "injured" in order to let him into court. *See* Note, *supra* note 2, at 570 n.48.

44. The term "polycentric tasks" was coined by Lon Fuller. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (written in 1961). It may be wrong to assume that Congress or the Executive is better equipped to deal with multi-party issues. Perhaps more important, however, is that they can do so without explicating their reasons. *See* Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 505-08 (1988) (noting that courts are generally assumed to proceed by "reasoned elaboration" from precedent).

45. The reasons for the rise of public rights litigation are discussed at length in Chayes, *supra* note 43. This Comment focuses on the increase in statutory regulation, not to diminish the importance of the other reasons, but to emphasize the role Congress plays in the determination of what is, and is not, a case. *See infra* text accompanying notes 126-51.

look and decided cases with broad implications, well beyond the narrow interests of the actual litigants. Increased congressional regulation of commercial activity thus largely animated the eventual expansion of the forms and limits of a "case" from a constitutional perspective.

The narrow legal interest test eventually impeded the development of such public rights litigation.[46] The Supreme Court began to realize that the "[g]overnment owes substantial duties and obligations to its citizenry that have no clear counterparts in the common law system."[47] Cases such as *Flast v. Cohen*[48] and *Baker v. Carr*[49] helped the Court to understand the limitations of the test and the potential for harm those limitations engendered. Forcing plaintiffs to allege that their interest fell into one of the predefined legal categories often meant that actions that had caused widespread injuries went unchallenged.[50]

The legal interest test was formally abandoned in 1970 in favor of a constitutionally mandated requirement of "injury."[51] The simplicity of

46. Justice Scalia has described the legal interest test as stingy. Scalia, *supra* note 1, at 887 n.28. The test, however, arose in an era of formalism, when courts and commentators were searching for the law as a science. *See, e.g.*, L. KALMAN, LEGAL REALISM AT YALE, 1927-1960 11 (1986) (" 'law is a science'," quoting Langdell in 1886). "The library, Langdell announced, was the student's laboratory." *Id.*

The legal interest test as articulated in *Tennessee Power* may perhaps best be seen as a vestige of the pure conceptualism that was rampant in the prerealist era. *See generally* Singer, *supra* note 44, at 468-75 (discussing the rise of realism as a reaction to formalism). As such, the test was unconscionable, as it forced plaintiffs to fit their "square-peg" injuries into the "round holes" of established legal doctrine. On the other hand, the test was popular with the judges, because it was easy to determine which plaintiffs had standing: one merely looked to the asserted interest in context of the established doctrines of tort, contract, property, and statute. The actual or threatened injury was virtually ignored. Perhaps the modern focus on injury as opposed to interest can be attributed to a backlash against the conceptualism of the legal interest test. *See* Nichol, *supra* note 40, at 1918 (noting that the judicial fascination with the actuality of the litigant's injury at the expense of the cognizability of the interest has left "the present articulation of 'injury in fact' . . . radically incomplete").

47. Nichol, *supra* note 40, at 1920.

48. 392 U.S. 83 (1968) (recognizing standing of taxpayers to challenge government spending).

49. 369 U.S. 186 (1962) (recognizing standing of voters to challenge legislative apportionment).

50. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687-88 (1973).

51. *See* Association of Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150, 152 (1970). Abandoning the legal interest test allowed the Court to recognize that assertion of such noneconomic interests as " 'aesthetic, conservational, and recreational' " and even "spiritual" values would be adequate to invoke the judicial power. *Id.* at 154 (quoting Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied, sub nom.* Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966)).

The first Supreme Court case to test these waters was Sierra Club v. Morton, 405 U.S. 727 (1972), where a California conservation group sued under the APA to enjoin federal officers from permitting development of a ski area near the Sequoia National Forest. Rather than alleging direct harm to its members, the Sierra Club characterized the injury as impairment of the enjoyment of the natural environment by members of the public. Despite recognition of the possibility of harm to aesthetic and environmental interests, the Court denied standing, announcing that "the party

the legal interest test has been replaced by a constitutional complex of particularized[52] or "distinct and palpable" injuries,[53] fairly traceable to the actions of the defendant,[54] and "redressable" by the requested court action.[55] Standing is no longer firmly anchored in the underlying substantive law. It is now a free-floating constitutional requirement, supposedly discernible in each case through application of the same three-part test.

Nevertheless, as Professor Fletcher points out, it is impossible to apply an injury requirement in a "nonnormative" way.[56] Arguably, anyone can assert that they are or will be "injured" by another's actions, even though the injury may be as insignificant as an offense to one's sensibilities. In order to distinguish those injuries that are "judicially cognizable,"[57] the Court has attempted to narrow the "injury-in-fact" determination in a variety of ways. Essentially, the Court tries to determine if the plaintiff is truly injured, in a manner differing somehow from injury sustained by the general population, and then attempts to tie that injury to the defendant's actions via the causation requirements.

B. The Injury Requirement

The concept of injury embodied in article III standing first received judicial notice in 1923 in *Frothingham v. Mellon,*[58] but remained of

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seeking review be himself among the injured." *Id.* at 735. By requiring a particularized injury, the Court effectively foreclosed the possibility of these plaintiffs suing merely as representatives of the general public.

The relative ease by which the particularized injury requirement could be overcome was illustrated one year later in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). Simply by alleging that they themselves were injured, an unincorporated association of five law students was granted standing to challenge a railroad freight surcharge approved by the Interstate Commerce Commission on the ground that the Commission failed to prepare an environmental impact statement. The surcharge allegedly would have caused a decrease in the use of recycled goods, thereby increasing pollution and injuring the students' personal interest in the forests, streams, and mountains of the Washington D.C. area. Although the asserted injuries were causally remote from the proposed government action, it was sufficient to confer standing because, unlike *Sierra Club,* the plaintiffs alleged that they themselves used the areas in question. *Id.* at 687.

52. *Sierra Club,* 405 U.S. at 735.

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

54. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976).

55. Allen v. Wright, 468 U.S. 737, 751 (1984) (citing *Simon,* 426 U.S. at 38, 41).

56. Fletcher, *supra* note 36.

57. Nichol, *supra* note 40, at 1929-39.

58. 262 U.S. 447 (1923).

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened . . . is made to rest upon such an act . . . . The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally.

minor importance until addressed by the Supreme Court in *Baker v. Carr*[59] in 1962. *Baker v. Carr* involved a section 1983 claim[60] by a group of Tennessee voters challenging a legislative reapportionment statute on the ground that it infringed on their right to vote effectively.[61] Justice Brennan, writing for the Court, noted first that the "gist" of standing is whether the plaintiff has "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."[62] The Court then ascertained a judicially recognized right to vote "free of arbitrary impairment by state action,"[63] and determined that the plaintiffs had standing because they had asserted an injury to that right.[64] *Baker v. Carr* thus articulated the modern standing inquiry as an injury to a judicially recognized right.

The Supreme Court further explored the relationship between the litigant and the issue raised in 1968 in *Flast v. Cohen.*[65] The *Flast* Court held that certain plaintiffs, maintaining an action based solely on their status as taxpayers, had standing to challenge a purportedly unconstitutional expenditure of federal funds under the Elementary and Secondary

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Id. at 488.

59. 369 U.S. 186 (1962).

60. 42 U.S.C. § 1983 (1982) (permitting a civil action by any person suffering a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

61. *Baker,* 369 U.S. at 187-88.

62. *Id.* at 204. The strong, almost mystical, influence of the "concrete adverseness" language has been noted by commentators. *See* Nichol, *Rethinking Standing, supra* note 2, at 71 (referring to the phrase as a "slogan," "litan[y]," "refrain," and "incantation"); *see also* 4 K. DAVIS, *supra* note 34, at 281 (listing cases using the phrase).

The "concrete adverseness" language, however, is somewhat of a red herring, perhaps an unfortunate choice of words. Questions as to how "sharply" the issues are presented or whether the parties' adverseness is "concrete" detract from the main issue of standing: whether *this plaintiff* presents a case or controversy. Indeed, not one court has based its standing analysis on the "concrete adverseness" test.

Nevertheless, Brennan's intuition was probably correct. He sensed that there is more to standing than a mere "personal stake" in the outcome of the litigation. There must also be a judicially recognized right. "Concrete adverseness" was probably Brennan's way of distinguishing the judicially cognizable interest from the insignificant. Furthermore, Brennan's formulation implies that there are certain plaintiffs better suited to raise an issue in federal courts than others. Unfortunately, the focus on personal stake and concrete adverseness does little to distinguish which plaintiffs are better and, more importantly, which are adequate to sustain standing. *See* Flast v. Cohen, 392 U.S. 83, 98 n.17 (1968):

> [I]f as we conclude there are circumstances under which a taxpayer will be a proper and appropriate party to seek judicial review of federal statutes, the taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit.

63. Baker v. Carr, 369 U.S. at 208.

64. "The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties." *Id.* at 207-08.

65. 392 U.S. 83 (1968).

Education Act of 1965.[66] The complaint alleged that funds were being expended under the Act to finance instruction in religious schools in violation of the establishment and free exercise clauses of the first amendment. Without expressly discussing injury, Chief Justice Warren, writing for the Court, added a "nexus" requirement to the standing inquiry. In an attempt to ground standing in the underlying substantive law, Warren stated the inquiry to be "whether there is a logical nexus between the status asserted [by the plaintiff] and the claim sought to be adjudicated."[67] In *Flast,* the plaintiffs satisfied the nexus requirement, since in their capacities as taxpayers, they challenged an exercise of the congressional spending power that involved a "substantial expenditure of federal tax funds."[68] Further, they alleged a violation of specific constitutional guarantees.

Despite the addition of the nexus requirement, *Flast* did little to clarify the definition of injury for standing purposes. The plaintiffs could not claim that their tax liability would have decreased had the funds not been spent in violation of the first amendment.[69] Certainly they had an "interest" in seeing that the provisions of the Constitution were properly enforced, but the Constitution generally does not tolerate suits by merely interested individuals suing as "private Attorney Generals."[70] The federal courts cannot become a forum for the "vindication of the value interests of concerned bystanders."[71] Despite its weaknesses, however, the *Flast* "nexus" test at least attempts to articulate a workable standard by which to evaluate the relationship between the injured plaintiff and the underlying substantive law. That the articulation ultimately fails does

66. The Act was replaced by the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143 (codified in scattered sections of 20 U.S.C.).

67. *Flast,* 392 U.S. at 102. For taxpayers, Warren broke the nexus requirement into two pieces. "First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked." *Id.* This meant that the taxpayer could only challenge a statute enacted under the taxing and spending clause. "Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* This meant that the taxpayer must allege that the statute exceeds the "specific constitutional limitations imposed [on the] taxing and spending power." *Id.* at 103.

68. *Id.* at 103.

69. Professor Davis has estimated, for purposes of argument, that each plaintiff's tax liability would have been reduced by 12 cents. Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 611 (1968). Of course, this assumes that the money would not have been spent on something else. The *Flast* plaintiffs were not challenging the collection of taxes, but rather how the money was spent. Thus, their individual tax liability was not particularly relevant for purposes of determining injury.

70. Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir.), *vacated on other grounds,* 320 U.S. 707 (1943). *But see Flast,* 392 U.S. at 111-14 (Douglas, J., concurring) (remarkably advocating wide-ranging use of private attorney generals to enforce constitutional rights he felt would not be enforced otherwise).

71. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973).

not mean that the notion should be discarded.[72]

The *Flast* Court's failure to articulate a workable injury standard led in 1970 to *Association of Data Processing Service Organizations, Inc. v. Camp,*[73] which announced the "injury-in-fact" test. Writing for the Court, Justice Douglas, in a sweeping reorganization, divided the standing inquiry into two prongs. First, the plaintiff must assert an "injury in fact, economic or otherwise."[74] Second, the plaintiff's injury must be to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[75]

In *Data Processing,* the Court recognized the standing of a group of data processing service companies challenging a ruling by the Comptroller of the Currency that allowed certain banks to sell data processing services. The Court first found that the plaintiffs had alleged a sufficient injury-in-fact to their economic interests. Indeed, at least one plaintiff alleged that previously held business was lost to a commercial bank.[76] Then, after examining the language and legislative history of the relevant statute, the Court found that the plaintiffs' injuries were to their interest in free competition, which was arguably within the zone of interests protected by section four of the Bank Service Corporation Act of 1962.[77] Thus the plaintiffs, though third parties, were granted standing as com-

72. *Flast* was widely regarded as reopening the possibility of taxpayer standing that was foreclosed in Frothingham v. Mellon, 262 U.S. 447 (1923). In *Frothingham* the Court found that a federal taxpayer's interest in federal disbursements to a third party is "so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Id.* at 487; *see also* Doremus v. Board of Educ., 342 U.S. 429 (1952) (denying a taxpayer challenge based on the establishment clause). *Flast* attempted to revive taxpayer standing by tying the injury to a violation of a specific constitutional clause. At least one commentator applauded the effort. Davis, *supra* note 69.

Despite *Flast's* broad language, the Supreme Court, in 1982, held that *Flast* was merely an exception to the *Frothingham* rule, and denied standing to a group of taxpayers challenging the gratis transfer of federal "surplus" property to a Christian college. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 481 (1982). The Court failed to see how the petitioners were injured by this apparent violation of the establishment clause, thus narrowing *Flast* so sharply that it virtually swallowed its precedential value.

73. 397 U.S. 150 (1970).

74. *Id.* at 152.

75. *Id.* at 153.

76. *Id.* at 152. It is unclear whether the Court would have found adequate injury in the absence of such a specific incident. The Court, however, has since looked to the likelihood of future harm as a basis for conferring standing. For example, in O'Shea v. Littleton, 414 U.S. 488 (1974), the Court denied standing to a group of plaintiffs alleging a pattern of racially discriminatory conduct in the criminal justice system of an Illinois county. The language indicates that had the named plaintiffs possessed a stronger likelihood of becoming criminal defendants in the future, then the probability of injury may have been sufficient to confer standing. *See id.* at 496-97. The Court, however, gave no indication of how one would determine such a probability. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (victim's standing "depended on whether he was likely to suffer future injury" from the use of police chokeholds); Rizzo v. Goode, 423 U.S, 362, 372 (1976) (similar holding and facts as *O'Shea*).

77. *Data Processing,* 397 U.S. at 154-56. Section four, as quoted by the Court, read: " 'No

petitors to challenge the Comptroller's administrative application of a statutory scheme.

The injury-in-fact test has become the cornerstone of the Court's constitutional standing requirement. Later standing cases are merely attempts to refine Justice Douglas' articulation. For example, in *Sierra Club v. Morton,*[78] the Court required "that the party seeking review be himself among the injured."[79] In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),*[80] the Court looked for a "specific and perceptible harm that distinguished [plaintiffs] from other citizens."[81] Finally, in *Warth v. Seldin,*[82] the Court settled on its current language: A litigant must allege "distinct and palpable injury to himself."[83] The *Warth* test thus focuses judicial attention on whether the injury is tangible or manifest, and whether the injury is suffered by the plaintiff "in a different manner than the rest of the populace."[84]

The zone-of-interests requirement articulated in *Data Processing* has become one of the Court's "prudential concerns." The Court considers these concerns to have no constitutional basis; rather, they are "judicially self-imposed."[85] In theory, the zone-of-interests test prevents members

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bank service corporation may engage in any activity other than the performance of bank services for banks.' " *Id.* at 155.

The Court specifically noted that " 'Congress has provided the sufficient statutory aid to standing even though the competition *may not be the precise kind Congress legislated against.*' " *Id.* (quoting Arnold Tours, Inc. v. Camp, 408 F.2d 1147, 1153 (1st Cir. 1969), *vacated,* 397 U.S. 315 (1970)) (emphasis added).

78. 405 U.S. 727 (1972).

79. *Id.* at 735.

80. 412 U.S. 669 (1973).

81. *Id.* at 689.

82. 422 U.S. 490 (1975).

83. *Id.* at 501.

84. Nichol, *supra* note 40, at 1923. By first looking at the injury, and then examining whether the individual suffered it, the Court rarely recognizes standing to redress so-called "abstract" injuries. The problem is particularly acute in racial discrimination cases. *See* Allen v. Wright, 468 U.S. 737, 755-56 (1984) ("abstract" injuries, such as the denigration suffered by a class of persons due to patent racial discrimination against a few, are not judicially cognizable). Only those plaintiffs who allege personal discrimination are entitled to judicial relief. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 165-71 (1972) (denying plaintiff standing to challenge a private club's racially restrictive membership policy because he had never applied for membership).

85. Allen v. Wright, 468 U.S. 737, 751 (1984).

Besides the zone-of-interests test, the Supreme Court has recognized two other prudential concerns. First, courts may not adjudicate general grievances more appropriately addressed in the representative branches. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); Flast v. Cohen, 392 U.S. 83, 106 (1968) (a taxpayer may not use "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System"). This concern is probably best seen as a gloss on the particularized injury requirement. It requires a plaintiff to show how she personally has been affected as distinct from the population in general.

A second prudential concern is the rule barring one litigant from raising the rights of another. *See Allen,* 468 U.S. at 751. This can be interpreted in two ways. It can either prevent a plaintiff from resting standing on the rights or interests of another, *see Warth,* 422 U.S. at 499, or it can

of one class from benefiting from laws designed to protect another class.[86] Until recently, the test was a seldom stated and rarely applied concept.[87]

In 1987, however, in *Clarke v. Securities Industry Association,*[88] the Supreme Court revived the zone-of-interests test and allowed a trade association representing securities brokers, underwriters, and investment bankers to challenge actions by the Comptroller of the Currency that permitted certain commercial banks to engage in discount brokerage activity. The Comptroller had ruled that discount brokerage activity was not within the definition of "branch" in the National Bank Act and thus did not trigger that Act's restrictions on branching.[89] The plaintiff alleged that the Comptroller's interpretation was contrary to the plain language of the Act.

Justice White, writing for the Court,[90] first noted that section ten of the Administrative Procedure Act (APA) grants a right of judicial review to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[91] White then looked to the National Bank Act and concluded that the plaintiff's asserted interest,

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prevent a plaintiff with standing from asserting the rights of another. This question has become virtually a separate body of law termed "*jus tertii*" or, more recently, "third party standing." *See* Monaghan, *Third Party Standing,* 84 COLUM. L. REV. 277, 278 n.6 (1984). Despite the literal language used to articulate this concern, there have been many cases permitting litigants to raise the rights of others. *See, e.g.,* Singleton v. Wulff, 428 U.S. 106, 115 (1976) (litigant an "effective . . . proponent" of third party's rights); Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972) (contraceptives distributor permitted to assert the reproductive rights of unmarried couples); Griswold v. Connecticut, 381 U.S. 479 (1965) (doctors permitted to assert the rights of married couples); *see also* 4 K. DAVIS, *supra* note 34, at 267 (citing 17 Supreme Court cases holding that one who has standing may assert the rights of others). Five recent cases, however, have asserted the opposite as dictum. *Allen,* 468 U.S. at 751; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263 (1977); *Warth,* 422 U.S. at 509. For criticisms of this requirement, see Monaghan, *supra,* at 311-15 and 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, 404-06 (1981).

Justice Scalia, among others, has questioned the Court's authority to decide standing as its prudence dictates. *See* Scalia, *supra* note 1, at 885; *infra* text accompanying notes 128-33.

86. *See* 4 K. DAVIS, *supra* note 34, at 279 (offering this theory as the only plausible rationale).

87. Professor Davis notes that the Court mentioned the test only six times between 1971 and 1983, often only in footnotes or in passing. *Id.* at 276-77.

88. 107 S. Ct. 750 (1987).

89. The National Bank Act, as amended, limits the "general business" of a national bank to its headquarters and "branches," which must be established and maintained in compliance with the Act. 12 U.S.C. § 81 (1982). A branch is defined to "include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks are paid, or money lent." *Id.* § 36(f).

90. Ironically, Justice White joined Justice Brennan's opinion in *Data Processing.* The two thought that the zone-of-interests test involved "a useless and unnecessary exercise" and confused the issues of standing, reviewability, and the merits. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 170 (1970) (Brennan, J., concurring in the result and dissenting).

91. 5 U.S.C. § 702 (1982 & Supp. III 1985).

freedom to compete effectively for a share of the financial services market, was an implicit concern of Congress when it enacted the statute.[92] Significantly, the Court did not require an explicit congressional grant of standing. Rather, the linchpin of White's analysis was that the injury was to an asserted interest that "implicates the policies of the National Bank Act."[93] Thus, the securities trade association was a "very reasonable candidate[ ] to seek review of the Comptroller's rulings."[94]

Clarke's revival of the zone-of-interests test is a potentially important development in the area of standing to challenge administrative actions. Implicit in White's opinion is the notion that, in some cases, the policies underlying a statute may provide sufficient reason for a court to permit a particular plaintiff to raise an issue based upon that statute, whether or not that plaintiff has suffered an injury-in-fact.[95] Justice White never analyzed injury in *Clarke,*[96] and the plaintiff trade association did not allege that any member had actually sustained a loss of business due to the Comptroller's action.[97] Thus, it may be that the Court in effect was permitting the suit because, given the statutory structure, this plaintiff was best suited to litigate this issue of statutory construction.

Unfortunately, Justice White failed to delineate the types of cases to which the zone-of-interests test should apply. He first noted that despite *Data Processing*'s broad language—" 'arguably within the zone of interests to be protected or regulated by the statute *or constitutional guarantee* in question' "[98]—the test was not "of universal application."[99] In fact, "[t]he principal cases in which the zone of interests test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of [section ten]."[100] Nevertheless, he refused to limit the test to APA claims, since he would once have

92. *Clarke,* 107 S. Ct. at 759 ("Congress has shown a concern to keep national banks from gaining a monopoly control over credit and money through unlimited branching.").

93. *Id.*

94. *Id.*

95. The role of a statute in the determination of standing is discussed *infra* text accompanying notes 126-51.

96. In a footnote, White explained that the Comptroller had argued unsuccessfully in the trial court that the plaintiff could show no injury, but had decided not to press the argument before the Supreme Court. *Clarke,* 107 S. Ct. at 754 n.5. Perhaps White was indicating that there was an injury problem, and that the Comptroller should therefore have pursued the issue. He did state that in *Data Processing,* "[t]here was no serious question that the data processors had sustained an injury in fact by virtue of the Comptroller's action." *Id.* at 754.

97. Recall that in *Data Processing,* at least one member of the trade association had alleged a particular instance of an actual loss of business. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970).

98. *Clarke,* 107 S. Ct. at 758 n. 16 (quoting *Data Processing,* 397 U.S. at 153) (emphasis by *Clarke* Court).

99. *Id.*

100. *Id.*

applied the test to find standing under the commerce clause.[101] Thus, the application window of the zone-of-interests test falls somewhere between a limitation to claims arising under the APA and "universal application."

Despite these nagging questions over applicability, the zone-of-interests analysis in *Clarke* is a step in the right direction for litigants raising issues of statutory interpretation by administrative agencies. While refusing to stray from the statutory interest in economic competition asserted in *Data Processing,*[102] the *Clarke* Court seems to hint at a broader application of the zone-of-interests test in the future. In *Clarke,* the Court *assumed* injury to competition merely because the plaintiff was actually a competitor and because the statute protected competition. This is a sensible analysis. The plaintiff claimed a statutory interest in preservation of competition. The plaintiff's actual economic harm was considered irrelevant to the standing analysis. *Clarke* may, therefore, signal a relaxation of the injury standard and a less restrictive policy towards third party suits challenging administrative action.

C. *The Causation Requirements*

The Court's apparent reluctance to broaden the zone-of interests test and to relax the injury requirement (despite indications to the contrary in *Clarke*) stems partially from a line of cases in the 1970s that introduced the requirements of traceability and redressability into the law of standing. Traceability examines whether an asserted injury can be fairly traced to the challenged actions of the defendant. Redressability examines whether the requested relief, if granted, will likely redress the injury. The inquiries are essentially "two facets of a single causation requirement."[103]

In establishing this causation requirement, the Court was continuing to search for that essential link between the plaintiff and the issue she wishes to adjudicate that has animated the entire body of standing law. Unfortunately, as is argued below,[104] reliance on causation for that conceptual connection is unsatisfactory because it is an easily manipulable test that has led to several poorly reasoned opinions.

The cases generally articulate the traceability and redressability inquiries as two distinct aspects of the constitutional prong of the stand-

101. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 320-21 n.3 (1977).

102. In Investment Co. Inst. v. Camp, 401 U.S. 617, 620-21 (1971), the Supreme Court again applied the zone test in a case of competitor standing, this time under the Glass-Steagall Banking Act of 1933, currently codified at 12 U.S.C. § 24 (1982 & Supp. IV 1986).

103. C. WRIGHT, THE LAW OF FEDERAL COURTS 68 n.43 (4th ed. 1983); *see also infra* note 155.

104. *See infra* text accompanying notes 156-96.

ing test.[105] The distinction, however, is ephemeral at best. While the two tests approach the problem from different sides, they address the same causation issue and inevitably yield the same results.[106]

The traceability aspect of causation, rooted in *Frothingham v. Mellon*,[107] came to fruition in *Linda R.S. v. Richard D.*.[108] The Court in *Linda R.S.* denied standing to an unwed mother challenging a Texas law that provided for criminal sanctions against parents who failed to provide a minimum level of child support. The plaintiff challenged the application of the statute solely to parents of legitimate children. Because the plaintiff failed to show that her illegitimate child's lack of support resulted directly from the inapplicability of the statutory sanctions to the child's father, she did not meet the traceability requirement and was denied standing.[109]

Later, in *Simon v. Eastern Kentucky Welfare Rights Organization*,[110] the Supreme Court noted that article III permits courts to "act only to redress injury that fairly can be traced to the challenged action of the defendant."[111] On this basis, it denied standing to groups representing indigents who were challenging IRS actions that permitted certain hospitals to retain a section 501(c)(3) tax exemption while denying low cost treatment to the poor.[112] Although some of the indigents actually had

105. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751-52 (1984).

106. The Supreme Court has never found redressability without traceability and vice versa. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). Professor Nichol has gone to great pains to justify the existence of separate tests. Apparently, traceability is "primarily aimed at providing that 'essential dimension of specificity' that informs judicial decision-making." Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 200 (1981) (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974))). Redressability, on the other hand, reflects "concern for the appropriate role of the judiciary in a democratic society." *Id.* Professor Nichol, however, confuses the issue of whether a court has the *power* to impose the requested relief with the question of whether the relief, if provided, will *redress* the plaintiff's injury. *See infra* note 115.

107. 262 U.S. 447, 488 (1923) (the plaintiff must allege some "direct injury as the result of" government action).

108. 410 U.S. 614 (1973).

109. *See id.* at 618. The plaintiff might have won on the merits had the Court recognized standing. In Gomez v. Perez, 409 U.S. 535 (1973), the Court held that the failure of Texas' courts to recognize a civil law right to paternal support for illegitimate children, while recognizing it for legitimate children, violated the equal protection clause of the Constitution. The criminal penalty at issue in *Linda R.S.* was part of the same statutory scheme; it allowed fathers to assert illegitimacy as a defense against prosecution for criminal failure to support. *Gomez*, 409 U.S. at 537. Given the clear authority of *Gomez*, *Linda R.S.* might be better understood as the Court simply applying the long-standing prohibition on challenges to prosecutorial discretion by those who are not being prosecuted. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 42 (1971); Bailey v. Patterson, 369 U.S. 31, 33 (1962); *see also* Haitian Refugee Center v. Gracey, 809 F.2d 794, 804 (D.C. Cir. 1987) (Judge Bork agreeing with this characterization of *Linda R.S.*).

110. 426 U.S. 26 (1976).

111. *Id.* at 41.

112. *Id.* at 46. IRS policy before *Simon* offered tax exemptions to hospitals that, to the extent of

been denied services, the Court emphasized that the alleged injury could have resulted from the "independent action of some third party not before the court."[113] The Court considered the question of whether the plaintiffs were denied treatment based on the actions of the IRS or the independent action of the hospital itself to be "purely speculative."[114]

Redressability analysis typically proceeds as follows: Before recognizing standing, the court must be satisfied that relief from the injury will be likely to result from the requested court action.[115] The *Linda R.S.* Court, for example, in analyzing traceability, noted that even if it granted the requested relief, the plaintiff would not automatically be entitled to support payments.[116] The Court believed that the delinquent father would be jailed, thereby precluding the possibility of paternal payments for the plaintiff's children.[117]

Unfortunately, this redressability analysis, like traceability, is easily manipulated by the Court. Assuming that the "requested relief" in *Linda R.S.* was an order to enforce the statute and jail the father, the claim failed the redressability requirement. But this assumption misconstrues the statute's goal. The purpose of the criminal sanction at issue was not to keep delinquent parents off the streets, but rather to act as an incentive to induce support payments. Had the Court held that the statute applied to the father, he might have decided to pay the child support to avoid a jail term and the plaintiff's injury would have been redressed. At the very least, it was inappropriate to order dismissal based on a lack

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their financial ability, provided reduced-cost health care to indigents. *See* Rev. Rul. 56-185, 1956-1 C.B. 202. When the IRS abandoned this policy, *see* Rev. Rul. 69-545, 1969-2 C.B. 117, the suit in *Simon* followed.

113. *Simon,* 426 U.S. at 42.

114. *Id. Simon* presents one of the clearest examples of the Court deliberately avoiding the merits of the case by invoking standing. Dismissal for lack of standing enabled the Court to avoid deciding the sticky question of whether a third party whose tax liability is not personally affected can challenge the status or liability of another.

Professor Davis argues that since causation here was essentially the factual question of whether hospital managers are "significantly influenced by tax advantages or lack of them," *Simon* was in reality a thinly disguised decision *on* the merits. 4 K. DAVIS, *supra* note 34, at 318. *See generally* Albert, *supra* note 11, at 427-50 (analyzing standing as a question of the merits). The plaintiffs, however, were arguing that the definition of "charitable" organization in the tax code included a requirement of indigent relief. *Simon,* 426 U.S. at 33. Certainly the Court did not decide *that* question on the merits. To the extent that the question of causation is a matter for the merits, however, Davis is surely right. Furthermore, the Court was probably wrong on the causation issue. Denying that organizations make financial decisions, based at least in part on tax consequences, denies the inherently coercive nature of the tax code. *See* Tushnet, *supra* note 2, at 682 (presenting four possible scenarios of how tax incentives could influence hospital decisionmaking).

115. *See* Allen v. Wright, 468 U.S. 737, 751 (1984). The requirement of redressability differs from the question of whether the court has the power to provide the requested relief. Redressability assumes that the requested relief is within the power of the court to provide. The question is whether the relief, if granted, will redress the injury.

116. Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973).

117. *Id.*

of standing when the likelihood of redressability was so high. The Court should have assumed that the statute would work as intended and permitted the plaintiff to press her claim.[118]

The difficulties with the injury-in-fact and causation requirements underscore a more fundamental problem. The next Part critically examines the question of whether a free-floating constitutional test of universal application makes sense in the context of standing.

II

RETHINKING THE CONSTITUTIONAL ASPECTS OF STANDING

The current doctrine of federal standing has received intense criticism.[119] This criticism falls into two major categories: first, that standing doctrine is extraordinarily inconsistent;[120] and second, that judges abuse standing in order to vindicate their view of the merits.[121] Both criticisms reflect the rather cynical attitude that the Court is purposely inconsistent in its treatment of standing in order to facilitate judicial misuse.

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118. An interesting anomaly in this line of causation cases is United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973), where the Court specifically reserved the question of causation for proof at trial. The Court could not say that "on these pleadings," the plaintiffs could not prove their allegations that tended to show actual injury.

> The causal connection in *SCRAP*, however, was almost laughingly tenuous.
>
> The suit was brought by a group of George Washington Law School students, who assertedly used park and forest areas, which areas assertedly would be rendered less desirable by an increase of litter, which increase assertedly would result from a decline in the use of recycled goods, which decline assertedly would follow from a rise in the costs of such goods, which rise assertedly would be produced by the freight surcharge. And if that were not harm enough, the aggrieved plaintiffs also averred that each of them "breathes the air within the Washington metropolitan area, the area of his legal residence, and that this air has suffered increased pollution caused by the modified rate structure." . . . Indeed, the court intimated, with respect to this governmental action "all who breathe [the country's] air" could sue.

Scalia, *supra* note 1, at 890 (footnotes omitted). To recoguize causation sufficient for standing in *SCRAP* and deny it in *Linda R.S.* and *Simon* is curions, to say the least.

119. "In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical." Nichol, *Rethinking Standing*, *supra* note 2, at 68 (footnote omitted). Professor Nichol cites no less than fourteen recent law review articles, two major treatises, and one influential book as *examples* of the criticism. *Id.* at 68 n.3. Since 1983, examples include Fletcher, *supra* note 36; McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441 (1984); Nichol, *supra* note 40; Nichol, *Abusing Standing*, *supra* note 2; Note, *supra* note 2.

120. The inconsistencies of standing law were discussed in Part I. Professor Davis offers Warth v. Seldin, 422 U.S. 490 (1975), as the paradigm. Davis has isolated ten propositions of law cited in *Warth*, each of which is directly contrary to other Supreme Court statements and holdings. 4 K. DAVIS, *supra* note 34, at 332-37.

121. Commentators have noted that standing cases present thinly disguised rulings on the merits of cases without explication. *See, e.g.*, Tushnet, *supra* note 2, at 663. Professor Tushnet emphasizes that standing is not used to *avoid* the merits but rather to actually *decide* the substance of the merits. *Id.* at 664 n.6. Professor Albert agrees, arguing that standing is merely a substitute for analysis of the underlying claim. Albert, *supra* note 11, at 426. The merits problem is particularly acute in the analysis of causation. *See infra* text accompanying notes 156-96.

The problems associated with standing stem from one major source: Courts utilize the doctrine to perform inappropriate tasks.[122] This usage stems from an unclear conception of standing's proper role in "case or controversy" jurisprudence.

This Comment contends that the standing of a plaintiff requesting adjudication of an issue of statutory interpretation should depend solely on whether the plaintiff's asserted interest is protected by that statute.[123] The courts should not examine whether the plaintiff has suffered a distinct and palpable injury, fairly traceable to the challenged government action, which is capable of being redressed by the remedy requested. Rather, the courts should examine whether the plaintiff asserts an interest within the zone of interests protected by the underlying statute. If the injury to the plaintiff's interest is within that zone, the court should assume that Congress intended for him to enforce that interest in federal court. In other words, where a statute protects a certain interest, and the plaintiff asserts actual or threatened injury to that interest, the court should assume that the plaintiff's injury presents the "concrete adverseness" the court requires.[124] In this way, the federal courts can provide an adequate forum for the vindication of rights without becoming involved in the litigation of polycentric disputes. Because the statute provides an appropriate structure for a narrow decision, there is no reason to bar such suits on standing grounds.

The difficulty with this reformulation is that it conflicts with the notion that article III requires a showing of injury and causation to establish standing.[125] Section A of this Part argues, however, that there are in fact no constitutional barriers to the ability of Congress to define standing under article III. The argument that the "case or controversy" requirement contains a distinct notion of injury is essentially misguided. Congress, by enacting a statute, defines the cases or controversies that may arise under that statute. The courts need simply recognize what Congress has done.

Section B of this Part examines the causation requirements of article III standing. It suggests that the Court's current causation inquiry has become hopelessly entangled with the underlying merits of the dispute. This confusion is not only doctrinally unsound, but unfair to litigants. Using causation analysis at the standing stage unfairly decides an often

122. *See* Nichol, *Rethinking Standing*, *supra* note 2, at 70 ("standing law has been made to serve too many masters").

123. The standing problems encountered when plaintiffs assert constitutional protections are more difficult and beyond the scope of this Comment. In general, they call for a more sensitive appraisal of the relationship between the plaintiff and the substantive protection he seeks. *See* Fletcher, *supra* note 36.

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

125. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750-51 (1984).

crucial aspect of the plaintiff's claim on the merits and diverts judicial attention from the real issue: Does this plaintiff assert a statutorily protected interest? This Section concludes that standing, often a substantive issue of statutory interpretation, should not be used to decide the merits of a case. This separation can only be accomplished by removing causation analysis from the standing determination.

A. Can Congress Legislate Standing?

Judicial opinions discussing standing often assert that Congress can legislate to the boundaries of article III, but not beyond.[126] This is perhaps the only practical effect of the bifurcation of standing into constitutional and nonconstitutional prongs. Congress is said to be able to override the prudential limitations on standing, but not the constitutional limits.[127] Unfortunately, this distinction has proved to be confusing and is consequently of limited utility, other than as an example of doctrinal formalism. It also belies an incomplete understanding of the case or controversy principles inherent in article III.

1. Standing to Assert Statutorily Protected Interests

The Constitution states only that "[t]he judicial Power shall extend to all Cases . . . [or] Controversies."[128] This broad language raises the question of whether federal courts are required to hear *every* case or controversy or whether they may exercise discretion and decline to hear some claims. The Court clearly has followed the latter course, as the prudential elements of standing doctrine are "judicially self-imposed."[129] Justice, then Judge, Scalia has noted, however, that the "bifurcation" of standing into a constitutional core and prudential concerns is "unsatisfying—not least because it leaves unexplained the Court's source of authority for simply granting or denying standing as its prudence might dictate."[130] He argues that courts have no power to confer standing.[131] Rather, federal courts "must always hear the case of a litigant who asserts the violation of a legal right."[132]

Of course, it may not always be clear whether Congress intended to create a legal right. In cases where

> legislative intent to create a legal right is . . . problematic, the courts apply the various "prudential" factors, not by virtue of their own inher-

126. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-501 (1975).

127. For an example of Congress removing a prudential bar, compare *Warth*, 422 U.S. at 512-14, with Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring).

128. U.S. CONST. art III, § 2, cl. 1.

129. Allen v. Wright, 468 U.S. 737, 751 (1984).

130. Scalia, *supra* note 1, at 885.

131. *Id.* at 886.

132. *Id.* at 885.

> ent 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. Thus, when the legislature explicitly *says* that a private right exists, this so-called "prudential" inquiry is displaced.[133]

Scalia's reasoning is undoubtedly correct, and should be applied when a litigant challenges the action of a government agency. The prudential limits, and indeed the constitutional criteria, are merely devices to help the courts determine whether a case exists, and should not be used by a court to decide whether, in its discretion, it wants to hear a particular case. Clear divisions between what constitutes a "case" or "controversy" from a constitutional standpoint often do not exist. One cannot divine an objective rule that will identify that dividing line in every situation. A "case" differs with each set of facts. A court, in effect, looks to these facts and tries to decide if a constitutional case is present. The inquiry is paradigmatically located in the common law.

This analysis leads to a perceptive assertion by Justice Scalia: "[The] existence [of standing] in a given case is largely within the control of Congress."[134] Courts have no inherent power to create or destroy standing; they can only recognize that it exists in a given case.[135] Congress, however, *can* create standing by establishing entitlements, benefits, liabilities, and duties. Each time Congress creates a right, it either expressly or impliedly provides for those who have standing to sue on that right. The courts must then determine, solely by reference to the statutory scheme, whether a particular plaintiff raising a statutory issue at a particular time has standing.

This inquiry is considerably more subtle than determining congressional *intent* to grant standing. We should not force Congress to enumerate the classes of individuals who have standing under a statute. Nor should we look for indicators of congressional consideration of the standing issue. Rather, the inquiry should focus on whether it would be consistent with the substantive congressional purposes in enacting the legislation for this litigant to raise this issue. By definition, then, the standing requirement will be a relatively low hurdle. But the desire to

133. *Id.* at 886. Scalia's characterization of standing as recognition of an injury to a legal right may sound like a return to the "legal interest" test that was repudiated in *Data Processing. See supra* text accompanying notes 37-51. While Scalia seems generally in favor of restricting access to the courts by denying standing to litigants, he does not appear to advocate a return to the "stinginess" of the legal interest test. Scalia, *supra* note 1, at 887 n.28. Instead, Scalia argues that standing should be recognized for plaintiffs asserting injury to a legal right, and the inquiry should be directed towards determining whether that right is legally recognized. *Id.* at 885-86. For a similar idea, see Nichol, *supra* note 40, at 1939-50 (suggesting that, for standing purposes, the Court should focus on the judicial cognizability of the interest alleged to have been harmed).

134. Scalia, *supra* note 1, at 885.

135. *Id.* at 885-86.

avoid a low threshold is not an independent justification for adding requirements that have no conceptual relationship to the question at issue.

One way to visualize the notion of standing to assert statutory interests is to think in terms of an *integration* of powers, rather than a separation of powers.[136] A federal court must hear all "cases" or "controversies," and the definition of a case or controversy is a matter of judicial interpretation. Congress, on the other hand, by passing statutes, can substantially determine the rights that litigants may raise. The Court must then recognize when an injury to one of those rights creates standing to sue.[137] Courts are interested in conserving judicial resources; Congress is interested in enforcing its statutes. Thus, the presence of a case or controversy depends to a large extent on a balance, an *integration,* of the powers that animate these not necessarily competing interests.

2. *Judicial Recognition of Statute-Based Standing*

The foregoing discussion may create the impression that the Supreme Court has never used the proposed analysis to address the standing issue. But in at least one standing case and in discussion of two doctrines that address essentially the same issue, the Court has analyzed whether the actual or threatened injury adversely affected an interest protected by the statute on which the claim was based.

In the "standing" case, *Clarke v. Securities Industry Association,*[138] the Supreme Court analyzed the standing of a securities trade association to challenge the Comptroller of Currency's interpretation of the Bank Service Corporation Act of 1962 regarding securities activity by commercial banks. The Court first noted Congress' intent "to make agency action presumptively reviewable," and then asked whether the plaintiffs, as injured third parties, asserted an interest "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot possibly be assumed that Congress intended to permit the suit."[139] This artic-

136. One commentator uses "separation of powers" to refer to the idea of integrated powers. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis,* 1984 WIS. L. REV. 37, 41 (separation of powers "suggests overlapping reservoirs of responsibility and necessitates a dynamic process of interaction—a dialogue—between the branches"). This is a sensible approach. Nevertheless, at least some of the confusion resulting from the separation of powers ideal may be due to the inappropriate metaphor of "separation," rather than "integration." *Cf.* C. MONTESQUIEU, THE SPIRIT OF LAWS bk. XI, ch.6, at 211 (1977) (1st English ed. 1750) ("These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still to move in concert.").

137. "[S]eparation of powers concerns counsel the Court to defer to Congress' ability to define injuries, no matter how novel, and to bestow standing upon a plaintiff, no matter how many other citizens may suffer the identical injury." Logan, *supra* note 136, at 61.

138. 107 S. Ct. 750 (1987).

139. *Id.* at 757.

ulation is a fairly straightforward application of the zone-of-interests test. Yet this test has traditionally been considered prudential, applicable only after the plaintiff has met the constitutional standing requirements. The *Clarke* Court, however, never gave the injury issue more than a cursory nod and completely ignored the causation elements. The plaintiffs alleged injuries that implicated the policies of the Act; thus they were "very reasonable candidates" to seek review of this administrative ruling.[140]

The doctrine of administrative preclusion of judicial review is essentially a specialized aspect of standing[141] that looks solely to the underlying statute. The preclusion doctrine denies judicial review in cases where Congress intended to foreclose such review. The Court in these cases essentially asks whether recognition of standing would be inconsistent with the purposes of the statute.[142] In *Block v. Community Nutrition Institute,*[143] for example, the Supreme Court applied preclusion analysis and held that consumers of milk products were not entitled to judicial review of a milk price stabilization order issued pursuant to the Agriculture Marketing Agreement Act of 1937.[144] In *Block,* the Court looked solely to the statute itself to determine whether the plaintiffs had standing, ignoring the constitutional requirements of injury and causation.[145]

Finally, there is a long line of cases, primarily involving securities litigation,[146] permitting plaintiffs to press claims under statutes by finding an implied private right of action.[147] Again, the question for the Court is one of statutory interpretation: "[W]here congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute."[148] The implied rights doctrine is similar to standing because only those with interests protected by the statute may sue. The doctrine, however, requires that the plaintiff be " 'one of the

140. *Id.* at 759.

141. The Supreme Court in *Clarke* analogized the issue of standing to challenge a statutory interpretation to the preclusion doctrine. *Id; see* 5 U.S.C. § 701(a)(1) (1982); *see generally* Note, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act,* 1976 DUKE L.J. 431, 442-49 (authored by Robert F. Holland).

142. *See Clarke,* 107 S. Ct. at 757-59.

143. 467 U.S. 340 (1984).

144. *See* 7 U.S.C. §§ 601-608 (1982).

145. *Block,* 467 U.S. at 345-48.

146. *But see* Cannon v. University of Chicago, 441 U.S. 677 (1979) (implying a remedial right of action under title IX of the Education Amendments of 1972).

147. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964); *see also* Cort v. Ash, 422 U.S. 66 (1975) (applying a four-part test); Touche-Ross & Co. v. Redington, 442 U.S. 560 (1979) (holding that the central inquiry after *Cort* remains whether Congress intended to create a private right of action).

148. Piper v. Chris-Craft Indus., 430 U.S. 1, 25 (1977) (finding no implied right of action in section 14(e) of the Securities Exchange Act of 1934 for rejected tender offerors).

class for whose *especial* benefit the statute was enacted.' "[149] The Court requires a special showing of intent because of the doctrine's essentially remedial nature; the doctrine permits plaintiffs to sue other private parties for damages, thereby exposing a significant number of citizens to potential lawsuits. Nevertheless, the Court must first determine whether the plaintiff's interest is within the range of statutorily protected interests, and this determination is the essence of standing.[150]

The cases discussed above serve to illustrate the role of Congress in "case or controversy" jurisprudence. While often not technically designated as standing doctrines, the doctrines of preclusion and implied private rights of action focus, as does standing, on whether the party asserts an interest that the statute at issue protects. Their reliance on the mandates of Congress is sensible; congressional purpose should be the sole concern in suits to adjudicate statutory interests. Further, as *Clarke* points out, standing should be no different. The standing threshold is understandably lower, but the analysis of congressional purpose is equally appropriate.[151]

B. Is Causation a Standing Requirement?

As discussed above,[152] for purposes of determining standing the Court requires that an alleged injury "be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision."[153] The traceability requirement has permitted the Supreme Court to deny standing where the plaintiff's asserted harm could have resulted from the "independent action of some third party not before the court."[154] Redressability merely examines the problem from

149. *Cort,* 422 U.S. at 78 (quoting Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)) (emphasis by *Cort* court).

150. The *Clarke* majority discussed the relationship between implied private rights of action and standing. Justice White noted that the implied rights test requires more from potential litigants than the zone-of-interests test, Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750, 758 n.16 (1987), thus implying that a plaintiff must have standing before he can sue for damages on an implied private right. Implied rights opinions, however, never analyze standing, primarily because the intended beneficiary umbrella of implied rights analysis subsumes the essential standing inquiry.

151. *See* Clarke v. Securities Indus. Ass'n., 107 S. Ct. 756, 758 n.16 (1987).

152. *See supra* text accompanying notes 103-18.

153. Allen v. Wright, 468 U.S. 737, 751 (1984).

154. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976); *see Allen,* 468 U.S. 737; Warth v. Seldin, 422 U.S. 490 (1975); Linda R.S. v. Richard D., 410 U.S. 614 (1973); Haitian Refugee Center v. Gracey, 809 F.2d 794, 802 (D.C. Cir. 1987).

Despite these assertions, the mere presence of a third party in the causal chain will not destroy standing. For example, in Meese v. Keene, 107 S. Ct. 1862, 1866-69 (1987), the Court recognized a film distributor's standing to challenge a Justice Department determination that a film is "political propaganda," because that characterization allegedly damaged his chances for reelection to the state senate. Similarly, the Court of Appeals for the District of Columbia Circuit has noted: "It is well settled that a plaintiff has standing to challenge conduct that *indirectly* results in injury .... 'We are concerned here not with the length of the chain of causation, but on [sic] the plausibility of the links

the opposite perspective: If the challenged action or inaction is reversed, will the plaintiff's injury be remedied?[155]

Unfortunately, the Court's causation inquiry is both inconsistently and unfairly applied.[156] The inconsistency is obvious from an examination of Supreme Court cases. For example, in *Simon v. Eastern Kentucky Welfare Rights Organization,*[157] the Court denied standing to plaintiffs who sought to challenge the effect of a tax exemption on hospital activity.[158] Yet in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),*[159] the Court accepted the plaintiffs' allegations that a proposed freight rate change by the Interstate Commerce Commission would harm their aesthetic and environmental interests.[160]

Quite apart from its unprincipled application, the question over the role of causation analysis in a sensible standing inquiry remains. This Section argues that the Court should abandon its analysis of causation at the standing stage. Standing is a threshold inquiry. As an aspect of a court's subject matter jurisdiction, standing requirements exclude improper plaintiffs without consideration of the merits of the dispute.[161] But denying standing to a plaintiff based on a tenuous causal relationship is unfair and unsound, because it forces her to substantiate an aspect of her claim on the merits before establishing jurisdiction.[162] This prema-

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that comprise the chain.' " Autolog Corp. v. Regan, 731 F.2d 25, 31 (D.C. Cir. 1984) (quoting Public Citizens v. Lockheed Aircraft Corp., 565 F.2d 708, 717 n.31 (D.C. Cir. 1977)) (emphasis added).

155. *See Allen,* 468 U.S. at 753 n.19 (traceability and redressability were "initially articulated by this Court as 'two facets of a single causation requirement' " (quoting C. WRIGHT, *supra* note 103, at 68 n.43)); National Wildlife Fed'n v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988) ("[r]edressability and causation analyses often replicate one another"); *Haitian Refugee Center,* 809 F.2d at 801 (traceability and redressability are "closely related").

156. *See supra* notes 108-18 and accompanying text.

157. 426 U.S. 26 (1976).

158. *See supra* text accompanying notes 110-17.

159. 412 U.S. 669 (1973).

160. *See supra* note 118. For another case with an attenuated yet permissible causal chain, see Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72-81 (1978) (environmental group had standing to challenge the Price-Anderson Act's limitation on nuclear power plant accident liability because it was substantially likely that the nuclear power plants at issue would not have been built absent the Act). *Cf.* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2866 n.4 (1986) (whale-watching group had right of action under the Administrative Procedure Act to challenge the Department of Commerce's failure to cite Japan for violations of international whaling agreements because continued whale harvesting would adversely affect the group's whale watching and studying).

161. *See* Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987) (analyzing standing on both motion to dismiss and motion for summary judgment).

This is not to say that the substance of the claim has no bearing on standing. Indeed, the analysis of whether a particular plaintiff has standing in a particular case depends entirely on the substantive issue raised. *See* Albert, *supra* note 11, at 426 (standing should be seen as focusing on substantive issues, not process or procedural issues).

162. In Simon v. Eastern Ky. Welfare Rts. Org., 462 U.S. 26 (1976), the indigent plaintiffs denied standing to challenge IRS actions were told that the hospitals may have independently denied

ture evaluation leads to badly reasoned decisions and to judicial misuse of standing doctrine in order to avoid deciding difficult cases on the merits.

1. *The Nature of Causation Analysis*

Professors Hart and Honoré describe the essential causation inquiry as an analysis of a wrongful act, a certain harm or consequence, and a third factor.[163] Assuming that both the wrongful act and the third factor are each a necessary condition (or "but for" cause) of the harm or consequence, "the law must decide whether or not the third factor negatives [the] causal connection" between the wrongful act and the harm.[164] The decision as to which of these "but for" causes legally caused the harm in question is the essence of proximate cause analysis. In these cases, the law articulates a policy judgment that precludes certain claims when the causal chain appears weak or implausible.[165]

These policy judgments are usually analyzed as a part of the plaintiff's claim on the merits. In a tort claim, for example, the plaintiff must prove a causal connection between the injury and the wrongful act or omission. The plaintiff must, of course, plead that the wrongful act or omission caused the injury, but she need not allege specific facts at the pleading stage.[166] If the plaintiff fails to allege causation properly, that defect can be attacked in a demurrer motion or motion for summary judgment.[167] In any event, however, the issue of causation is decided on its merits. Judges and juries ask whether it is reasonable to expect the defeudant to have exercised reasonable care with respect to the plaintiff, often with reference to community standards.

What does causation have to do with standing? Standing focuses on

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them service. Had they sued the hospitals, they may have been told that the IRS caused the injury. *Id.* at 42-46. The injured plaintiffs were thus unfairly barred from seeking judicial redress. By deeming this causal chain "purely speculative," *id.* at 42, the Court in effect decided that the economic incentive of a tax exemption was also "purely speculative." *But see* Haitian Refugee Center v. Gracey, 809 F.2d 794, 803 (D.C. Cir. 1987) ("The entire theory of IRS rulings is that they will modify behavior."); Tushnet, *supra* note 2 at 681-84 (demonstrating the connection between causation and the merits in *Simon*); *supra* text accompanying notes 110-14.

163. H.L.A. HART & T. HONORÉ, CAUSATION IN THE LAW 134 (2d ed. 1985).

164. *Id.*

165. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

166. *See* FED. R. CIV. P. 8(a) (eliminating the old regime of specific fact pleading). For an examination of the relationship between pleading rules and standing, see Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980).

167. *See* FED. R. CIV. P. 12(b)(6) (federal demurrer rule permitting dismissal for "failure to state a claim upon which relief can be granted"); FED. R. CIV. P. 56 (motion for summary judgment).

the person raising the claim and asks whether that person should be entitled to raise an otherwise justiciable issue in federal court. It does not follow, however, that the plaintiff who is denied standing for failure to articulate a plausible causal relationship is necessarily the wrong person to raise that issue.

It is more accurate to state that a plaintiff who fails to show causation sued the wrong person, not that he was the wrong person to bring suit. If indeed an injury occurred, it must have been caused by someone, or by something owned or controlled by someone. When a court denies standing based on the inadequacy of the causal allegations, it is saying that the injury was probably not caused by the person whom the plaintiff has accused. Accordingly, the plaintiff should be permitted to amend the complaint and sue the person who actually injured him. By denying standing, however, the Court uses causation to weed out "improper" *plaintiffs* instead of "improper" *defendants*. Causation analysis seems wholly unsuited for this task.

In defense of causation analysis, Judge Bork has noted that, in the context of standing, causation is "somewhat of a term of art."[168] He notes that, if viewed as "pure analyses of causation, as that term is ordinarily used," the Supreme Court opinions in *Warth v. Seldin*[169] and *Simon v. Eastern Kentucky Welfare Rights Organization*[170] "would not be entirely persuasive," presumably because of the analysis presented above.[171] Bork, however, suggests that the causation inquiry in standing cases is mandated by the separation of powers doctrine. His suggestion apparently follows from *Linda R.S. v. Richard D.*,[172] in which the Court used causation analysis to deny standing to a person not herself threatened with prosecution, who was attempting to challenge the discretion of the prosecuting authority.[173] To date, this separation of powers argument is the only serious justification proffered for the causation aspect of standing analysis.[174]

168. Haitian Refugee Center v. Gracey, 809 F.2d 794, 801 (D.C. Cir. 1987).

169. 422 U.S. 490 (1975).

170. 426 U.S. 26 (1976).

171. *Haitian Refugee Center*, 809 F.2d at 803.

172. 410 U.S. 614 (1973).

173. Neither the majority nor the dissent in *Linda R.S.* offered separation of powers as an independent justification for the standing requirement of causation. The majority opinion based its denial of standing, at least in part, on the separation of powers notion that prosecutorial discretion has traditionally been vested in the executive. *Id.* at 619. The majority also found the causal chain lacking. The Court did not, however, state or imply that the causation requirement is somehow mandated by separation of powers.

174. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 759-61 (1984) (idea of separation of powers explains why the Court does not recognize standing to assert tenuous causal claims); *cf.* Nichol, *supra* note 106, at 200 (redressability is attributable to "concern for the appropriate role of the judiciary in a democratic society"). *But cf.* Nichol, *supra* note 40, at 1918 n.22 (the Court's present articulation of causation is "logically distinct from separation of powers scrutiny").

2. *Standing and the Separation of Powers*

Courts and commentators have often aligned standing with traditional separation of powers notions.[175] Nevertheless, while denial of standing often relegates the litigant to redress, if any, through the political process, characterizing this result as compelled by the separation of powers does not advance the analysis. A comparison of standing and a true separation of powers doctrine, such as the political question doctrine, illustrates this point.

As a matter of separation of powers, the political question doctrine holds that there are certain decisions the Constitution entrusts solely to the "political" branches of government. These issues simply are not reviewable by the judiciary, no matter how severe the plaintiff's injury, and no matter how egregious the alleged wrongdoing.[176] The political question inquiry is essentially an overt separation of powers analysis. Courts must look for "a textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[177]

The political question doctrine focuses on the justiciability of the substantive *issue* to be adjudicated. Standing, on the other hand, focuses on whether *this plaintiff* should be entitled to raise a justiciable issue in federal court.[178] As Professor Henkin suggests: "Where plaintiff is denied *standing* to raise an issue . . . the issue is usually justiciable if raised by a different plaintiff with a 'personal' interest."[179] The question of whether *this plaintiff* should be allowed to litigate an "otherwise justiciable controversy,"[180] however, does not implicate separation of powers

175. *See, e.g., Allen,* 468 U.S. at 750; Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473-74 (1982); Logan, *supra* note 136 (using separation of powers analysis to expand the range of plaintiffs with standing); Scalia, *supra* note 1 (using separation of powers analysis to constrict the range of plaintiffs with standing).

176. Two often-cited Supreme Court cases examining the political question doctrine are Baker v. Carr, 369 U.S. 186, 209 (1962), and Powell v. McCormack, 395 U.S. 486, 548-49 (1969). Ironically, the Court did not find the doctrine applicable in either case and went on to decide the merits of both. The doctrine recently surfaced in Goldwater v. Carter, 444 U.S. 996 (1979), where four justices believed that a dispute between the President and Congress over the conduct of foreign relations was a nonjusticiable political question. *Id.* at 1002-06 (Rehnquist, J., concurring).

177. *Baker,* 369 U.S. at 217; *see also* Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues,* 75 HARV. L. REV. 40, 75 (1961) (describing the political question doctrine as "in sum . . . the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from").

178. *See Allen,* 468 U.S. at 791 (Stevens, J., dissenting) (standing focuses on the party, not the justiciability of the issue).

179. Henkin, *Is There a "Political Question" Doctrine?,* 85 YALE L.J. 597, 600 n.8 (1976) (emphasis added) (noting further that confusion abounds when courts fail to clarify whether they are "denying relief out of deference for the political branches" or invoking the constitutional doctrine of political questions).

180. Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) ("Whether a party has a sufficient

notions in the same way as a political question does.

The Supreme Court says that article III "limit[s] the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers.' "[181] This is hardly remarkable; article III "limits the federal judicial power," and by limiting that power it confines federal courts to a distinct role in the system. There are, however, two ways in which article III defines the role of the judiciary. The first is what might be termed a "relative" approach, which limits judicial power by defining it *with respect to the other branches of government.* The second, or "pure," approach, limits judicial power by defining it only by reference to *article III itself.* The "relative" approach, exemplified by the political question doctrine, is an overt separation of powers analysis. The "pure" approach, however, exemplified by standing, does not implicate separation of powers analysis.

Political questions require a "relative" analysis, since they are, by definition, constitutionally assigned to political branches. A political issue is not justiciable because to decide it would usurp the powers of another branch. A court therefore, must look to the powers of the other branches first; only if it finds the issue justiciable may it move on to the question of standing.

The focus of standing, however, differs. With standing, the court must take a "pure" article III approach, strictly focused on whether the plaintiff has presented a case or controversy in an abstract sense. Since the court has already determined that the issue is justiciable, the standing inquiry does not require a "relative" approach. This is not to say that standing does not depend on the pronouncements of another branch of government. To the contrary, standing to raise statutory issues should depend entirely on the zone of interests embraced by the underlying statute. But that is because Congress defines a "case" in that situation, and not because recognition or denial of standing would usurp congressional power. In other situations, a litigant's standing may depend on the scope of a particular constitutional protection. The standing of a party therefore simply is not defined, as a matter of separation of powers, with respect to the executive and legislative branches of government.[182]

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stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue.").

181. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).

182. Chief Justice Warren emphasized this distinction 20 years ago:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.

Flast v. Cohen, 392 U.S. 83, 100-01 (1968).

It is thus inappropriate to think of standing as a separation of powers doctrine. Standing is merely one aspect of the "case or controversy" requirement of article III. As courts continue to examine the contours of article III, they must be careful not to confuse the result with the cause. Simply because a potential litigant without standing is by definition forced to resolve her problem elsewhere (or not at all) does not mean that standing is a separation of powers doctrine. It does not mean that the judiciary would have usurped the powers of another branch had it decided the case. It merely means that the plaintiff did not present a case appropriate for judicial resolution in the context of the particular fact situation.[183]

3. *Causation and the Zone of Interests*

If, indeed, standing is not animated by separation of powers principles, then Judge Bork's justification for "relative" causation analysis in standing law must fail, and we are left with "pure" causation.[184] Even Judge Bork, however, recognizes that commonly accepted notions of causation are troubling in the standing context.[185] As explained above, causation is essentially an element of the merits of a claim. A court may dismiss a claim before trial for failure to plead causation properly, but causation analysis does not address the critical standing question of whether *this person* should be entitled to raise an issue in federal court. Indeed, in order to become entitled to plead causation as part of a claim, a plaintiff must show that he is entitled to raise that claim in the first

183. Justice Stevens posits three possible theories for the role of separation of powers in standing analysis. First, it could simply mean that when a person lacks standing, there is no case or controversy, thus "the matter is not within an area of responsibility assigned to the Judiciary by the Constitution." Allen v. Wright, 468 U.S. 737, 790 (1984) (Stevens, J., dissenting). While this is certainly the result of a standing denial, it cannot of its own force provide guidance in the standing inquiry. *Id.*

Second, "the Court could be saying that it will require a more direct causal connection when it is troubled by the separation of powers implications of the case before it." *Id.* But that confuses standing with the justiciability of the issue. "The purpose of the standing inquiry is to measure the plaintiff's stake in the outcome, not whether a court has the authority to provide it with the outcome it seeks." *Id.*

Third, the Court could be saying that it will not consider cases where the injury results from an administrative decision "concerning how enforcement resources will be allocated." *Id.* at 792. This is clearly a separation of powers issue—enforcement of the laws is expressly delegated to the Executive Branch. But here again, does it implicate standing? If the issue is whether or not the executive should enforce a specific violation of the law, then an adjudication of that issue would violate separation of powers. This, however, also concerns the adjudication of the issue itself, not the plaintiff's standing to raise it. Moreover, the question raised in challenges based on statutes is usually whether the action violates the statute, not whether the agency should enforce one violation but not another.

184. *See* Haitian Refugee Center v. Gracey, 809 F.2d 794, 803 (D.C. Cir. 1987).

185. *Id.* at 803-05. Bork notes, for example, the statute at issue in *Linda R.S.* was intended to force fathers to pay child support, and the ruling at issue in *Simon* would tend to discourage hospitals from providing low-cost health care to indigents. *Id.* at 804-05.

place. Causation should not provide an independent basis for denying a plaintiff the chance to litigate an issue in federal court.

An example from administrative law illustrates the inappropriateness of an independent causation inquiry. In order to state a cause of action for damages under section 11 of the Securities Act of 1933, a plaintiff must prove that there was a misstatement or omission of a material fact in a registration statement or prospectus in connection with the purchase of registered securities.[186] The plaintiff must be a purchaser who bought securities that declined in value, but she need not prove that the alleged misstatement or omission caused her loss, that is, the decline in value of her securities.[187] Nevertheless, if current standing doctrine is to be taken seriously, the trial court must first examine, as a matter of its article III jurisdiction, whether the "links in the chain of causation" are strong enough to sustain standing.[188] In a section 11 case, a court could find that the injury—loss in value—was caused by numerous third parties. For example, the loss could have resulted from general market conditions, the poor management of the company, the good management of the company's competitors, an "act of God" that destroyed the company's plant, or any of a number of business circumstances that affect the value of corporate securities. Such an analysis would effectively impose an element of causation on a claim that Congress decided did not need one. Indeed, this unwarranted intrusion by the judiciary into an area substantially regulated by Congress might in itself constitute a violation of separation of powers. In reality, the court would never attempt such a coup, but the example illustrates the problem.

Another more realistic concern is that the court uses the causation requirement to weed out those claims that it does not want to hear.[189] For example, in both *Simon v. Eastern Kentucky Welfare Rights Organization*[190] and *Allen v. Wright*,[191] the Supreme Court refused to allow plaintiffs to assert claims challenging actions by the IRS that apparently permitted tax-exempt organizations to engage in certain illegal activi-

186. 15 U.S.C. § 77k (1982).

187. *See, e.g.*, Greenapple v. Detroit Edison Co., 618 F.2d 198, 203 n.9 (2nd Cir. 1980); *see also* Feit v. Leasco Data Processing Equip. Corp. 332 F. Supp. 544, 585-86 (E.D.N.Y. 1971) (noting that defendant may mitigate damages by showing that part of the decline was caused by other factors).

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

189. *Cf.* Albert, *supra* note 11 (arguing that standing should be viewed as an aspect of the law of claims). Professor Albert's suggestions have apparently been effected in at least one jurisdiction. In Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (1977), the Supreme Court of Colorado stated: "When standing is in issue, the broad question is whether plaintiff has stated a claim for relief which should be entertained in the context of a trial on the merits." *Id.* at 168, 570 P.2d at 539. Professor LeBel, however, notes that in operation Albert's scheme is "wanting, even in the context of judicial review of administrative action." LeBel, *Standing After* Havens Realty: *A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013, 1015 n.8.

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

191. 468 U.S. 737 (1984).

ties.[192] In these cases, the Court used causation analysis as a convenient way to avoid deciding the merits of two especially difficult cases.[193]

The Court in *Allen* and *Simon* apparently felt insecure about the claims presented in the two cases. The Court rarely questions the administration of the tax code, in part because of its underlying statutory structure.[194] Furthermore, the Court may have been responding to a perceived fear of flooding the courthouse with litigants wishing to challenge the tax status of others.[195] Finally, the Court may have perceived the alleged injuries in these cases, racial stigmatization and loss of a previously granted special status, as unworthy of judicial scrutiny in the context of a taxpayer suit.

This use of standing as a substitute for claim analysis is inappropriate.[196] This Comment suggests that the Court should carefully distinguish the substantive issue of standing from the substantive issue of the merits of the case. When a court recognizes or denies standing, it rules on the substantive issue of whether the plaintiffs are entitled to sue, but not on the merits of their claims. In the context of administrative law, the substantive issues of both standing and the merits are usually determined by the underlying statutory structure. It is important, therefore, that the Court refrain from using standing to decide the merits of a claim. The interrelation of the inquiries does not excuse the failure to recognize the essential differences.

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192. *Allen*, 468 U.S. at 750-66 (plaintiffs lacked standing to challenge IRS grant of tax-exempt status to racially discriminatory private school); *Simon*, 426 U.S. at 37-46 (plaintiffs lacked standing to challenge IRS rule change that permitted tax-exempt hospitals to discontinue reduced-cost service to indigents without losing tax-exempt status).

193. Professor Tushnet argues that the Court is not avoiding the merits, but actually ruling on the substantive issue *sub silentio*. Tushnet, *supra* note 2, at 664 n.6.

194. *See infra* note 220.

195. Empirical evidence usually undermines this type of argument. *See, e.g.*, 4 K. DAVIS, *supra* note 34, at 227-28 (fear of opening floodgates has no foundation); Davis, *supra* note 69, at 634 ("Opening the judicial doors to taxpayer suits does not cause floods; it hardly causes trickles.").

196. Professor Scott has responded to some of these criticisms by arguing that use of standing for these types of policy reasons is completely appropriate. He argues that standing law serves two functions: rationing scarce judicial resources ("access standing") and allocating judicial policymaking responsibility ("decision standing"). Scott, *supra* note 29, at 670-90. Scott argues that a plaintiff can prove his "special interest" required for "access standing" simply by showing his willingness to pay the costs of litigation. *Id.* at 692. He argues that the courts are ill-suited for devising and applying any other sort of access screen, though it would be preferable for the legislature to "specify what categories of litigants or litigation" should warrant the subsidy of judicial review. *Id.* at 682.

"Decision standing" apparently refers to the element of justiciability analysis that presents itself in certain standing cases and goes to the proper scope of judicial policymaking. *Id.* at 683. In these cases, where separation of powers concerns are present, "decision standing" is a screen for weeding out cases (rather than plaintiffs) that are inappropriate for judicial determination. *Id.* at 683-90; *see also Panel II: Standing, Participation, and Who Pays?*, 26 ADMIN. L. REV. 423, 430-33 (1974); *cf.* Albert, *supra* note 11, at 425-26 (standing should be viewed as an aspect of a claim).

III
EXPANDING STANDING: THIRD PARTIES AND THE ADMINISTRATIVE PROCESS

Part II of this Comment has attempted to show that a litigant's standing to challenge statutory interpretations should be determined by asking whether the actual or threatened injury is to an interest protected by that statute. This Part suggests that such a standing test will have its greatest impact in the area of administrative law. Administrative agencies are creatures of statute. As such, their obligations and powers are defined and shaped by the underlying statutory structure. Moreover, agency regulation pervades our society.[197] Administrative regulation touches our lives every day.

Nevertheless, challenges of agency action by adversely affected third parties are rare. This is due at least in part to the confusing and restrictive requirements of constitutional standing, particularly the causation requirement.[198] Consider again the section 501(c)(3) organization paradigm discussed in the Introduction. Suppose that an organization, exempt from federal income taxation under section 501(c)(3), begins distributing "voter education" pamphlets touting the credentials of an announced presidential candidate. Suppose further that the candidate owns and controls the organization, and that the organization shares office space with the candidate's taxable political action committee. The IRS, however, summarily decides to renew the group's exemption. Two months later, the candidate wins an election. Shortly thereafter, the

197. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 7 (1938) (including the "rise of democracy" and the expansion of economic regulation as reasons for the growth of agencies).

198. For example, to date, the Supreme Court has never found standing under the zone-of-interests test for any plaintiff not alleging a form of economic injury. *See, e.g.*, Clarke v. Securities Indus. Assn., 107 S.Ct. 750 (1987); Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). Given the broad articulation of judicially cognizable interests in *Data Processing*, this is rather surprising. The Court, however, has had difficulty reaching the zone-of-interests inquiry in other contexts because it cannot get past the causation requirements. In Allen v. Wright, 468 U.S. 737 (1984), for example, the Court never considered whether an injury to the plaintiffs' interest in preventing racial discrimination by private schools fell within the zone of interests protected by section 501(c)(3) of the Internal Revenue Code because it reasoned that the injury could have been caused by actions of the school independent of IRS action. While it seems clear that a nondenigration interest is probably not within the tax code's zone of interests, it again was unfair for the Court to deny the litigants a chance to prove the causal allegations. Had the Court saved the causal question for the merits, it may have come up with a better reasoned, doctrinally sound opinion about how nondenigration interests are not protected by the Internal Revenue Code.

Nevertheless, it is fairly easy for the Court to fit injury to an economic interest within the confines of a traditional injury determination: The injury can be perceived in terms of dollars. The Court may therefore be unwilling to relax its fundamental hostility to third party suits except in the area of economic injury. This is an overly cautious approaeh. Congress acts to protect many interests, economic and otherwise. No doctrinal reason justifies the Court's avoidance of noneconomic interests, so long as the statutory structure permits such a suit.

losers file suit in federal district court against the IRS and the organization. The complaint alleges that their ability to affect the political process was irrationally impaired by the IRS's grant of tax-exempt status to the winner's organization and that the distribution of such pamphlets was not "education," but rather campaigning in violation of section 501(c)(3). Indeed, the tax exemption has amounted to a federal subsidy of the candidate's lobbying efforts to the exclusion of her opponents.[199]

Under the current articulation of standing, the challengers would almost certainly fail to meet the requirements. Even assuming that the court would recognize the political injury as "distinct and palpable," establishing causation elements would be problematic. The loss of the election, and perhaps even the funding differential, could have been caused by numerous third parties. Moreover, even if the court were to order the IRS to revoke the organization's tax-exempt status, the losers would still be losers; the injury would not be redressed.

Under the statute-based standing articulation described in Part II of this Comment, however, these litigants would have a chance to establish their standing to sue. The balance of Part III examines the standing of these plaintiffs in the context of section 501(c)(3). This Part suggests that these third-party litigants should be granted standing to raise the statutory issue of whether the pamphlets were "voter education" or "political campaigning" within the meaning of section 501(c)(3). First, by presenting an analysis of the policy notions underlying the third party beneficiary rule in contract law, this Part argues that these plaintiffs have legitimate, statutorily protected interests as third parties. Second, this Part suggests that, as an institutional policy matter, courts should be willing to recognize the standing of third parties challenging agency action when to do otherwise would effectively and arbitrarily insulate the issue from judicial review. The section 501(c)(3) paradigm is one such situation.

The analysis presented in this Part challenges current practice and thinking. The point, however, is not to definitively answer a question of tax policy or to argue for third party beneficiary standing to challenge administrative action as a general matter. Rather, this Part illustrates the potential benefits of a standing inquiry based on the underlying statute. Once the Court clears away the constitutional clutter, it can focus on the essential question of whether the statute actually protects the interest harmed. In this way, the Court can approach the problem of third-party access to the judicial process with a sensitivity impossible under the current scheme.

199. *See* Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983) ("tax exemptions . . . are a form of federal subsidy that is administered through the tax system . . . [and have] much the same effect as a cash grant").

A. Analogy to Third Party Beneficiaries

In contract law, third party beneficiaries are sometimes permitted to sue to enforce a contract. If the third party was the intended beneficiary of the contract, he may sue to enforce it; if he was merely an incidental beneficiary, he has no enforcement rights.[200] A beneficiary is considered intended if the promisee owes the third party a debt or if the promisee intends to give the third party the benefit of the bargain.[201]

The third party beneficiary rule is essentially a specialized area of standing law. Courts in the United States have recognized that certain contracts affect people other than just the parties to the agreement.[202] The beneficiary rule merely attempts to identify those affected persons who should be entitled to enforce the contract. When it asks whether a particular third party should be able to enforce a contract, a court engages in pure standing analysis.[203]

Professor Waters has argued that the principles embodied in third party beneficiary standing analysis have applications beyond the area of private contracts. He notes that the third party beneficiary rule has quasi-contractual origins.[204] He considers the rule a "restitutionary right to intangible property," rather than a pure contractual right;[205] a right to the "New Property" created by government entitlements to certain classes of persons.[206] Waters illustrates his theory by examining the so-called "public welfare" cases, in which government contracts condition funding upon the grantee conferring a benefit on a third party.[207]

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200. RESTATEMENT (SECOND) OF CONTRACTS § 304 (1979).

201. *See id.* § 302(1); *see also* Lawrence v. Fox, 20 N.Y. 268, 271 (1859).

202. The United States is apparently the only common law country to recognize third party contractual rights. *See* Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule,* 98 HARV. L. REV. 1109, 1111 & n.1 (1985).

203. Third party beneficiary doctrine differs from "third party standing" (or *jus tertii*). The latter describes the situation where a party with standing attempts to assert the rights of a party not before the court. *See supra* note 85. Third party beneficiaries, however, have first party standing: they are attempting to assert their *own* rights under a contract.

Third parties also assert their own rights in standing cases involving administrative action. For example, in several cases, affected parties have tried to challenge the tax-exempt status of an organization despite being third parties with respect to the relationship between the IRS and the organization. *See, e.g.,* Allen v. Wright, 468 U.S. 737 (1984) (parents of black schoolchildren challenged the tax-exempt status of allegedly discriminatory private schools); Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982) (granting in part and denying in part a motion to dismiss for lack of standing a claim that the Roman Catholic Church's allegedly political antiabortion activity should disqualify it from tax-exempt status), *on appeal sub nom. In re* United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987), *cert. granted sub nom.* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 484 (1987), *remanded,* 108 S. Ct. 2268 (1988) (remanded to Second Circuit for resolution of standing issue).

204. Waters, *supra* note 202, at 1116-21.

205. *Id.* at 1115.

206. *Id.; see* Reich, *The New Property,* 73 YALE L.J. 733 (1964).

207. Waters, *supra* note 202, at 1184-92.

In several recent cases concerning public welfare programs, federal courts applied third party beneficiary rules and allowed suits by affected third parties challenging the administration of contracts between the government and private citizens. In *Holbrook v. Pitt*,[208] for example, the Seventh Circuit held that tenants had a right to enforce a contract between the Department of Housing and Urban Development and the owner of a low-income housing complex. The owner had failed to certify, pursuant to the terms of the contract, that the tenants were eligible for federal rent subsidies, and those tenants who were indeed eligible sued as third party beneficiaries to force certification.[209] According to the Restatement, courts determine third party contract rights by examining the intent of either original party to the contract.[210] In *Holbrook*, however, the court examined the purposes of the contract itself,[211] and determined that because *the contract* was intended for the benefit of the tenants, they could sue as third party beneficiaries.[212]

The *Holbrook* analysis has interesting implications for third party challenges in administrative law cases. The fundamental premise of the court's reasoning was that, despite the contractual relationship between

208. 643 F.2d 1261 (7th Cir. 1981).

209. *Id.* at 1265-66.

210. RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (requiring examination of the intent of the promisee).

211. *See Holbrook*, 643 F.2d at 1271.

212. Section eight of the United States Housing Act of 1937, ch. 896, 50 Stat. 888 (amended by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 42 U.S.C. § 1437 (1982)) provides a comprehensive program of federal housing assistance for low-income persons. The policy is generally implemented by direct subsidies to owners of apartments who certify that their tenants meet the income requirements of the Act. For a discussion of this provision see *Holbrook*, 643 F.2d at 1266-69.

Other courts have used third party beneficiary rules to permit third parties to enforce agreements between administrative agencies and private citizens. *See* Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 850 (5th Cir.) (holding children on an Air Force base third party beneficiaries of an agreement between the federal government and the local school district to provide access to public schools equally to all residents), *cert. denied*, 388 U.S. 911 (1967); Fuzie v. Manor Care, Inc., 461 F. Supp. 689, 697-98 (N.D. Ohio 1977) (holding medicaid patients third party beneficiaries of an agreement between state and federal government concerning use of federal medical funds); Zigas v. Superior Court, 120 Cal. App. 3d 827, 174 Cal. Rptr. 806 (1981) (tenants third party beneficiaries of contracts between landlords and the Department of Housing and Urban Development made under HUD's statutory authority), *cert. denied*, 455 U.S. 943 (1982). Other courts have rejected this reasoning. *See, e.g.*, Hodges v. Atchison, T. & S.F. R.R., 728 F.2d 414, 416 (10th Cir.) (dismissing the third party beneficiary claim as "but another aspect of the implied right of action argument"), *cert. denied*, 469 U.S. 822 (1984).

The Supreme Court has never directly considered the subject. Certain cases, however, have hinted that the Court may one day recognize third party beneficiary analysis in administrative settings. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17-18 (1981) (describing a statutory scheme in terms of contractual obligations while denying an implied right of action). Moreover, Justice Marshall has noted the "analogy . . . between the acceptance of funds under spending legislation and the formation of a contract," and the possibility of recognizing third party beneficiaries under such a scheme. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 632 (1983) (Marshall, J., dissenting).

the government and the landlord, Congress was actually protecting the interests of the tenants when it enacted the statute. It is a perfectly sensible policy to allow suits by those protected persons, based on the statutory structure, since they are the ones most affected by the statute in question. Certainly the landlord, who allegedly violated the law, has no incentive to sue. Nor does the government agency that dispenses funds, since the agency's financial liability increases with each certified tenant.

The primary parties' lack of incentive to sue, which is the chief concern of the third party beneficiary rule, applies equally well to administrative law. Focusing on the intent to confer a benefit is one practical way to resolve the problem of third party challenges, in both contract and administrative actions. The clear and specific intent required before private contracts create third party rights, however, would not be an appropriate standard by which to judge third party challenges to agency action, since the intent standard is based on the premise that two uninterested parties will rarely form a contract for the benefit of a third party.[213] In contrast, Congress routinely enters into relationships with one party to protect the interests of others. The statutory scheme in *Holbrook* is a perfect example. Another example is the political restrictions imposed by section 501(c)(3).

At first blush, the prohibitions on campaigning and excessive lobbying in section 501(c)(3) seem odd. The IRS, as a revenue collection agency, has no real interest in campaigning or lobbying except to the extent that it affects tax law. Similarly, Congress' concern with tax-exempt organizations should be whether they are operated for one of the enumerated exempt purposes, not whether they achieve that purpose through lobbying.

The legislative history of section 501(c)(3) yields little insight into its purpose. The lobbying prohibition was added in 1934, without hearings, apparently sponsored by a senator with a personal grudge against one particular organization.[214] The political activity prohibition was sponsored by then-Senator Lyndon Johnson in the 1950s, also for personal reasons.[215] One commentator suspects that its original purpose was to curb the political power of the wealthy, presumably because they comprise the majority of contributors to tax-exempt organizations.[216]

213. The notion of contracting for another's benefit is directly antithetical to the basis of a bargain. *See* Eisenberg, *The Bargain Principle and Its Limits,* 95 HARV. L. REV. 741, 744 (1982) ("a bargain promise is rooted in self-interest rather than altruism").

214. *See* B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 265 (5th ed. 1987).

215. *Id.* at 281 (reporting that Johnson apparently wanted to dampen the activities of a group that had given money to his opponent in the previous election).

216. R. HOLBERT, TAX LAW AND POLITICAL ACCESS: THE BIAS OF PLURALISM REVISITED 27 (1975). The tax deduction incentive offered by section 170 of the Code clearly benefits wealthy taxpayers. *See* I.R.C. § 170 (Supp. IV 1987).

Whatever the origins of the section 501(c)(3) exemption, the Supreme Court recently held that it is in reality a "subsidy administered through the tax system," equivalent to a "cash grant."[217] The subsidy can be characterized as conditioned on the promise of an organization not to engage in prohibited political or legislative activity. It is at least plausible that this promise is not intended to benefit either of the parties to the "agreement" (the IRS or the organization), but rather benefits that group of individuals and organizations actively engaging in political activity. Thus, one purpose of the restriction is to discourage the subsidy from creating an unfair imbalance in the political arena.

This type of analysis, clearly analogous to the reasoning in *Holbrook*, would lead to recognition of standing in a political competitor of a section 501(c)(3) organization who challenged that organization's tax-exempt status on the basis of its illegal political activities. The interest of the competitor in an unsubsidized political arena is analogous to the interests of the tenants in *Holbrook*. Even if it is not a vested interest in "New Property," to borrow Professor Waters' terminology,[218] it is an interest at least arguably protected by the underlying statute. A third party beneficiary analysis of section 501(c)(3) that looks to the purpose of the statute is a sensible way to ensure statutory compliance and fairness in the political process and to provide political opponents with a forum to vindicate their statutorily protected interest.

The demonstration that third parties have protected interests in contracts thus suggests a parallel to the statutory interests of third parties challenging administrative actions. This comparison uses the nonenforcement rationale of third party beneficiary rules to permit recognition of the interests of political opponents in section 501(c)(3). It is proposed exclusively as a means for determining standing to enforce a statutory obligation; opponents should not now be able to sue for expectation or restitutionary damages. Most importantly, however, the third party beneficiary analysis illustrates the potential of the statute-based standing formula developed in Part II, which would allow for a sensitive appraisal of the various interests protected by the statute.

The above analysis does not purport to be the definitive or final explication of the intended purposes of section 501(c)(3). The interest of political competitors in an unsubsidized political process is merely one interest protected by the statute. Though perhaps not the sole purpose, that interest is nonetheless sufficient to establish standing.[219]

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217. Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983).

218. *See supra* text accompanying note 206.

219. Justice Brennan has alluded to beneficiary analysis to sustain standing to challenge the constitutionality of a statute under the establishment clause. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 504 (Brennan, J.,

B. *Diminishing the Possibility of Unreviewable Discretion*

A recurring problem arising from the denial of standing to third parties challenging administrative action is that this denial can encourage the agency to engage in illegal conduct. This problem is particularly acute in third-party challenges to IRS decisionmaking.[220] This Section proposes that, when appropriate, courts should consider whether a denial of standing in a given case will permit the agency to interpret its statute free from all possibility of judicial review. Moreover, this section demonstrates that a statute-based standing analysis can better accommodate these institutional concerns than the constitutional regime.

There is nothing doctrinally unsound about a court looking to such practical concerns as unreviewable discretion when defining standing, especially where the statutory structure allows for such an inquiry. Indeed, the Supreme Court has in the past shown a willingness to depart from formal doctrine in other "case or controversy" analyses and, on occasion, even in standing cases.

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dissenting). After examining the history of the establishment clause, Brennan noted: "*The taxpayer [plaintiff] was the direct and intended beneficiary of the [clause's] prohibition on financial aid to religion.*" *Id.* (emphasis in original). According to Brennan, this intended beneficiary status was sufficient to sustain standing despite problems with the sufficiency of the injury. This type of analysis, which looks solely to the purposes of the underlying law, coincides with the analysis presented in this Comment.

220. In American Soc'y of Travel Agents (ASTA) v. Blumenthal, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 947 (1978), the court denied standing to a group of travel agents challenging IRS treatment of tax-exempt competitors because the injury alleged was too abstract and speculative. *Id.* at 148-49. Chief Judge Bazelon, dissenting, found the completely unreviewable discretion of the IRS in these cases "discomforting," especially since the action was allegedly illegal. *Id.* at 152 n.2 (Bazelon, C.J., dissenting). *See generally* Note, *Standing to Challenge Internal Revenue Service Decisionmaking: The Need for a Better Rationale,* 6 HOFSTRA L. REV. 1041 (1978) (authored by Clifford Gerber) (detailed analysis of this case).

Justice Stewart noted that he could not "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." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 46 (1976) (Stewart, J., concurring). Chief Judge Bazelon, however, has commented:

> [I]t must be recognized that the [tax] Code is a statutory system designed delicately to balance the relationships among economic entities. To permit tax liability to be challenged only by the taxpayer himself is in effect to permit the IRS virtually unfettered discretion in adjusting these economic interrelationships. The spectre of such unreviewable discretion, especially when . . . it is exercised in contradiction to the commands of Congress, is . . . discomforting.

ASTA, 566 F.2d at 152 n.2 (Bazelon, C.J., dissenting from denial of standing).

While Justice Stewart's question was specifically left open by the Supreme Court, his opinion is bolstered by specific statutory language. Section 7421(a) of the Internal Revenue Code provides: "Except [for certain limited circumstances,] no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . ." I.R.C. § 7421(a) (1982). Chief Judge Bazelon responds: "[I]t does not bar suits seeking to *compel* the collection of taxes." *ASTA,* 566 F.2d at 153 n.4 (Bazelon, C.J., dissenting) (emphasis added).

1. Recent Expansions of Ripeness and Mootness

The development of the doctrine of ripeness illustrates the Supreme Court's distinct inclination to abandon its traditional formalistic notions and to incorporate certain practical inquiries in the interests of fairness. Until the 1960s, the ripeness determination turned on whether an issue had matured enough for judicial review.

> [The] basic rationale [of ripeness] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[221]

Abbott Laboratories Inc. v. Gardner,[222] however, added a practical element to ripeness law. Today, the ripeness inquiry balances the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[223] The Court realized that its refusal to consider certain cases until the issue ripened with the passing of time unfairly harmed the interests of some complaining parties. The Court thus rejected strict adherence to formula and gave judicial recognition to the potential for injury caused by waiting until an issue was technically fit for review.

As with ripeness, courts have shown a willingness to depart from established mootness doctrine where practical reasons dictate. A court will hear an otherwise moot case where the issue is "capable of repetition, yet evading review."[224] This formulation has permitted courts to hear cases that by their very nature would foil all attempts at judicial review. For example, in *Roe v. Wade,*[225] the Supreme Court allowed a woman to challenge a Texas antiabortion statute despite the fact that her condition of pregnancy had long since passed. The Court reasoned that the overburdened nature of our judicial system precluded a woman from bringing such a case before the Court while still pregnant. Therefore, it was willing to deviate from its established mootness doctrine.[226]

The Court's willingness to recognize the practical concerns affecting ripeness and mootness holds great promise for standing. The evolution of mootness and ripeness demonstrates that article III jurisprudence is

221. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

222. 387 U.S. 136 (1967).

223. *Id.* at 149.

224. Southern Pac. Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911).

225. 410 U.S. 113 (1973).

226. Another positive outgrowth of the Court's departure from rigid article III reasoning is the development of the underlying substantive law. *Roe v. Wade*, for example, has become one of the most controversial cases in constitutional history, sparking commentary and cases that question the very foundations of the Constitution.

not set in stone: that the definition of a case or controversy is not absolute. Despite the fact that ripeness and mootness are "constitutional" doctrines, ripeness accommodates practical concerns based on the realities of the administrative process, while mootness accommodates the realities of the court system.

2. *Recent Expansions of Standing*

When a court denies standing to a third party challenging administrative action, this often means that the agency may continue its allegedly illegal behavior. For example, denial of standing to a political competitor in the 501(c)(3) hypothetical would mean that, all other things remaining the same, the IRS could continue to grant a tax exemption to the challenged organization. If the IRS does not enforce its statute, no one will, since the organization itself certainly has no incentive to sue. There is no reason, however, why the Supreme Court could not allow an overt judicial inquiry into the possibility of unreviewable agency discretion when analyzing a party's standing to challenge administrative action.[227]

Though not to the same extent it has demonstrated in ripeness and mootness, the Court has at times shown a willingness to depart from traditional standing dogma in order to hear the merits of particularly important cases. For example, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[228] the Supreme Court found that an environmental organization had standing to challenge the civil liability limitations imposed on nuclear power plant accidents by the Price-Anderson Act. The plaintiffs alleged that the liability cap violated the takings clause of the fifth amendment because it would result in inadequate compensation to victims of nuclear accidents.[229] The Court found sufficient injury and causation to recognize standing even though there had been no accident in which the Act's liability cap had resulted in decreased compensation.

Chief Justice Burger, writing for the majority, attempted to fit the facts of the case into a traditional standing analysis. He reasoned that, were it not for the Act, certain power plants would not have been built, and argued that these plants produced small quantities of nonnatural radiation, a "sharp increase" in the temperature of certain nearby lakes,

227. The Court long ago recognized the importance of allowing suits to challenge administrative action where to do otherwise would result in unredressed injuries: "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 95 (1836).

228. 438 U.S. 59 (1978).

229. *Id.* at 69.

and other injuries unrelated to a nuclear accident.[230] Justice Stevens, however, took the long view. He noted the "national interest in removing doubts concerning the constitutionality of the Price-Anderson Act."[231] He further characterized the Court as performing an act of "statesmanship"[232] by abandoning traditional standing doctrine in order to hand down an important ruling with enormous political and economic repercussions.

A more recent case presents a more striking example of the Court's occasional willingness to ignore strict standing doctrine. In *Havens Realty Corp. v. Coleman,*[233] an organization promoting equal opportunity in housing employed two "testers," one black and one white, to determine whether Havens Realty practiced illegal "racial steering" practices in violation of section 804 of the Fair Housing Act of 1968.[234] The two similarly situated testers independently inquired of Havens Realty regarding the availability of apartments in the Richmond, Virginia area. On four documented occasions, the black tester was told that there were no available vacancies while the white tester was directed to vacant apartments. In a sensible analysis, the Court decided that since the Act prohibited racist practices directed to "any person," the black tester was entitled to sue despite his having suffered no distinct and palpable injury as he already had a place to live. "A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions."[235]

Havens Realty is an important example of the Court's willinguess to modify traditional standing doctrine in order to effect the congressionally mandated enforcement of a statute. The Court recoguized that unless public interest groups engaged in this sort of investigative behavior, many instances of illegal discrimination would go unredressed. It would completely foil the purposes of the statute if black testers were not allowed to sue.[236]

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230. *Id.* at 73.

231. *Id.* at 103 (Stevens, J., concurring).

232. *Id.*

233. 455 U.S. 363 (1982).

234. *Id.* at 366-69.

235. *Havens Realty,* 455 U.S. at 373-74. Interestingly, the white tester was denied standing, the Court noting that he failed to allege any actual misrepresentation to himself. *Id.* at 375. For a criticism of this aspect of *Havens Realty,* see LeBel, *supra* note 189, at 1020-24. This Comment takes no position on the white versus black tester issue, agreeing only with the methodology of the Court's reasoning apart from its result.

236. The ideal of enforcing congressional mandates where standing will allow flows directly from the integration of powers concept presented above. *See supra* text accompanying notes 136-37. When the drafters of the Constitution established the three-headed monster, they gave Congress the

A similar policy analysis can be applied to third-party challenges to administrative action. Like the statute in *Havens Realty,* the Administrative Procedure Act provides for judicial review for any person "adversely affected or aggrieved . . . within the meaning of a relevant statute."[237] This language underscores a fundamental congressional concern with the role of agencies in our system of government. The APA's implicit recognition of the possibility of third-party injury from agency action should serve as a guide to the Supreme Court in its development of standing doctrine in the administrative context.

The case of third-party challenges of a section 501(c)(3) organization's tax-exempt status illustrates how such an inquiry would proceed. The effect of an IRS ruling can have an impact on third parties, resulting in a distinct and palpable injury. If those parties are not permitted to sue as persons "adversely affected or aggrieved" under the APA, who will be? Assuming that the IRS is unwilling to enforce its statute, if these hypothetical political competitors are denied standing, the IRS will be vested with unreviewable discretion to promulgate illegal rulings. This danger of unfettered discretion, coupled with the plaintiff's assertion of a protected statutory interest, should be sufficient to confer standing in federal court. Furthermore, judicial recoguition of such a practical concern is not inappropriate in light of the similar evolution of the ripeness and mootness doctrines, and standing decisions such as *Duke Power* and *Havens Realty.*

CONCLUSION

The current articulation of the law of federal standing is characterized by years of inconsistent, directionless, and uncertain opinions, which have created a particularly egregious situation for plaintiffs challenging federal administrative agency action. Despite the pervasiveness of agency regulation in our daily lives, third-party plaintiffs are finding it increasingly difficult to litigate essentially straightforward questions of statutory interpretation due to the restrictive requirements of standing. This Comment argues that the standing of a litigant who seeks to adjudicate questions of statutory interpretation should be evaluated *solely* by whether his allegedly injured or threatened interest is within the scope of the protection afforded by that statute.

This analysis requires a reevaluation of the constitutional basis of standing and concludes that the Supreme Court should eliminate the causation requirements from the standing inquiry, thereby regrounding

biggest brain. The Constitution "leave[s] the shaping of government in Congress' hands." W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, ADMINISTRATIVE LAW: CASES AND COMMENTS 47 (8th ed. 1987).

237. 5 U.S.C. § 702 (1982).

standing analysis in the underlying substantive law. With issues of causation properly left to the merits, the Court can better focus on the problems of third-party challenges of administrative action. This Comment then suggests that by incorporating the policy notions underlying the contract doctrine of third party beneficiaries, and by requiring overt judicial consideration of the possibility of unreviewable agency discretion to interpret its statute, the Court can increase judicial sensitivity to the needs of directly injured, statutorily protected third parties who are currently excluded from the federal courts.