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CASTE AND THE CIVIL RIGHTS LAWS: FROM JIM CROW TO SAME-SEX MARRIAGES

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SUMMARY:

... The battle over civil rights law has been waged on many different fronts at the same time. ... But the language of moral irrelevance quickly disappears from view when the question is whether affirmative action programs should redress grievances against particular groups, or whether considerations of diversity should permit - or require - institutions to take into account matters of race or sex in order to obtain the proper internal institutional balance, independent of whether the individuals involved have been the targets of past discrimination. ... This more limited notion of caste supplies no justification for the enforcement of any civil rights law that purports to limit the freedom of association among individuals, whether their connections be intimate and personal, economic and professional, or religious and social. ... The first effort to expand the notion of caste beyond its formal base has been in the area of race relations. ... Thus the Colorado decisions stress that what is at stake is not gay and lesbian relations as such but their connection to participation in the political process: ... It has long been fashionable in legal and policy debates to decry the distinction between de jure and de facto, between formal legal differences and social imbalances. ...

TEXT:

[\*2456]

The battle over civil rights law has been waged on many different fronts at the same time. Historically, the emphasis has been on the manifest injustices that dominant groups have inflicted on other groups with less political power. Economically, the dispute has been over whether civil rights legislation will increase or reduce overall levels of production. Sociologically, the question has been whether civil rights legislation can overcome hierarchy and foster a sense of community among equals, or whether it increases levels of group consciousness, which in turn leads to issues of group separation.

In most modern settings, this search for rationales has not stemmed from any doubt about the wisdom or even the necessity of civil rights laws. Quite the opposite, the desirability of these laws is usually taken for granted, and the inquiry then proceeds with the aim of finding the most powerful intellectual

base on which these laws can rest. But the evident increase in racial and ethnic conflict and the massive attention to sex differences or gender relations - even the terms used in the debate will say a lot about which side an advocate is on n1 - show that the old confidence about the desirability of these laws has been shaken by an ever-increasing awareness that things have not turned out quite the way the supporters of civil rights legislation had hoped.

-Footnotes-

n1. For a recent overview, see Alan Wolfe, *The Gender Question*, *New Republic*, June 6, 1994, at 27 (reviewing Sandra L. Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* (1993), Helen W. Haste, *The Sexual Metaphor* (1994), and Judith Lorber, *Paradoxes of Gender* (1994)).

-End Footnotes-

That sense of disappointment is evident in the disagreement over fundamental objectives. On the one hand, commentators commonly proclaim that the purpose of civil rights legislation is to make institutions and individuals ignore those differences of race [\*2457] and sex that are morally irrelevant from a proper point of view. n2 That line of argument works well when the question is whether someone from a privileged class - usually, but not always, a white male - should be allowed to indulge a "taste" for discrimination against individuals who fall outside that preferred group. But the language of moral irrelevance quickly disappears from view when the question is whether affirmative action programs should redress grievances against particular groups, or whether considerations of diversity should permit - or require - institutions to take into account matters of race or sex in order to obtain the proper internal institutional balance, n3 independent of whether the individuals involved have been the targets of past discrimination. These two conceptions clash in uncomfortable ways and have led to a certain amount of bobbing and weaving in an effort to justify state-imposed preferences that to the undiscerning eye may look like forms of reverse discrimination, all for motives that could vary from lofty to suspect, depending on the interlocutor's point of view.

-Footnotes-

n2. The most systematic and thorough application of the caste principle to modern questions of race and sex discrimination is Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410 (1994) (this issue), which ably presents a defense of the caste principle to which this article is in part a response.

n3. Judith Lorber, it appears, argues for "scrupulous gender equality," meaning that 50% of the employees in each job category should be male and 50% should be female. See Lorber, *supra* note 1, at 298; see also Wolfe, *supra* note 1, at 32. Lorber cares not a whit for total output - which will fall precipitously - or for individual freedom - which will disappear under the crush of government mandates.

-End Footnotes-

The utter ambivalence over the nature and justification of civil rights laws is not easily remedied, and perhaps we should not even try to supply the

needed rationalizations. I have stated as openly, forcefully, and frequently as I can: these laws should be repealed as quickly as possible to the extent that they regulate the behavior of private parties in competitive employment markets, and indeed in other competitive markets, such as education and housing. n4 The point of this argument is that open markets can allow separate and distinct institutions to forge their own policies on discrimination. Burning questions of diversity and affirmative action need no longer be collective issues, and governments do not have to decide, [\*2458] once and for all, whether they believe in color-blind rules, affirmative action, diversity, or strict proportionality, nor do they have to do the mental gymnastics necessary to defend all these positions simultaneously. Separate institutions can go their separate ways. The overall level of social output should increase without the dangerous side effects and resentments that are brought on by ever more intrusive forms of government regulation. More important, perhaps, the truly powerful and insidious institutions of caste and domination could not survive in a world in which the presumption was set against the exercise of state power, the law of contracts enforced private bargains, the law of tort controlled private aggression, and public officials acted in a neutral and impartial fashion toward all citizens in the protection of these private rights.

-Footnotes-

n4. See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992). For subsequent elaborations, see Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 *San Diego L. Rev.* 1 (1994) [hereinafter *Epstein, Standing Firm*] (answering my many critics), and Richard A. Epstein, *Why the Status Production Sideshow; or Why the Antidiscrimination Laws Are Still a Mistake*, 108 *Harv. L. Rev.* (forthcoming Mar. 1995) (commenting on Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *Harv. L. Rev.* (forthcoming Mar. 1995)).

-End Footnotes-

The usual response, however, has not been to give up on civil rights laws but to find ways to imbue them with a new life and vitality. One way to achieve that goal is to create the kind of focus on outrages and abuses that lent the movement its great moral power in the years before 1964. It is, I think, not quite coincidence that public television often replays the clips of Marion Anderson singing "My Country 'Tis of Thee" on the steps of the Lincoln Memorial and relives the early triumphs of Thurgood Marshall in *Brown v. Board of Education*. n5 It is a form of nostalgia that allows the rejuvenation of a social fabric grown weary with the travails of Benjamin Chavis. n6 More generally, the effort has been to show that the evils of racism and sexism that we face today are, in more subtle form, the same evils we have faced in times past. One way to achieve that result is to claim that we have today, again in more subtle form, the same kind of economic and social "caste" system that operated in the Old South during the heyday of Jim Crow. The social and legal barriers that are still in place prevent the emergence of the kind of social equality and economic competitiveness that would render all forms of civil rights laws unwise and unnecessary. Until that equality emerges, some form of government action is necessary to redress the injustices of the past and to restructure the society of today.

-Footnotes-

n5. 347 U.S. 483 (1954).

n6. See Ellis Cose & Vern E. Smith, *The Fall of Benjamin Chavis*, Newsweek, Aug. 29, 1994, at 27; Steven A. Holmes, *After Ouster of Chavis, Uncertainty for N.A.A.C.P.*, N.Y. Times, Aug. 28, 1994, 4, at 2.

- - - - -End Footnotes- - - - -

I think that any effort to portray the current social situation as the outgrowth of traditional castelike policies confuses the outgrowth of multiple and uncertain social forces with explicit legal [\*2459] distinctions. We must be aware of establishing formal distinctions between persons, sanctioned and recognized by law - an establishment that helps to perpetuate the same rigid class distinctions that a liberal society should seek to obviate. This result is evident in the work of radical feminists who want to impose their own vision of a just society on those who do not share their own beliefs and conviction. But it is also evident in the work of moderate institutions that are not attentive to what those feminists do.

One illustration will have to suffice. The evolution of the 1964 Civil Rights Act n7 shows how easy it is for castelike notions to creep in through the back door of the very law that was designed to expel them. The original text is the paragon of neutrality insofar as it makes it unlawful for any employer - not all people or all employees - "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." n8 The studied effort of the section is to use impersonal language that speaks of a universal obligation, the antithesis of caste. But in just one unthinking decision, *McDonnell Douglas Corp. v. Green*, n9 the Supreme Court changed the ground rules under the Act from universal to particularistic when it announced that any individual could make out "a prima facie case of racial discrimination ... by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open." n10 But it is a whopping non sequitur to declare that only members of racial minorities can be victims of racial discrimination under the statute, even if such individuals are in fact more likely to be the targets of such discrimination. The casual way in which the Supreme Court imposed formal restrictions on eligibility under the Civil Rights Act at that first stage of the prima facie case shows how easy it is to introduce castelike distinctions into a law that a few short years before had been dedicated to their elimination. From the use of protected classes, it is only a short step to the idea of affirmative action, n11 [\*2460] which adds the carrot to the stick and further reinforces the race and sex distinctions the statute was designed to eliminate.

- - - - -Footnotes- - - - -

n7. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. 2000a-2000h-6 (1988)).

n8. 42 U.S.C. 2000e-2(a)(1) (1988).

n9. 411 U.S. 792 (1973), criticized in Epstein, *supra* note 4, at 167-81.

n10. 411 U.S. at 802.

n11. See David A. Strauss, *Biology, Difference, and Gender Discrimination*, 41 DePaul L. Rev. 1007, 1019 (1992) (agreeing with my analysis that the use of protected classes and affirmative action are not significantly distinct, but reaching the opposite conclusion - that is, that both practices should be preserved).

-----End Footnotes-----

In this essay, therefore, I address the notion of caste in two separate contexts: in the traditional disputes over race and sex, and in the more modern disputes over sexual orientation. In both cases the idea of caste and its kindred notions of subordination and hierarchy are used to justify massive forms of government intervention. In all cases I think that these arguments are incorrect. In their place, I argue that the idea of caste should be confined to categories of formal, or legal, distinctions between persons before the law. This more limited notion of caste supplies no justification for the enforcement of any civil rights law that purports to limit the freedom of association among individuals, whether their connections be intimate and personal, economic and professional, or religious and social. But by the same token, this limited conception mirrors the older conception of civil rights law - a conception that restored to individuals the capacity to contract and to form associations of their own choosing. n12 Judged by that standard, many laws on the books today are illegitimate, limiting associational choice between individuals, as laws once did under Jim Crow in the South, or as the pre-twentieth-century legal disabilities of women did. In particular, the current prohibitions against same-sex marriages are themselves a mistake - regardless of what one thinks of the wisdom or morality of these marriages - and should be rejected as inimical to the basic principle of freedom of association on which a liberal society should rest. Rightly understood, the idea of caste works best when confined to its original understanding. The effort to expand that conception obscures the critical distinction between removing and imposing state barriers to voluntary associations. The older, liberal conception of civil rights law thus makes far more sense than its modern competition.

-----Footnotes-----

n12. For a longer discussion, see Richard A. Epstein, *Two Conceptions of Civil Rights*, Soc. Phil. & Pol., Spring 1991, at 38.

-----End Footnotes-----

I. Race and Sex

The first effort to expand the notion of caste beyond its formal base has been in the area of race relations. It is easy to denounce the Jim Crow rules of the old South as the creation of a caste system insofar as the system had formal segregation in public schools, explicit racial segregation on public transportation, and an explicit [\*2461] prohibition on racial intermarriage. Kenneth Karst, a champion of the communitarian view, has stated this position well. n13 The Court upheld these racial restrictions in *Plessy v. Ferguson*,

n14 and it took not only Brown v. Board of Education n15 but a host of other decisions to root out segregation in American life. n16 But the identification of these restrictions as abuses need not translate into a need for big government. Quite the opposite - the removal of these restrictions is perfectly consistent with the program of a limited-state libertarian, an individualist to the core, who wholeheartedly champions the civil rights movement to the extent that it allows all persons the equal protection of the common law rules of property, contract, and tort, and equal legal rights to vote and otherwise participate in public affairs. The first civil rights movement aimed to assure the capacity of all persons to enter into voluntary transactions, to hold property, and to sue and be sued, n17 and insofar as it sought to create capacities and remove legal disabilities, it is an essential part of the liberal and individualist program to the same if not greater extent than it is part and parcel of the modern civil rights agenda.

- - - - -Footnotes- - - - -

n13. See Kenneth Karst, Equality and Community: Lessons from the Civil Rights Era, 56 Notre Dame Law. 183, 200-14 (1980); Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303 (1986) [hereinafter Karst, Paths to Belonging]. Karst writes:

Jim Crow illustrates the main technique of nativist domination: the enforced separation of members of the subordinate cultural group from a wide range of public and private institutions that, in the aggregate, constitute "society." Racial segregation in the American South was the successor to slavery and the Black Codes, both of which had been decisively made unlawful by congressional legislation and the Civil War amendments. In this historical context it is easy to see Jim Crow for what it was: a thoroughgoing program designed to maintain blacks as a group in the position of a subordinate racial caste by means of a systematic denial of belonging.

Id. at 320-21.

n14. 163 U.S. 537 (1896).

n15. 347 U.S. 483 (1954).

n16. See, e.g., Turner v. City of Memphis, 369 U.S. 350 (1962) (municipal airport restaurant); New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); see also Karst, Paths to Belonging, supra note 13, at 323 n.136.

n17. See Act of Apr. 9, 1866, ch. 31, 1, 14 Stat. 27 (codified as amended at 42 U.S.C. 1982 (1988)) (addressing the right to hold property); Act of May 31, 1870, ch. 114, 16, 16 Stat. 144 (codified as amended at 42 U.S.C. 1981 (1988)), amended by 42 U.S.C. 1981(a) to 1981(c) (Supp. V 1993) (addressing the right to enter into contracts and the right to sue and be sued).

- - - - -End Footnotes- - - - -

The modern antidiscrimination norm requires each person within a group to treat with equal respect all other persons, regardless of their race, creed, sex, religion, or national origin. These principles are designed not to further the principle of freedom of [\*2462] association but to limit its scope, in effect, by requiring that certain characteristics regarded as morally irrelevant by some general theory must be treated as irrelevant by all individuals in their private decisions - with the usual sting - whether they like it or not. In part this theory seeks to rely on the same set of instincts that led the first wave of civil rights reform; it indicates that persons - notably blacks and women - who have been treated as inferiors and subordinates in their economic or social status should be accorded the special protection of the law. n18

-Footnotes-

n18. See, e.g., Sunstein, supra note 2, at 2428-29.

-End Footnotes-

Yet here there is a fatal flaw in the effort to link the formal differences in legal status with the economic and social deprivations that some groups suffer, or are said to suffer, in society - in effect, to make disparate results in gross statistical analyses of economic success analogous to caste. We should remember, though, that caste is not a synonym for subpopulation. Caste means something very specific - that is, a hereditary class structure. Thus my Webster's gives as its first definition of caste a narrow one: "one of the hereditary social classes in Hinduism." n19 The stress on hereditary positions in a caste does not seem to transfer easily to the contemporary American environment, in which no formal structures - except, of course, the civil rights laws - enforce social or economic stratification based on inborn characteristics. This is especially true in a world of racial intermarriage, and without some very sophisticated translation, the focus on hereditary positions makes no sense at all with respect to distinctions between men and women.

-Footnotes-

n19. Webster's Ninth New Collegiate Dictionary 212 (1984). The more general definition refers to "a division of society based on differences of wealth, inherited rank or privilege, profession, or occupation." Id.

-End Footnotes-

Most importantly, however, castes are formal constructs that tie explicit privileges to each discrete status. But there is no lockstep connection between group identity and economic position. It is possible for a group to be the target of legal discrimination and subordination on the one hand and yet to be economically prosperous on the other. That was surely the case in the early years of the Nazi regime for the Jews, who were at best second-class citizens, and is the lot of many Indians who have left India and have settled and worked in various African countries.

Any concern with economic differentials and disadvantages should not blind us to the fact that first and foremost in any caste system is the traditional concern with explicit legal differences in capacities or entitlements based on the accidents of birth: race, sex, [\*2463] religion, and national origin. The effort to find evidence of de facto discrimination should not blind us to

the obvious point that de jure, explicit, and formal discriminations by the state are still the first evil, whether or not they produce the economic inequalities with which they are often, but not necessarily, associated. It is dangerous to pump up economic and social differences by using a word that makes them sound like formal legal distinctions imposed by operation of law and against the will of the parties so bound and disadvantaged.

As one might expect, the economic data are balky as well. African Americans today do not do well by many of the standard measures of success. The United Nations Development Programme (UNDP) has constructed a human development index, incorporating three basic elements by which it rates various nations and groups within nations: life expectancy at birth, education, and income. n20 Under these measures the United States is said to rank sixth behind Japan, Canada, Norway, Switzerland, and Sweden, n21 though the differences among these nations are all trivially small, with numbers ranging from 0.983 for Japan to 0.976 for the United States. n22 But the story is quite different when the divisions are made by race. On that scale American whites move to first place on the list, a small change given the defects in the basic index. But American blacks receive a score of 0.875, which would place them in thirty-second place on the list of nations, just behind Trinidad and Tobago, while American Hispanics - including many recent immigrants from Latin America, so the figure is systematically misleading - would rank thirty-fifth, just behind Estonia, with an index of around 0.87. n23 The data should surely give everyone pause. [\*2464]

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n20. United Nations Dev. Programme, Human Development Report 1993, at 10, 104 (1993) [hereinafter Human Development Report]. The Human Development Index (HDI) ranges from 0.983 for Japan to 0.045 for Guinea; HDI scores are computed by subtracting a composite score - referred to as a nation's "average deprivation" - from 1. See id. at 135-37, 100-01.

n21. See id. at 135 tbl. 1.

n22. The small differences relate to imperfections in the construction of the index. The educational component, for example, takes into account basic literacy, which is at 99% for all developed nations; mean years of schooling, which shows only little variation; and a literacy index, which likewise is at 1.00 for the first 14 nations on the list. Id. at 100-01. There are also only a few years' variation in life expectancy in the developed nations; the figure hovers in the mid-70s for males and females born in 1990. Id. The major differences come in the income figures, and these are subject to genuine difficulties in conversion in that the variations in standards of living do not track the higher volatility of exchange rates in a one-for-one fashion. Id. at 106-07. The rankings at the top are therefore close to arbitrary and the bunching effect is evidence, not of the closeness of these nations to each other, but of the insensitivity of the variables chosen.

n23. Id. at 18 figs. 1.12 & 1.13. The numbers are approximate, from the graph. It is also striking that black females do far better than black men on the scale. The aggregate figures are around 0.90 for females and 0.86 for males, id. fig. 1.13, and these numbers surely understate the difference because they give more weight to the greater black male income than is appropriate for any overall measure of individual well-being. It is hard to attribute these sex differences to any form of racial discrimination.

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Nonetheless, to draw an inference of caste from this data is to ignore the enormous differences in life fortunes and expectations among the individuals who fall within any given population - differences not discussed in the UNDP report. For its part, however, the very notion of a formal caste does not admit of these degrees of informal differentiation; all members of the subordinated group are forced to ride in the back of the bus, so to speak. The very fact of significant variation in social success within groups is itself evidence that some process far more complex than caste differentiation is involved. There is little doubt that black professional women, for example, earn far more than unskilled white male laborers do. These distinctions in income within racial groups are largely attributable to the very broad categories of workers who are lumped together in a single class: the label accountant, for example, covers both people who do simple audits and those who structure complex financial transactions. n24

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n24. See Victor R. Fuchs, Women's Quest for Economic Equality 49-52 (1988) (suggesting this analogy in an analysis of the "wage gap" between men and women).

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But even if we put that point aside, there is no reason to believe that differences in economic or personal well-being are solely, or even mostly, the result of social forces rather than individual effort. In particular, it is wrong to say that any observed differences in group achievement levels should be attributed as a matter of course to social practices or institutional structures. In some instances the differences might well be attributed to personal motivation, family structure, hustle, and luck. At some point the consequences of individual failure should be laid at the feet of the individual who fails, for if they are not, then the incentives for success are effectively undermined. An ethic of personal responsibility is not meant solely to point the finger at those who fail. Its prime objective is to give individuals incentives to succeed so that no fingers need be pointed at them after the fact. The willingness to create collective responsibility for individual failure has as its unfortunate consequence an increase in the rate of failure. It is not possible to create the right incentives for individual achievement by resorting only to carrots but never to sticks, and it is not possible to get the right mix of incentives by appealing to the idea of pervasive social discrimination as the source of lower economic and educational achievement for some African Americans. Indeed, at least twenty years of aggressive enforcement of civil rights laws designed precisely to eliminate such social discrimination and "caste distinctions" has done little to redress the worrisome trend in these statistics. n25 The sources of the current social difficulties cannot be explained by a simple appeal to the notion of caste.

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n25. See James J. Heckman & J. Hoult Verkerke, Racial Disparity and Employment Discrimination Law: An Economic Perspective, 8 Yale L. & Poly. Rev. 276, 276 (1990) ("Since 1975, relative black economic status has not advanced and may have deteriorated slightly.").

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Current social practices are also inconsistent with the idea that African Americans are the victims of caste distinctions within this country. Indeed, while African Americans are experiencing lower levels of success by the standard economic measures, there is at the same time a systematic set of programs, both public and private, that discriminate in their favor on grounds of race. Many of the public programs for affirmative action or diversity introduce explicit notions of caste by allowing African Americans certain advantages based on race that are denied to others. I am hard pressed to identify any real caste system in the history of the world that has had affirmative action programs for members of its disadvantaged groups. The result is a rare juxtaposition of phenomena: declining economic fortunes for African Americans at the same time that there is a steady or increasing level of explicit legal advantages. It is hard to see how a return to older principles of freedom of association and equality of all persons before the law could do much to alter the situation for the worse.

The economic data on caste with respect to women is even more suspicious. To look at the UNDP's report, one might think that there was a major scandal brewing in the world. When the UNDP breaks down its HDI by sex, it comes up with the bald - and false - categorical conclusion: "No country treats its women as well as it treats its men." n26 To support this conclusion it takes the breakdown of its HDI by sex and notes that for the first-place country, Sweden, the HDI is 0.977 overall and 0.921 for women, while for the United States the comparable drop is from 0.976 to 0.824. n27 It should be quickly apparent that something is sadly amiss, because the index measure states that the position of American women is below that of the citizens of, among other countries, Trinidad and Tobago and Estonia. n28 In fact, the position of the average American woman is just below that of the average citizen of Poland and [\*2466] Georgia, both long under communist rule. n29 Because the women in these countries are clearly less well-off than the men, it seems that the American woman is far worse off than the men of Romania and Albania, although these numbers are mercifully not included in the report.

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n26. Human Development Report, supra note 20, at 16 fig. 1.19.

n27. Id. tbl. 1.3.

n28. Id. at 135 tbl. 1.

n29. Id.

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Clearly there is something bizarre about this rank order, and it is easy to see what it is. The UNDP report uses, ironically, a male-centered analytical methodology: to the extent that women match up statistically "like men," the report sees them as successful. Yet the report makes no effort to recognize the economic contributions made disproportionately by women - contributions that are not contained in its limited data set. While the UNDP report insists that the lives of human beings are what is really at stake, n30 its treatment of sex differences makes a mockery of that claim. Thus, in looking at the breakdown

by sex, it is clear that women outlive men - and the disparity is greater for blacks than it is for whites n31 - and that female levels of literacy are higher as well. The UNDP gives all females in the United States a rating of 103.0% in life expectancy - with 100% representing parity with men - and 101.6% in educational attainment. n32 All the negative data then come from the economic indicators on adjusted gross domestic product, whereon American women rate at 48.7 relative to men's 100. n33 Surely a moment's reflection shows that something is deeply amiss. How can American women achieve at least parity on life expectation and education if they have only half the income of men?

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n30. See id. at iii.

n31. See id. at 18 fig. 1.13. White American females have a life expectancy of somewhat over 77 years, and for white American men, the figure is 75. For black females the life expectancy is somewhat over 72 years of age, and for black men, somewhat less than 69. Id.

n32. Id. at 101 tbl. 1.1.

n33. See id.

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What is missing in the report is any notion that family units engage in cooperative production and distribution, whereby women invest more of their time in work in the home, for which they do not receive any cash payment from a third-party source. This work generates enormous amounts of imputed income, which the women share with their husbands and families, just as husbands share their market-based wealth with their wives and their families. There is a pooling of income and gains from trade. A similar story has to be told when the inquiry turns from wages to income from stocks and [\*2467] bonds. I have not done any close work on the subject, but information supplied by the New York Stock Exchange suggests that the average male has a portfolio of about \$ 13,500 in stock, while the average female has a portfolio of little more than half that size, or \$ 7,200. n34 But once again the raw data cry out for correction, for the key question for social welfare is not who receives the dividend checks but who spends the proceeds and to what ends. The same kind of informal redistribution with the immediate - and extended - family that happens all the time with earned income happens with investment income as well: there are massive amounts of redistribution within families that are not caught by the official exchange statistics. The problems, moreover, are complicated still further by the complex patterns of survivorship rights that are applicable to substantial assets that are placed in pension or private trusts. There are more widows than widowers in the United States, and spousal protection usually ranks higher than the passage of wealth onto the next generation in the eyes of most decedents. I am in no position to conduct the detailed empirical study that is necessary to determine the actual divisions and effective control of wealth by sex in our society. But the educational and life expectancy figures surely provide some clue that this redistribution is substantial, for it is difficult to understand how women could do so well as a group by these output measures if they had so few inputs to work with.

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n34. NYSE Shareownership 14-15 (1990). Information provided by Bethann Ashfield, New York Stock Exchange Library.

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Unfortunately, the UNDP report makes no effort to capture any of these effects, and every effort to ignore them, when it blandly concludes as follows: "In industrial countries, gender discrimination (measured by the HDI) is mainly in employment and wages, with women often getting less than two-thirds of the employment opportunities and about half the earnings of men." n35 Even within the paid sector, there is no effort to make adjustments to take into account years of specialized education, years of experience, or hours committed to the workplace. To give some idea of how misguided the UNDP figures are, the better studies on comparable worth indicate that male-female differences when job classifications are held constant are, at a maximum, ten to fifteen percent, and even that gap disappears when marital status is taken into account: n36 "Women who have never married have historically received wages roughly comparable to men's." n37

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n35. Human Development Report, supra note 20, at 16-17.

n36. See, e.g., Ellen F. Paul, Equity and Gender: The Comparable Worth Debate 16 (1989). She relies on studies by Paul Weiler. See Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 Harv. L. Rev. 1728, 1784 (1986).

n37. Paul, supra note 36, at 17; see also Weiler, supra note 36, at 1785.

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The UNDP conclusions on the differential status of men and women are, then, worse than worthless. They are positively misleading and downright mischievous. Moreover, for our mundane purposes they do not advance the idea that women are a subordinated caste by so much as a millimeter. Overall, there is little mileage in the idea of using caste as a way to get at the social and economic differences that are found among members of a society. Likewise, I think that there is little to be gained by seeking to use the idea of caste to justify an antidiscrimination law that is designed, not to eliminate formal barriers to association and exchange, but to override in its very conception the freedom of association that should lie at the heart of any rational liberal order.

II. Discrimination and Sexual Preference

The most vivid illustration of the arguments about caste arise in the context of sexual preferences. At present there is a good deal of litigation and dispute over the legal rights of gays and lesbians in the United States. At one level the demands are for associational freedom - that is, for the state to recognize and enforce same-sex marriages on the same terms and conditions on

which it recognizes and enforces marriages between men and women. Here the concern is parallel to the formal restrictions on interracial marriages. It is therefore quite proper to argue that these formal restrictions at least raise the specter of caste differences between persons. But at the same time there is an equal concern about extending the protection of the antidiscrimination norm in employment and housing, for example, to gays and lesbians. In essence, the effort to remove formal barriers to gays and lesbians is accompanied by an attack on the informal barriers as well.

The bundling of these two programs in the same package creates all sorts of tensions that are nicely brought to bear in the extraordinary judicial proceedings that have taken place in Colorado over its recent popular constitutional referendum - Amendment 2 n38 - preventing state and local governments from enacting antidiscrimination laws that would treat gays, lesbians, and bisexuals [\*2469] as classes protected from discrimination in employment and housing, or indeed from any form of discrimination. n39 The Colorado Supreme Court recently struck down Amendment 2 on the grounds that the state had not shown a compelling state interest to justify the amendment's infringement on the right of those affected by the provision to participate equally in the political process. n40

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n38. Colo. Const. art. II, 30b.

n39. The provision reads:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Colo. Const. art. II, 30b. The amendment clearly attacks bans on private discrimination and appears to reach discrimination by the state as well. See Evans v. Romer, 854 P.2d 1270, 1284-85 & n.25 (Colo.), cert. denied, 114 S. Ct. 419 (1993).

n40. Evans v. Romer, Nos. 94SA48, 94SA128, 1994 Colo. LEXIS 779 (Oct. 11, 1994). The court initially held that the amendment should receive strict scrutiny in Evans v. Romer, 854 P.2d 1270 (Colo.), cert. denied, 114 S. Ct. 419 (1993).

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In one sense, the decision invalidating Amendment 2 bears some resemblance to one of the most important and controversial decisions of the Warren Court, Reitman v. Mulkey. n41 At issue in that case was an amendment to the California Constitution passed by referendum. The amendment provided:

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n41. 387 U.S. 369 (1967).

-End Footnotes-

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or who desire to sell, lease or rent any part of all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses. n42

The provision did not apply to real estate owned by the state.

-Footnotes-

n42. Cal. Const. art. I, 26 (enacted 1964, repealed 1974) (enacting Proposition 14).

-End Footnotes-

In Reitman, the Court struck down the provision on the grounds that by incorporating the provision into its constitution, the state "authorized" the forms of discrimination that had previously been prohibited under the Unruh and Rumford Acts, n43 which were necessarily overridden by the new constitutional provision. n44 As is typical in dubious constitutional decisions, the Court refused to find that any dispositive test existed to demarcate state action from private action and instead announced that all depends on "sifting facts [\*2470] and weighing circumstances." n45 But surely this idea of state authorization is extended so far as to be useless for making any decision. Authorization normally connotes a situation in which one person authorizes another to act on his behalf, so that the acts of the agent are then sufficient to bind the principal. Yet this provision properly exempted state property from its scope. n46 Moreover, even if the state authorizes the autonomous acts of its own citizens through this provision, which acts does it authorize - only those that involve racial discrimination against preferred classes? Or those that discriminate in their favor? Or those decisions that purport to follow a color-blind policy in selling or leasing? These policies are all diametrically at odds with one another, and it is far more accurate to insist that the state authorizes none of them than to pretend that it authorizes them all. The decisions to exclude or include are made by the individuals in question. They are only enforced by the state, which does not take a position as to their intrinsic desirability, any more than it does when it solemnizes a marriage between two persons of the same race, neither of whom would on principle marry a person of a different race. In my view, the initial provisions of the Unruh and Rumford Acts should have been struck down as illicit forms of state action that interfere with the liberty and property rights of individuals, so that the corrective referendum should not have been needed at all. But, as it was, Reitman followed the line set originally by Shelley v. Kraemer n47 and Barrows v. Jackson n48 and sought to obliterate the public-private distinction under a clause that aimed to constitutionalize it. n49

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n43. Unruh Civil Rights Act, Cal. Civ. Code 51 (West 1982 & Supp. 1994); Rumford Fair Housing Act, Cal. Civ. Code 35720 (West 1973), repealed by Act of Sept. 19, 1980, ch. 992, 1980 Cal. Stat. 3166 (codified at Cal. Govt. Code 12955 (West 1992 & Supp. 1994)).

n44. 387 U.S. at 376-77.

n45. 387 U.S. at 378 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

n46. Cal. Const. art. I, 26 (repealed 1974). It also excludes innkeepers, who were at common law subject to an antidiscrimination provision.

n47. 334 U.S. 1 (1948).

n48. 346 U.S. 249 (1953).

n49. For my criticism of the Shelley line of cases, see Epstein, *Standing Firm*, supra note 4, at 29-33.

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This constitutional tradition makes it difficult to think about the wisdom of Amendment 2. In principle, the background rules against which the soundness of the amendment is evaluated are critical to the inquiry. As I have argued, the proper background condition is one that allows all private individuals to choose the persons with whom they wish to associate and deal. To say, therefore, that any person can refuse to deal with gays or lesbians is not to say very much at all. All individuals also have the right to refuse to deal with heterosexuals or indeed any other subclass of the general pop [\*2471] ulation. On this view, therefore, the amendment is quite simply unnecessary as it only confirms a set of rights that are already universally held.

That simple approach will not do, however, in a world in which the antidiscrimination norm is regarded as superior to the principle of freedom of association. If the law now says that one cannot discriminate on the grounds of race, ethnic origin, sex, age, religion, or disability, then why should it single out sexual orientation as an area in which the ancient principle of freedom of association is allowed full sway against its two traditional antagonists: criminalization of the relationship and the antidiscrimination ordinance? Viewed in this context, the very passage of the referendum could be viewed as an effort to impose second-class citizenship on some persons for the benefit of others. Indeed, it was just this argument that led the Colorado Supreme Court to insist that the amendment be subjected to strict scrutiny, n50 even after *Bowers v. Hardwick* n51 apparently closed the door on any ordinary strict scrutiny attack on equal protection grounds. n52 Thus the Colorado decisions stress that what is at stake is not gay and lesbian relations as such but their connection to participation in the political process:

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n50. See *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo.), cert. denied, 114 S. Ct. 419 (1993).

n51. 478 U.S. 186 (1986).

n52. See 478 U.S. at 190.

-End Footnotes-

Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden - no other group's ability to participate in the political process is restricted and encumbered in a like manner....

In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them. n53

By this standard the amendment is surely dead on arrival. But the question is why this standard should be applied at all. If Amendment 2 were confined to private parties alone, then in a world of freedom of association, the amendment would be redundant and unnecessary and the singling-out argument raised in the opinion [\*2472] would fail. n54 Precisely because association rights are accorded such low status, the defenders of this amendment, at least as it is applied to private parties, are now put to a cruel choice. In order to defend part of the turf of freedom of association, they have to make it appear as though they harbor special animus against the groups that want to claim the protection of the antidiscrimination ordinance. It is no longer possible to argue simply that people should be able to choose to associate with some individuals but not with others without giving learned reasons for their choice. Instead, proponents of the amendment must give long and elaborate explanations as to why some groups are unworthy, by some public standard, of a guarantee of the same level of protection that is accorded to other groups. The net effect, therefore, is to invite both testimony and rebuttal on the issue of whether homosexual conduct is or is not immoral or whether it is or is not against the public interest. Moreover, it is to do so, not in open public debate, but in the context of expert testimony in a courtroom setting - hardly the place to have a sensible debate over any sensitive social issue. n55 The inability to rely on freedom of association means that all refusals to associate have to be for cause, so that individuals and groups who wish to be left alone now have to engage in the unhappy task of group defamation in order to achieve that rather simple end. The upshot is that the entire process sanctions a level of antigay and antilesbian rhetoric that is better left unspoken in public settings.

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n53. 854 P.2d at 1285 (quoting Gray v. Sanders, 372 U.S. 368, 379-80 (1963)); see also Evans v. Romer, Nos. 94SA48, 94SA128, 1994 Colo. LEXIS 779, at \*5, \*10 (Oct. 11, 1994).

n54. For what it is worth, this argument also seems wrong for another reason. All sorts of people who are neither gay, lesbian, nor bisexual could, and did,

oppose the amendment. The disabilities created in the amendment are directed to one class, but the limitations on participation in the political process are not.

n55. For excerpts of this courtroom debate, see the testimony by John Finnis and Martha Nussbaum, first for and then against the amendment. John Finnis & Martha Nussbaum, *Is Homosexual Conduct Wrong? A Philosophical Exchange*, New Republic, Nov. 15, 1993, at 12. I venture no opinion on the accuracy of classical references, but Finnis's testimony surely is fatal to his own cause insofar as it equates homosexual conduct with "all extramarital sexual gratification." *Id.* (citing Plato, Xenophon, Aristotle, Musonius, Rufus, and Plutarch). Finnis just misunderstands the situation if he even thinks that the people who supported Amendment 2 would extend it to unmarried couples living together, or even to casual heterosexual contact. His condemnation of sex outside marriage sweeps far too broadly for the occasion. In any event, this testimony is odd indeed because what is at stake is an antidiscrimination ordinance that could be in place even after homosexual conduct is decriminalized. Moreover, his argument that homoerotic culture should be discouraged because it is incompatible with true friendship, *id.*, is an observation that does not need the force of law behind it, even if it is true.

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Importing rhetoric of this sort into the political process can hardly do anything to build the strong sense of mutual respect on which political communities are supposed to rest. Indeed, there is reason to believe that it can only make matters far worse. The [\*2473] traditional position of individualism has a great virtue insofar as it does not link freedom of association to the endorsement of the modern antidiscrimination principle of the civil rights laws. Today it is too often assumed that the proposition that A has the right to do X carries with it two distinct implications: first, that no one can punish or sue A for having done X, and second, that no one can discriminate against A in personal or business dealings for having done X. For example, once we decide that people cannot be punished because they have once used drugs, then we have necessarily decided that private employers and landlords cannot discriminate against people for just these same reasons. Similarly, once we have decided that homosexual conduct is not criminal, then we are necessarily committed to the proposition that employers and landlords cannot discriminate against gays and lesbians in their private affairs; nor, for that matter, can employers and landlords discriminate in their favor.

The connection here is unfortunate because, among other things, it encourages resistance to the first step - legalization and recognition - because of the fear that the second step - forced association - will follow. For example, the question of the legality of same-sex marriages has bullied its way to the front of the constitutional agenda. n56 The arguments in favor of their legalization are strong as a matter of political theory. The principle of freedom of association is no weaker on matters of intimate association than it is on matters of business association, and it may be stronger in the sense that it can resist regulation even with compensation. But for our purposes, the key point is that outsiders cannot point to their own distaste for the practices, or to their strong religious convictions and objections, as public reasons to render these unions unlawful. Surely the principle of offense cannot be used to prevent gay and lesbian couples from normalizing their relationships by [\*2474] contract. n57 Once same-sex couples are allowed to use ordinary

contractual devices to help keep their relationships on an even keel, it is hard to see why the state should be able to deny them the opportunity to introduce into their relationships the same level of permanence and stability that state sanctions give to marriages between couples of different sexes. It follows that these married couples should be allowed to participate on equal footing with other couples in the benefits that the state confers on marriages: preferred status under immigration laws, n58 with guardianship arrangements, n59 under rent control laws, n60 and in the area of inheritance. n61

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n56. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that a strict scrutiny standard must be applied to determine whether the state prohibition against same-sex marriages should stand). On this same question, see Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 *Seton Hall L. Rev.* 347 (1993) (urging that the due process guarantees of privacy to different-sex couples apply to same-sex couples as well). See also William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 *Va. L. Rev.* 1419 (1993); Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 *S. Cal. L. Rev.* (forthcoming Mar. 1995) (arguing that competitive pressures for the business of these couples and their supporters will induce some states to break ranks and introduce these marriages, which then must be recognized by other states under the Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, 1).

n57. Often gay and lesbian couples have entered into contracts that spell out the division of financial and personal responsibility and that require each partner to bear some responsibility for the welfare of the other. Understandings of that sort are usually a prerequisite for treating the arrangement as "permanent" enough to qualify for the same types of benefits as married couples receive. See Brown, *supra* note 56, for a list of local governments that award same-sex benefit packages. Many private institutions, including the University of Chicago, have same-sex benefit packages, as do many businesses, including Apple Computer.

n58. For an example of the limitations placed on same-sex partners in the context of immigration, see *Adams v. Howerton*, 486 F. Supp. 1119 (1980) (disallowing "immediate relative" status to an Australian citizen in a same-sex union with an American citizen).

n59. For an example of this benefit as extended to same-sex partners, see *In re Guardianship of Sharon Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) (allowing a same-sex partner to be appointed guardian over the objections of the ward's parents).

n60. For an example of the extension of this privileged status to same-sex partners, see *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989) (allowing a gay partner to "inherit" a rent-controlled apartment under a statute that permitted these rights to descend to members of the decedent's "family"). One blissful way to avoid this problem would be to abolish rent control, but only if it were abolished for all couples.

n61. For an application of this principle in the same-sex context, see *In re Estate of Cooper*, 564 N.Y.S.2d 684 (Sup. Ct. 1990), *affd. sub nom. In re*

Cooper, 592 N.Y.S.2d 797 (App. Div. 1993) (disallowing a current partner's rights to inherit as a surviving spouse).

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This last set of demands cannot, I believe, be opposed on the ground that it is one thing for the state to suppress an arrangement and quite another to require the state to place its stamp of approval on the full arrangement, which is what legal recognition seems to demand. n62 That question of conferring benefits means far less in the state context given the state monopoly power over the relevant set of licenses, so that the key question - at least for the supporters of a liberal state - is whether the state skews private preferences among various forms of associational freedom, which it surely does when it gives one kind of sexual union a preferred position that is systematically denied to another. The liberal and individualistic argument for same-sex marriages is thus quite powerful and is similar to the argument against the barriers to marriages between different races, which were removed when the Supreme Court declared antimiscegenation laws unconstitutional. n63 It should hardly matter that there are lots of people who are deeply offended by either kind of union or who regard them as violating every sacred religious belief. They are not asked to participate in these unions, and under the liberal theory they could not be required to enter any associations whatsoever with people who choose to enter into them.

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n62. See Earl M. Maltz, Constitutional Protection for the Right to Marry: A Dissenting View, 60 Geo. Wash. L. Rev. 949, 955 (1992).

n63. See Loving v. Virginia, 388 U.S. 1 (1967).

- - - - -End Footnotes- - - - -

The challenge here is whether the case for homosexual rights and same-sex marriages should leap two chasms with a single bound. First, the associational freedom would be preserved and given the same level of protection as other unions. But then the usual protections of antidiscrimination laws would be imposed so that persons in such relationships could not be the subject of discrimination in employment or housing. If that second step would necessarily be taken, then suddenly there is a good reason to keep homosexual relations illegal if the alternative is that a religious fundamentalist would have to lease an upstairs apartment to a gay couple once their conduct is decriminalized or their marriage solemnized.

It is, in my view, a far better world if the owner can keep and act on his own religious and moral scruples on this issue, even if learned academics and legislators are quite capable of proving that his conclusions do not rest on any rational principles that are capable of articulation to nonbelievers. Religious and moral scruples should never limit the freedom of association of gays and lesbians: religious folks are not spared from having to tolerate offensive behavior any more than the remainder of the population is, and if they have to put up with enforceable same-sex contracts short of marriage and with the private recognition of these contracts, n64 then they have to accept the marriages as well. But by the same token, these individuals should be entitled to rely on their own religious and moral convictions, however flawed and

imperfect others might believe them to be, in ordering and organizing their own affairs. No principle of community values should encourage either group to be so confident in the soundness of its own moral precepts that it is prepared to force them down the throats of those unfortunate and uneducated enough to disagree with them. All sides should be entitled to the defensive use of their own beliefs under a principle of free association. There is no reason to lurch from a world in which [\*2476] too little protection is conferred to homosexual individuals and couples to a world in which they receive too much protection.

-Footnotes-

n64. See supra note 57.

-End Footnotes-

Conclusion

I think that some important social lessons can be learned from the recent flirtation with caste as the generative principle behind the antidiscrimination laws. The chief point concerns the relationship between legal prohibitions and social distinctions. It has long been fashionable in legal and policy debates to decry the distinction between de jure and de facto, between formal legal differences and social imbalances. That popular attack, however, has its greatest appeal after the legal barriers to associational freedom and political participation are removed, not before. A sad realization often follows the removal of these barriers - the realization that social cures are not quickly or easily achieved if only because differences in living standards, occupational choices, cultural values, social status, and lifestyle survive the removal of legal barriers, and that these differences prove more difficult to eradicate, even if their eradication is desirable. But the situation looks markedly different while the legal disabilities are still in place, for then it becomes quite coherent, if not attractive, to assert that all that is asked for is the removal of legal barriers to participation in various forms of social and political life. Think of what we will no longer have: no huge social programs that require massive tax increases or intrusive regulatory schemes; no political gerrymandering; no special privileges; no social campaigns to decide which individuals or groups are victims of past discrimination, which are the perpetrators of that discrimination, and which are innocent bystanders caught in the crossfire between warring political factions. The program seems to promise great gains at little cost. It can be easily endorsed with little more than simple justice as its guide.

The completed campaign for the abolition of Jim Crow and the upcoming campaign for the recognition of same-sex marriages both fall into this tradition. But they are in some ways very odd companions. Jim Crow is a legacy of slavery and domination that worked havoc on the lives and fortunes of a group of individuals who were excluded from formal participation in the political process. With same-sex marriages, the prohibitions and restrictions are directed at individuals who are often highly trained and successful, with good economic prospects, a loud - if minority - voice in the political process, and - paradoxically - a protected-class status under some antidiscrimination laws.

The demographics and positions of [\*2477] the two groups could hardly be more different, and it is doubtful that any political alliance between them could be more than a short-term convenience given these differences in social positions and personal aspirations. Yet it is precisely because each group in its own time targets legal disabilities that they can make a common appeal. A good libertarian who believes that all persons have equal capacity to make the associational choices that govern their own lives has to support these campaigns. It hardly matters whether he or she has any sympathy with the ends and aspirations of the individuals who are denied the ordinary incidents of full citizenship.

Once the legal disabilities have been removed, then we see the emergence of an effort to analogize various economic and social differences to the formal legal differences captured in the idea of caste. It is just at this juncture that the modern civil rights movement makes its greatest blunders. The economic data in question are often impossible to interpret, or are interpreted, if not misinterpreted, with an eye to magnify differences that either do not exist or can be explained, at least in part, by differences in education, training, aptitudes, or inclinations. Even when some unjustified differences continue to persist, it is hard to identify them or to know exactly what steps should be taken to counteract them. The constant refrain has been that irrational prejudice drives the key behaviors in employment and housing, so that all that need be done is to make irrational behavior illegal. Would that it were so simple! The number of cases of pure irrationality that leap out in practice is small, especially in relation to the overall size of the social tensions and conflicts. Reforms that are loudly trumpeted when passed are utterly incapable of delivering on their oversized promises. The net effect of an antidiscrimination law, therefore, is to introduce greater cost and uncertainty into the process, to provoke evasive responses by firms that fear entrapment by the law, and to create resentments on the part of those who fear that the law has done too much or too little to redress the perceived level of social imbalance. In a word, the size of the pie shrinks while its distribution is scarcely improved.

These effects are, in my view, an inescapable consequence of any philosophical outlook that conflates social and economic differences with formal legal barriers. What is needed, therefore, is a sharp reversal of intellectual orientation. It is critical to defend the freedom of association of all individuals. It is equally critical to decouple the two fundamentally different questions that today are lumped under the single banner of civil rights: civil capacity and discrimination. Governments should concentrate on the protection [\*2478] of the former and abandon pursuit of the latter. In a society as diverse as our own, any effort to impose a single standard of social correctness on associational choice is bound to lead to endless struggles over its proper articulation. It is a far better solution to allow individuals to go their separate ways, secure in the knowledge that they have the protection of the law behind them in pursuit of their associational freedoms. That was the original message of civil rights law, and that should be the message of the civil rights movement today.

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ARTICLE: WHAT'S STANDING AFTER LUJAN? OF CITIZEN SUITS, "INJURIES," AND ARTICLE III. +

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-----Footnotes-----

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-----End Footnotes-----

SUMMARY:

... In 1983, Judge Antonin Scalia, of the U.S. Court of Appeals for the District of Columbia Circuit, published a dramatic and provocative essay on the law of standing. ... In 1992, Justice Antonin Scalia wrote the dramatic opinion for the Supreme Court in Lujan v. Defenders of Wildlife, which significantly shifts the law of standing. ... To have standing, a litigant needed a legal right to bring suit. ... "The English tradition of locus standi in prohibition and certiorari is that 'a stranger' has standing, but relief in suits by strangers is discretionary." ... Thus it was that the legal injury test came, quite naturally and plausibly, to be read to allow standing for beneficiaries, who often faced statutory harm -- "legal injury" -- by virtue of inadequate regulatory action. ... It falls into four parts: a general statement about standing; a discussion of injury in fact; an assessment of redressability; and a treatment of the citizen suit. ... If a regulatory beneficiary with standing persuades a court that the President is violating the law, and the court so holds, there is no constitutional difficulty. ... The result would be to jeopardize standing for many objects of regulation, not merely for beneficiaries. ... The Lujan Court should not have discussed redressability; the congressional grant of standing disposed of the issue. ... The Lujan Court, however, does not want the redressability requirement to bar standing in such cases. ...

TEXT:

[\*164] INTRODUCTION

In 1983, Judge Antonin Scalia, of the U.S. Court of Appeals for the District of Columbia Circuit, published a dramatic and provocative essay on the law of

standing. The thesis can be found in the title: The Doctrine of Standing As An Essential Element of the Separation of Powers. n1 Only recently named a judge, and having taught administrative and constitutional law for many years, Judge Scalia called for a significant shift in the law of standing.

-Footnotes-

n1 Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U.L. REV. 881 (1983).

-End Footnotes-

Judge Scalia's argument hinged on a distinction between two kinds of cases. "[W]hen an individual who is the very object of a law's requirement or prohibition seeks to challenge it, he always has standing." n2 But standing should frequently be unavailable when "the plaintiff is complaining of an agency's unlawful failure to impose a requirement or prohibition upon someone else." n3 In the latter case, Judge Scalia contended that there was a serious interference with executive power. Judge Scalia concluded that in cases of the latter sort, courts should hold that Article III imposes "a limit upon even the power of Congress to convert generalized benefits into legal rights. . . ." n4 The Court had not addressed this important and long-disputed issue before.

-Footnotes-

n2 Id. at 894.

n3 Id.

n4 Id. at 886.

-End Footnotes-

In 1992, Justice Antonin Scalia wrote the dramatic opinion for the Supreme Court in Lujan v. Defenders of Wildlife, n5 which significantly [\*165] shifts the law of standing. The opinion hinges on a distinction between two kinds of cases. "When . . . the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question" that he has standing. n6 "When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed." n7 In the latter case, there is the risk of serious interference with executive power, in the form of a "transfer from the President to the courts" of "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" n8 Through Justice Scalia's opinion, the Court held that Article III required invalidation of an explicit congressional grant of standing to "citizens." n9 The Court had not answered this question before. n10

-Footnotes-

n5 112 S. Ct. 2130 (1992).

n6 112 S. Ct. at 2137.

n7 112 S. Ct. at 2137.

n8 112 S. Ct. at 2145.

n9 112 S. Ct. at 2137-40.

n10 The apparently unanimous view of lower courts had been that a legislative grant of citizen standing was constitutional even without a showing of injury in fact. See, e.g., Evans v. Lynn, 537 F.2d 571 (2d Cir. 1976); Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976); Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975); City of Chicago v. General Motors Corp., 467 F.2d 1262 (7th Cir. 1972); Citizens for a Better Evt. v. Deukmejian, 731 F. Supp. 1448 (N.D. Cal. 1990).

- - - - -End Footnotes- - - - -

Lujan may well be one of the most important standing cases since World War II. Read for all it is worth, the decision invalidates the large number of statutes in which Congress has attempted to use the "citizen-suit" device as a mechanism for controlling unlawfully inadequate enforcement of the law. n11 Indeed, the decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated. n12 The citizen suit has become a staple of federal environmental law in particular: nearly every major environmental statute provides for citizen standing. n13 The place of the [\*166] citizen in environmental and regulatory law has now been drawn into sharp question.

- - - - -Footnotes- - - - -

n11 See, e.g., Toxic Substances Control Act, 15 U.S.C. @ 2619 (1988); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. @ 1270 (1988); Clean Water Act of 1976, 33 U.S.C. @ 1365 (1988); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. @ 1415(g)(1) (1988); Safe Drinking Water Act, 42 U.S.C. @ 300j-8 (1988); Noise Control Act of 1972, 42 U.S.C. @ 4911 (1988); Energy Policy and Conservation Act, 42 U.S.C. @ 6305 (1988); Solid Waste Disposal Act, 42 U.S.C. @ 6972 (1988); Clean Air Act, 42 U.S.C. @ 7604 (1988 and Supp. 1990); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. @ 9659 (1988); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. @ 8435 (1988); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. @ 1104(a)(1) (1988); Outer Continental Shelf Lands Act, 43 U.S.C. @ 1349 (1988); Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. @ 2014 (1988). Every major environmental statute except FIFRA authorizes a citizen suit.

n12 Its chief rival in this regard is INS v. Chadha, 462 U.S. 919 (1983). See 462 U.S. at 1003-12 (White, J., dissenting) (appendix).

n13 See supra note 11.

- - - - -End Footnotes- - - - -

But the importance of Lujan does not lie only in the invalidation of the citizen suit. The decision revises the law of standing in several other ways as well. And it raises a host of new puzzles for later cases to solve.

In this article, I have two principal goals. The first is to explain why Lujan's invalidation of a congressional grant of standing is a misinterpretation of the Constitution. It is now apparently the law that Article III forbids Congress from granting standing to "citizens" to bring suit. But this view, building on an unfortunate innovation in standing law by Justice William O. Douglas, n14 is surprisingly novel. It has no support in the text or history of Article III. It is essentially an invention of federal judges, and recent ones at that. Certainly it should not be accepted by judges who are sincerely committed to the original understanding of the Constitution and to judicial restraint. Nor should it be accepted by judges who have different approaches to constitutional interpretation.

-Footnotes-

n14 See the discussion of Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970), infra notes 102-13 and accompanying text.

-End Footnotes-

Lujan holds that the requirement of an "injury in fact" is a limitation on congressional power; but an "injury in fact," as the Court understands it, is neither a necessary nor a sufficient condition for standing. The relevant question is instead whether the law -- governing statutes, the Constitution, or federal common law -- has conferred on the plaintiffs a cause of action. n15 An inquiry into "injury in [\*167] fact" will both allow standing where it should be denied and deny standing where it should be granted.

-Footnotes-

n15 In an often-quoted phrase, Justice Douglas wrote that "[g]eneralizations about standing to sue are largely worthless as such." Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970). If the analysis here is correct, this generalization is indeed largely worthless; but one generalization -- that the standing issue depends on the existence of a cause of action -- is not. This approach to the question of standing is also set out in Lee A. Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 YALE L.J. 425, 451-55 (1974); David P. Currie, Misunderstanding Standing, 1981 SUP. CT. REV. 41; William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221 (1988); David A. Logan, Standing to Sue: A Proposed Separation of Powers Analysis, 1984 WIS. L. REV. 37; Cass R. Sunstein, Standing and the Privatization of Public Law, 88 COLUM. L. REV. 1432 (1988). In a similar vein, see Richard H. Fallon, Of Justiciability, Remedies, and Public Law Litigation, 59 N.Y.U.L. REV. 1 (1984). Many authorities to the same effect are collected in Fletcher, supra, at 223 n.18.

The courts have shown a discernible trend in this direction. See Air Courier Conference of America v. American Postal Workers Union, 111 S. Ct. 913 (1991); Lujan v. National Wildlife Fedn., 497 U.S. 871 (1990); Block v. Community Nutrition Inst., 467 U.S. 340 (1984). Of course one could conclude that Article III imposes limits on Congress' power to grant standing but that, short of those limits, the standing question is whether Congress or any other source of law confers a cause of action. Perhaps the law will tend in this direction even post-Lujan. See especially International Primate Protection League v. Administrators of Tulane Educ. Fund, 111 S. Ct. 1700 (1991), where the Court said that "standing is gauged by the specific common law, statutory or

constitutional claims that a party presents," and noted that standing "should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked." 111 S. Ct. at 1704 (citing Fletcher, supra, at 229).

- - - - -End Footnotes- - - - -

More fundamentally, the very notion of "injury in fact" is not merely a misinterpretation of the Administrative Procedure Act n16 and Article III but also a large-scale conceptual mistake. I hope to show that the injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process. It uses highly contestable ideas about political theory to invalidate congressional enactments, even though the relevant constitutional text and history do not call for invalidation at all. Just like its early twentieth-century predecessor, it injects common law conceptions of harm into the Constitution. Moreover, it acts as if injury can be assessed through a purely factual inquiry, rather than one that is inevitably a product of courts' value-laden judgments and of governing legal conventions. This deep problem has been obscured by the surprising evolution of modern standing principles.

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n16 5 U.S.C. @ 702 (1988).

- - - - -End Footnotes- - - - -

My second goal is to discuss the many new issues that will arise in the aftermath of Lujan. Under what circumstances can citizens now prove that they are not mere citizens, but people with the requisite "injury" or "personal stake"? How does Lujan affect environmental and other regulatory cases? What might Congress do to respond to the decision? These will be the key questions in the next decade. They will have considerable importance for the development of environmental law and risk regulation, and indeed for administrative and regulatory law in general.

This article is divided into three Parts. Part I briefly sets out the history of the law of standing. Here I discuss the clear acceptance of "stranger" or "citizen" suits at the founding period in both England and early America. The Lujan Court should not have taken the extraordinary step of invalidating a congressional grant of standing without investigating the relevant history.

I also describe the very recent creation of the "injury-in-fact" test. I will show that, in an exceedingly short period, a revisionist view of Article III, with no textual or historical support, has established injury in fact as a constitutional prerequisite. I also argue that, despite its apparent simplicity, the notion of injury in fact is heavily dependent on an assessment of law and is far from a law-free inquiry into facts.

Part II describes and evaluates the various holdings in the Lujan [\*168] case. I end the Part with two brief detours: a discussion of the role of the citizen suit in regulatory law and a general assessment of Justice Scalia's conception of Article III, as set out in his 1983 Suffolk Law Review article. The overlap between the 1992 Lujan opinion and the 1983 article is sharp and

clear. The overlap makes the article a matter of considerable current interest.

Part III discusses the future of the law of standing in the wake of Lujan. Here I try to show exactly which issues are open and which closed. One of my major purposes is to explore the effect of Lujan on current regulatory cases brought by beneficiaries of regulatory statutes. I argue that in many such cases standing remains available, but that some cases brought by consumers and others are now drawn into sharp question.

In order to overcome some of the uncertainties now facing citizen suits, I recommend that Congress create a system of bounties for citizens in cases involving both private defendants and the executive branch. Even after Lujan, such a system should raise no constitutional question. Congress may also have the power both to create property rights in the benefits provided by regulatory statutes and to establish standing to vindicate those property rights. I conclude with a discussion of this intriguing possibility.

I. A CAPSULE HISTORY OF STANDING

The law of standing has had many remarkable twists and turns. For convenience, we might think of American law as evolving through five different eras of standing doctrine. We are now in the midst of the fifth; its contours remain indistinct. But one of its principal features is an insistence that Article III requires injury in fact, causation, and redressability -- requirements unknown to our law until the 1970s. In this Part, I outline the development of standing doctrine. n17

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n17 Some aspects of this history are also discussed in Sunstein, supra note 15.

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It makes sense to begin with the text of Article III, which extends "Judicial Power" to certain specified "Cases" and "Controversies." n18 In the original understanding, "cases" included both civil and criminal disputes, whereas "controversies" were limited to civil disputes. n19 Article III contains no explicit constitutional requirement of "standing" or "personal stake." Nor does it ever refer to "injury in fact." It does require a case or controversy, and very plausibly there is no such thing [\*169] without a cause of action. n20 If we are to impose additional standing requirements, we must do so on the basis not of text but of history, both before and at the time of the framing and through judicial practice over time. n21

- - - - -Footnotes- - - - -

n18 U.S. CONST. art. III, @ 2.

n19 See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431-32 (1793).

n20 See Akhil R. Amar, Law Story, 102 HARV. L. REV. 688, 718 n.154 (1989) (reviewing HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (Paul M. Bator et al eds., 3d ed. 1988)).

n21 The same point is made in Scalia, supra note 1, at 882.

- - - - -End Footnotes- - - - -

An overview of opinions addressing the issue of standing will help illustrate the basic picture. In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions. n22 Of those 117 occasions, 55, or nearly half, of the discussions occurred after 1985 -- that is, in the past seven years. Of those 117, 71, or over two thirds, of the discussions occurred after 1980 -- that is, in just over a decade. Of those 117, 109, or nearly all, of the discussions occurred since 1965. The first reference to "standing" as an Article III limitation can be found in Stark v. Wickard, n23 decided in 1944. The next reference does not appear until eight years later, in Adler v. Board of Education. n24 Not until the Data Processing case in 1970 n25 did a large number of cases emerge on the issue of standing. The explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon. n26

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n22 Search of LEXIS, Genfed library, US file (July 11, 1992). On the history of the term, see Stephen L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 STAN. L. REV. 1371, 1418-25 (1988).

n23 321 U.S. 288 (1944).

n24 342 U.S. 485, 501 (1952) (Frankfurter, J., dissenting).

n25 Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970).

n26 This evidence is crude because it is consistent with two speculations. (a) Perhaps the recency of the particular words obscures the tradition represented by the general concept. (b) Perhaps standing has become important only recently as a result of attempts to bring suit by people who would never even thought of doing so before. If (a) is true, the evidence tells us nothing. If (b) is true, the constitutional limit was always present but did not have to be often invoked until recently.

The discussion in Part I should shed light on these possibilities. For the moment, a few brief words. The history suggests that (a) is only partly true. A cause of action has traditionally been required, and this requirement is indeed imposed by Article III. But standing, as a distinct body of law, represents a genuinely new development, not a traditional one. As Part I also suggests, (b) is only partly true as well. Stranger or citizen actions are familiar to English and American law. The suit to compel nondiscretionary government action is no innovation; it is part of the old idea of mandamus. On the other hand, the modern regulatory state has furnished many more occasions for this suit than was traditional.

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What of "injury in fact"? No court referred to this phrase before Barlow v. Collins n27 in 1970. After that year, the phrase appears in about ten cases during each succeeding five-year interval, until a leap to ten references in the brief period from 1990 to 1992. n28 Thus the [\*170] injury-in-fact test

played no role in administrative and constitutional law until the past quarter century.

-Footnotes-

n27 397 U.S. 159 (1970).

n28 Search of LEXIS, Genfed library, US file (July 11, 1992).

-End Footnotes-

To say this is not to deny that there were important antecedents for the requirement of standing. As we will soon see, there had always been a question whether the plaintiff had a cause of action, and this was indeed a matter having constitutional status. Without a cause of action, there was no case or controversy and hence no standing. This is an extremely important principle. Moreover, a handful of cases in the 1920s and 1930s relied on notions of "standing" without mentioning the word. These cases, too, are of considerable importance. But we will see that the modern understanding of standing is insufficiently self-conscious of its own novelty, even of its revisionism.

A. English and American Practice

The first period, by far the longest, ranges from the founding era to roughly 1920. In that period, there was no separate standing doctrine at all. n29 No one believed that the Constitution limited Congress' power to confer a cause of action. Instead, what we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue. n30 To have standing, a litigant needed a legal right to bring suit.

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n29 Much of the relevant history emerges from three important essays: Raoul Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 YALE L.J. 816 (1969); Louis L. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 HARV. L. REV. 1265, 1269-82 (1961); Winter, supra note 22, at 1394-425. I rely a good deal on these treatments here.

n30 See Winter, supra note 22, at 1395-96 (explaining how this idea was mediated through the forms of action); supra note 15. Justice Scalia appears to have recognized this point, subject to his Article III caveats, in his 1983 article: "Standing requires . . . the allegation of some particularized injury to the individual plaintiff. But legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature." Scalia, supra note 1, at 885.

-End Footnotes-

The notion of injury in fact did not appear in this period. The existence of a concrete, personal interest, or an injury in fact, was neither a necessary nor a sufficient condition for a legal proceeding. People with a concrete interest could not bring suit unless the common law, or some other source of law, said so. But if a source of law conferred a right to sue, "standing" existed, entirely independently of "concrete interest" or "injury in fact." n31

-Footnotes-

n31 See Winter, supra note 22, at 1396.

-End Footnotes-

Implicit in these ideas was a particular conception of Article III and a particular understanding of the relationship between Article III and standing. If neither Congress nor the common law had conferred a right to sue, no case or controversy existed. Whatever harm had occurred was not legally cognizable at all; this was a case of damnum [\*171] absque injuria. Courts had no power to hear the plaintiff's claim. There was therefore a sharp distinction between an injury on the one hand (a "harm") and a legal injury on the other. To this extent, the Article III requirement of a case or controversy did indeed constrain the category of persons who could bring suit. But the constraint had everything to do with whether the legislature or some other source of law had created a cause of action. It had nothing to do with "injury in fact."

There is no evidence of constitutional limits on the power to grant standing. In both England and America, actions by strangers, or by citizens in general, were fully permissible and indeed familiar. There is no basis for the view that the English and early American conception of adjudication forbade suits by strangers or citizens.

1. England

The practice in England is revealing, for it helps cast light on what the founding generation may have understood by "case or controversy." Before and at the time of the framing, the English practice was to allow strangers to have standing in the many cases involving the ancient prerogative writs. Of these writs, two of the most important were certiorari and prohibition. "The English tradition of locus standi in prohibition and certiorari is that 'a stranger' has standing, but relief in suits by strangers is discretionary." n32.

-Footnotes-

n32 Jaffe, supra note 29, at 1274.

-End Footnotes-

The governing idea behind the writ of prohibition was that a usurpation of jurisdiction encroached on the royal prerogative. It followed that anyone could bring the writ. n33 A key case was Articulai Cleri, reported by Coke in a passage that would have been familiar to the Americans of the late eighteenth century. n34 The central passage says: "And the kings courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court temporall or ecclesiasticall doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same . . . ." n35 No English court appears to have rejected the view that prohibition was available at the behest of strangers. n36

-Footnotes-

n33 J.M. EVANS, DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 417 (4th ed., 1980); Jaffe, supra note 29, at 1274.

n34 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 602 (1797).

n35 Id. (emphasis added).

n36 See Berger, supra note 29, at 819; Winter, supra note 22, at 1394-95.

- - - - -End Footnotes- - - - -

The writ of certiorari was similarly available to citizens, and not just those with a concrete or personal interest. A case in 1724 indicated [\*172] that "one who comes merely as a stranger" was entitled to discretionary judicial relief. n37 Suits by strangers were also permitted under a statute allowing an information of quo warranto. n38 An English case expressly so held in the auspicious year of 1789. n39

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n37 Arthur v. Commissioners of Sewers, 88 Eng. Rep. 237 (K.B. 1724); see Berger, supra note 29, at 820-21 & n.29.

n38 Berger, supra note 29, at 823.

n39 See Rex v. Smith, 100 Eng. Rep. 740 (K.B. 1790) (discussing Rex v. Brown); see also Berger, supra note 29, at 823 & n.38 (noting that Rex v. Brown, decided in 1789, allowed strangers to enforce acts of Parliament, as such acts were of interest to all in "the kingdom").

- - - - -End Footnotes- - - - -

There were other English precedents for the citizen suit. In the seventeenth and eighteenth centuries, mandamus was available in England, even at the behest of strangers. n40 Thus Berger writes:

From such cases a colonial lawyer might well have concluded that mandamus was capable of issuance at the suit of a stranger who sought to assert the public interest, especially because the analogy of mandamus to prohibition was early drawn, and because Coke, who had unequivocally stated the availability of prohibition to strangers, also made a massive assertion of mandamus jurisdiction. n41

The mandamus action is closely related to the modern citizen suit. The purpose of the mandamus action is to require the executive branch to do what the law requires it to do. This is the same idea that underlies the citizen suit, most conspicuously in the environmental area.

- - - - -Footnotes- - - - -

n40 Berger, supra note 29, at 824-25.

n41 Id. (footnotes omitted).

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Related devices in England were the informers' action and the relator action. In the informers' action, cash bounties were awarded to strangers who successfully prosecuted illegal conduct. In relator actions, suits would be brought formally in the name of the Attorney General, but at the instance of a private person, often a stranger. "[A]ny persons, though the most remote in the contemplation of the charity, may be relators . . . ." n42 Certiorari and prohibition remain available to strangers in England today. n43

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n42 Attorney Gen. v. Bucknall, 26 Eng. Rep. 600 (Ch. 1741).

n43 Berger, supra note 29, at 823.

-End Footnotes-

The English history is sufficient to show that if we are thinking in historical terms, "the argument for a constitutional bar to strangers as complainants against unconstitutional action" is "without foundation." n44 The modern injury-in-fact test, developed in the twentieth century, attempted to draw on the Westminster practice. n45 But [\*173] enough has been said to show that this is a historical blunder.

-Footnotes-

n44 Id. at 827.

n45 Thus Justice Frankfurter wrote:

[A] court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

-End Footnotes-

2. America, the Qui Tam Action, and Others

There is relatively little explicit material on the Framers' conception of "case or controversy." n46 Certainly there is no direct evidence that injury in fact or concrete interest was intended to be a constitutional prerequisite under Article III. There is no reason to think that the Framers sought to limit Congress' power to create "cases" or "controversies" by conferring causes of action. n47 To understand what the Americans understood, it is useful to consult the early American practice, looking at the state and federal levels.

-Footnotes-

n46 Most of it is collected in 4 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 212-373 (1987).

n47 Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-64 (1803) (exploring whether the right to a commission is something which the laws of the United States cannot enforce:

In pursuing this inquiry, the first question which presents itself, is, whether this can be arranged with that class of cases which come under the description of damnun absque injuria -- a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.).

- - - - -End Footnotes- - - - -

If we look at the practice in state courts, we will find no reason to think that the American practice was more restrictive than that in England. Several state cases built explicitly on the English practice. For example, a South Carolina court issued a writ of prohibition at the behest of a stranger. n48 A New Jersey case in 1794 established stranger jurisdiction in certiorari, effectively allowing a citizen action. n49 Another New Jersey case issued a writ of certiorari on behalf of a citizen and expressly rejected the view that the "court ought not to award a certiorari on the mere prayer of an individual, unless he will previously lay some cause before them tending to show that he is or may be affected by the operation of the by-law . . . ." n50

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- n48 Zylstra v. Corporation of Charleston, 1 S.C.L. (1 Bay) 382, 398 (1794).
- n49 State v. Justices of Middlesex, 1 N.J.L. 283, 294 (1794).
- n50 State v. Corporation of New Brunswick, 1 N.J.L. 450, 451 (1795).

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Other cases in the first century of the republic suggested the same view. n51 Thus Louis Jaffe summarized his historical survey with the [\*174] suggestion that "the public action -- an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations -- has long been a feature of our English and American law." n52

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- n51 See Jaffe, supra note 29, at 1276-79. Jaffe notes that this position has survived to the present day. "The considerable weight of authority now supports the citizen-mandamus suit." Id. at 1276 & n.44.
- n52 Louis L. Jaffe, Standing to Secure Judicial Review: Private Actions, 75 HARV. L. REV. 255, 302 (1961). After the founding period, the American law

took on a predictably complex and somewhat exotic form, with rules of its own. See FRANK GOODNOW, THE PRINCIPLES OF ADMINISTRATIVE LAW OF THE UNITED STATES 418-41 (1905). For the modern rules, see 2 CHESTER J. ANTIIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES (1987), discussing prohibition, quo warranto, and certiorari. Although many modern American courts generally require a personal stake of some kind, this requirement is far from universal. See, e.g., id. at 622-24 (describing citizen and taxpayer standing in Georgia, Hawaii, and New Jersey).

- - - - -End Footnotes- - - - -

At the national level, there is no clear American tradition of reliance on the prerogative writs. According to the Supreme Court's interpretation of the All Writs Act, n53 Congress did not choose explicitly to create general mandamus, prohibition, or certiorari jurisdiction, though there were particular statutory and common law cases involving the writs, and it seems clear that their limited use was a matter of legislative discretion rather than constitutional command. n54 There are, however, revealing early precedents for the citizen suit at the national level. The writ of prohibition to restrain an allegedly unconstitutional tax was treated as a constitutional case in a relatively early decision of the Marshall Court, n55 and in 1875 the Supreme Court allowed a petition for mandamus at the behest of what it treated as citizens. In Union Pacific Railroad v. Hall, n56 merchants brought suit to require a federally chartered railroad to create a certain railroad line. They invoked a general mandamus statute "to compel the Union Pacific Railroad Company to operate its road as required by law." n57 The Court said that the merchants were attempting to enforce "a duty to the public generally" and that they "had no interest other than such as belonged to others." n58 Nonetheless, the Supreme Court allowed the action to go forward.

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n53 28 U.S.C. @ 1651 (1988).

n54 The Supreme Court denied general mandamus jurisdiction, but did so on the theory that Congress had not chosen to act, not that there was any Article III issue. Thus the Court concluded that the Judiciary Act of 1789, ch. 20, @ 14, 1 Stat. 73, 811-82 (1848), did not vest general mandamus power in the federal courts. See McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505-06 (1813); see also Kendall v. United States, 37 U.S. (12 Pet.) 524, 569, 577-79 (1838).

n55 Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 171 (1829).

n56 91 U.S. 343 (1875). For an especially good discussion of this case, see Winter, supra note 22, at 1404-05.

n57 91 U.S. at 343.

n58 91 U.S. at 354.

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Moreover, the early Congress was active as well. I believe that Congress supplied two precedents -- the qui tam action and the informers' action -- that operate as a powerful affirmative argument [\*175] against the view that

Article III bars "stranger" or "citizen" actions once these have been congressionally authorized.

The most important development was the widespread early congressional creation of the qui tam action. The purpose of this action is to give citizens a right to bring civil suits to help in the enforcement of the federal criminal law. Under the qui tam action, a citizen -- who might well be a stranger -- is permitted to bring suits against offenders of the law. Qui tam actions are familiar to American law. "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." n59 In the first decade of the nation's existence, Congress created a number of qui tam actions. n60 Explicit qui tam provisions were allowed under many statutes, including those criminalizing the import of liquor without paying duties, n61 prohibiting certain trade with Indian tribes, n62 criminalizing failure to comply with certain postal requirements, n63 and criminalizing slave trade with foreign nations. n64

-Footnotes-

n59 United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943) (quoting Marvin v. Trout, 199 U.S. 212, 225 (1905)).

n60 There is a valuable discussion in Harold J. Krent, Executive Control Over Criminal Law Enforcement: Some Lessons From History, 38 AM. U.L. REV. 275, 296-303 (1989), and I draw on that discussion here. See also Evan Caminker, The Constitutionality of Qui Tam Actions, 99 YALE L.J. 341 (1989).

n61 Act of Mar. 3, 1791, ch. 15, @ 44, 1 Stat. 199, 209.

n62 Act of May 19, 1796, ch. 30, @ 18, 1 Stat. 469, 474.

n63 Act. of Feb. 20, 1792, ch. 7, @ 25, 1 Stat. 232, 239.

n64 Act of Mar. 22, 1794, ch. 11, @ 2, 1 Stat. 347, 349.

-End Footnotes-

The qui tam action was accompanied by the informers' action. Through this action, people can bring suit to enforce public duties; successful plaintiffs keep a share of the resulting damages or fines. In the states, this action had become familiar in the early stages of American history. Notably, the informers' action was available against both private defendants and public officials. n65 Early Congresses created at least two informers' actions to assist in the enforcement of federal law. The first of these operated not only against private violators but against executive officials as well. n66 "Suits by those without personal injury who were acting as representatives of others were not viewed as raising constitutional problems under article III." n67

-Footnotes-

n65 See Winter, supra note 22, at 1406-09 & nn.189-91.

n66 See Act of July 31, 1989, ch. 5, @ 29, 1 Stat. 29, 45; see also Act of May 8, 1792, ch. 36, @ 5, 1 Stat. 275, 277-78.

n67 Winter, supra note 22, at 1409.

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For present purposes, what is especially revealing is that there is [\*176] no evidence that anyone at the time of the framing believed that a qui tam action or informers' action produced a constitutional doubt. No one thought to suggest that the "case or controversy" requirement placed serious constraints on what was, in essence, a citizen suit. This fact provides extremely powerful evidence that Article III did not impose constraints on Congress' power to grant standing to strangers.

There are two possible differences between the qui tam and informers' actions on the one hand and the modern citizen suit on the other. First, the former are usually brought against a private defendant. By contrast, the government is often the defendant in the citizen suit, as indeed it was in Lujan itself. If the requirement of injury is to be read in light of constitutional provisions relating to executive power, n68 then the existence of the qui tam and informers' actions may not be decisive as against the claim that citizen or stranger suits are constitutionally forbidden.

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n68 See infra text accompanying notes 145-47.

- - - - -End Footnotes- - - - -

Second, the victor in a qui tam action is ordinarily entitled to recover money to be paid to himself, to the United States, or to both. The victor in an informers' action also receives some financial benefit. By contrast, the victor in a citizen action does not recover money. For this reason it is not completely odd to think that, as originally understood, the Constitution permitted stranger actions only if dollars were to change hands.

These are not entirely implausible distinctions. But if they are set out as part of an argument that Article III forbids the citizen suit, they do make for quite a stretch. Most important, the informers' action was available against public as well as private defendants at the state and federal levels. It cannot be distinguished on the ground that it operated only against private defendants. Nor should it matter that money does not change hands. The history suggests that the bounty is designed to offer an incentive, not to create an injury where none existed before. A declaratory judgment or an injunction serves the same purposes as a victorious suit in a qui tam or informers' action. Indeed, mandamus suits did not involve money at all, and these too were accepted during the early period. n69

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n69 See supra notes 53-58 and accompanying text.

- - - - -End Footnotes- - - - -

More generally, if the stranger suit was thought constitutionally problematic, in all probability some constitutional concern would have been voiced about the qui tam action or the informers' action. The absence of any concern about these actions makes it exceedingly unlikely that the case or controversy requirement was believed to place [\*177] any constraints on Congress' ability to grant causes of action to strangers. n70

-Footnotes-

n70 The notion of "stranger" is in fact problematic in this context, for the cause of action makes the litigant the holder of a kind of property right. See infra notes 130-32 and accompanying text.

-End Footnotes-

The Constitution may require courts to impose greater constraints on standing when the executive is the defendant. n71 But if an "injury in fact" is required by Article III, it should not matter a great deal whether the defendant is public or private. Hence the qui tam and informers' actions do seem to be powerful evidence against the claim that an injury in fact is an Article III requirement.

-Footnotes-

n71 The point is discussed infra text accompanying notes 145-47.

-End Footnotes-

3. Summary

The discussion thus far has shown that early English and American practices give no support to the view that the Constitution limits Congress' power to create standing. The relevant practices suggest not that everyone has standing, nor that Article III allows standing for all injuries, but instead something far simpler and less exotic: people have standing if the law has granted them a right to bring suit. There is no authority to the contrary before the twentieth century, and indeed, I think that there is no such authority before World War II. n72

-Footnotes-

n72 See supra notes 23-31 and accompanying text.

-End Footnotes-

A general picture emerges from the words of the great administrative law teacher Frank Goodnow, writing in 1905. Goodnow's extensive treatise has no discussion of standing, then a foreign concept; but it does deal with the prerogative writs in America. Describing what had come to be the American practice, Goodnow wrote:

The purpose of the writs is twofold. In the first place, they are issued mainly with the intention of protecting private rights; in the second place, some of them may be made use of also for the purpose of the maintenance of the law regardless of the fact whether in the particular case a private right is

attacked or not. Thus in the case of the certiorari it has been held that this writ may not be made use of simply for the maintenance of the law, that no one may apply for it unless he has some particular interest in its issue which is greater than that possessed by the ordinary citizen. The courts, however, have held with regard to the quo warranto that it may be issued on the demand of any citizen of responsibility; and the better rule would seem to be that in matters of public concern any citizen or taxpayer may apply for the mandamus. n73

-Footnotes-

n73 GOODNOW, supra note 52, at 431-32 (emphasis added) (footnotes omitted).

-End Footnotes-

In this light, is it even possible to argue that the case or controversy requirement forbids the citizen action? Perhaps the English cases are not decisive, since the case-or-controversy requirement was [\*178] not present in English law. That requirement might even be seen as a check on certain suits cognizable in England. Nor is the American practice completely unambiguous. The prerogative writs were not generally available at the behest of strangers in the federal courts. As noted, the qui tam action operated against private persons, and money would always change hands. It might therefore remain possible to argue that Article III indeed requires a "personal stake" or an "injury in fact" because, in the United States, federal courts were not traditionally given jurisdiction in pure citizen suits.

The history does not completely foreclose this argument, but it does make the argument seem far-fetched. There is absolutely no affirmative evidence that Article III was intended to limit congressional power to create standing. There is no affirmative evidence of a requirement of a "personal stake" or an "injury in fact" -- beyond the genuine requirement that some source of law confer a cause of action. Nor is there reason to believe that the case-or-controversy requirement was designed to draw sharper limits than existed in English law. The general unavailability of the prerogative writs in federal court was a matter of legislative discretion, not constitutional compulsion. n74 It is at the very least highly suggestive that no one seemed to think that the qui tam or informers' action raised an Article III issue. In light of all this, the claim that Article III bars citizen standing -- once Congress has created it -- seems most adventurous as a matter of history.

-Footnotes-

n74 See supra note 54.

-End Footnotes-

It would be possible to respond that particular historical understandings are not always binding in constitutional law. Segregation is unconstitutional even if the framers did not intend to abolish it; n75 in the Due Process Clause, the meaning of "liberty" changes over time; n76 the Contracts Clause has been understood to be far narrower than originally conceived. n77 Perhaps Article III should be treated the same way; perhaps we should not be bound by the framers' particular conception of its meaning.

-Footnotes-

n75 See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

n76 See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

n77 See *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).

- - - - -End Footnotes- - - - -

The general point about constitutional interpretation seems correct, but it does not justify the view that Article III prohibits Congress from granting standing to citizens. When the specific understandings are not binding, it is because the framers are taken to have set out a general principle capable of change over time, or because changed circumstances call for a departure from historically specific understandings. n78 [\*179] In Article III, the general principle is that a case cannot exist unless some source of law creates a cause of action. It is hard to understand why this principle should be abandoned in the context of a citizen suit. n79

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n78 *Brown* exemplifies both these points. See *Brown*, 347 U.S. at 483.

n79 I do not contend that there are no limits to Congress' power to decide what is a "case" or "controversy." In all likelihood, for example, Congress is barred from overcoming the ban on advisory opinions: See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 86 (2d ed. 1991). This ban is a plausible inference from the "Opinions in Writing" Clause, which allows the President to require opinions from heads of departments, but not from judges. U.S. CONST. art. II, @ 2, cl. 1. Moreover, the notion of a "case," as historically understood, excludes the judicial provision of advice at the behest of public officials. Outside of the distinctive area of standing, then, there are barriers to Congress' power to create a "case" where one did not exist before. In very rare cases, there may even be barriers to the congressional conferral of standing for separation-of-powers reasons. Consider, for example, a grant of standing to all members of Congress to challenge all executive action. I do not deal with such exotic examples here. See also *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (refusing to adjudicate case where judicial decision is subject to executive suspension and legislative revision).

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B. The Initial Appearance of "Standing": The Progressive and New Deal Periods

The second stage of standing law occurred in the early parts of this century. It was here that "standing" began to make a modest initial emergence as a discrete body of doctrine. To understand this development, a little background is in order.

The preliminary development of standing doctrine should be understood as part and parcel of the heated struggle, in the 1920s and 1930s, within the country and the courts about the constitutional legitimacy of the emerging regulatory state. Courts frequently invoked the Constitution as a barrier to regulatory

law. n80 Justices Brandeis and Frankfurter were, in their somewhat different periods, the leading exponents of the view that courts should defer to the outcomes of democratic processes.

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n80 See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 573-74 nn. 23-25 (2d ed. 1988) (collecting cases). The connection between the New Deal and the development of standing doctrine is traced in illuminating detail in Winter, *supra* note 22, at 1452-57, and briefly discussed in Sunstein, *supra* note 15, at 1437-38.

-End Footnotes-

In this light, it should come as no surprise that the principal early architects of what we now consider standing limits were Justices Brandeis and Frankfurter. n81 Their goal was to insulate progressive and New Deal legislation from frequent judicial attack. Attempting to counter the aggressive Supreme Court of the period, Justices Brandeis and Frankfurter helped develop a range of devices designed to limit the occasions for judicial intervention into democratic processes.

-Footnotes-

n81 See Winter, *supra* note 22, at 1443-52.

-End Footnotes-

[\*180] In the key cases, they repudiated constitutional attacks on legislative and administrative action by invoking justiciability doctrines. n82 Prominent among these doctrines was the requirement of what we now think of as standing. n83 The crucial cases involved efforts by citizens at large to invoke the Constitution to invalidate democratic outcomes. n84 In such cases, the Court held that there was no personal stake for the invocation of judicial power.

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n82 See *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943) (reviewability); *FCC v. CBS*, 311 U.S. 132 (1940) (same); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (reviewability and ripeness).

n83 See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring); *Ashwander v. TVA*, 297 U.S. 288, 341-45 (1936) (Brandeis, J., concurring); *Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922); see also *Wilson v. Shaw*, 204 U.S. 24, 30-31 (1907) (refusing to enjoin payments by U.S. government for construction of Panama Canal as plaintiff demonstrated no interest and such relief "would be an exercise of judicial power which . . . is novel and extraordinary"). It is especially notable that Justice Brandeis' great opinion in *Ashwander* -- the modern source of justiciability doctrine -- does not refer to Article III at all. See Winter, *supra* note 22, at 1424.

n84 See *Massachusetts v. Mellon*, 262 U.S. 447, 479-80 (1923); Winter, *supra* note 22, at 1424; *infra* text accompanying notes 212-14.

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How are we to understand these cases? We might begin by asking whether there was any source of a cause of action. In each case, no common law right was at stake. In addition, no statute created a right to bring suit. Finally, it seemed implausible to suggest, in these cases, that the relevant constitutional provision created a private right of action. The very notion that private rights of action -- or standing -- could be created by constitutional provisions was many years away. n85 Even if some constitutional provisions created private rights, it seemed hard to accept the view that provisions in these cases did so, because the relevant duties could not be individuated and seemed to run to the public at large. I take up this matter below. n86

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n85 See *Bivins v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

n86 See *infra* text accompanying notes 215-18.

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The development of standing limitations in the early part of the twentieth century was indeed a novelty, in the sense that no separate body of standing law existed before this period. Notably, the relevant opinions did not even refer to the word standing. But we might well see the Brandeis-Frankfurter innovations as broadly compatible with preexisting law. For the most part, their opinions can be read to hold that no one has a right to sue unless some law has conferred a right to do so. In the cases in which the cause of action was denied, no such right had been conferred. This was the key point in the relevant opinions. n87

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n87 See *infra* text accompanying notes 212-21. Some of the cases, most prominently *Mellon*, 262 U.S. at 486-88, did express doubt about citizen or taxpayer standing, though not in the context of an express congressional grant.

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[\*181] As noted above, the requirement of a cause of action is indeed a command both of Article III and of tradition. n88 The relevant denials of standing were therefore properly based on the plaintiffs' inability to find a law that entitled them to sue. Thus the Supreme Court could write as late as 1939 that, to have standing, a plaintiff must have a "legal right -- one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." n89

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n88 See *supra* text accompanying notes 30-31.

n89 *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939).

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C. The Administrative Procedure Act

The third period in the development of standing consists of the enactment and interpretation of the Administrative Procedure Act (APA) in 1946. n90 The relevant provision of the APA was an effort to codify the developing body of judge-made standing law: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." n91 This apparently cryptic phrase was actually designed to recognize standing in three straightforward categories of cases. All three categories had become well-established under previous law. n92

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n90 Administrative Procedure Act, ch. 423, 60 Stat. 237 (1946) (codified at 5 U.S.C. @@ 551-59, 701-06 (1988)).

n91 5 U.S.C. @ 702 (1988).

n92 See UNITED STATES DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947): "The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. . . . This construction of section 10(a) was not questioned or contradicted in the legislative history." Id. at 96 (footnote omitted); see also Richard Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1723-47 (1975); Sunstein, supra note 15, at 1438-40.

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First, people could obtain standing by showing that they suffered a "legal wrong" because a common law interest was at stake. An invasion of a common law interest would certainly qualify as a legal wrong. Courts presumed that anyone who could show such an invasion would be entitled to bring suit. This idea had constitutional foundations, to the extent that a foreclosure of standing to people with common law interests might raise problems under the Due Process Clause or Article III. n93

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n93 See Yakus v. United States, 321 U.S. 414, 431-35 (1944) (discussing due process issue but finding no violation as statute in question provided reasonable opportunity to challenge its validity); Crowell v. Benson, 285 U.S. 22, 40-41 (1932) (finding no due process or Article III violation as remedies provided in statute approximately probable judicial damages).

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Second, plaintiffs could show that they suffered a legal wrong within the meaning of APA by demonstrating that their statutory interests [\*182] were at stake. For example, if the interest of a litigant in competition on equal terms was a relevant factor under the governing statute -- if the agency was required to take that factor into account -- the litigant would have standing to bring suit to vindicate its interest. Congress need not have expressly conferred standing on the plaintiff; under the APA, the mere existence of an interest protected by statute was sufficient. n94 The APA's framers paid

little attention to the question how far this approach would extend standing to beneficiaries and competitors, though it seems clear that standing was not merely contemplated for objects. n95

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n94 See The Chicago Junction Case, 264 U.S. 258, 266-69 (1924); SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 276 (1946): "The phrase 'legal wrong' . . . means that something more than mere adverse personal effect must be shown in order to prevail -- that is, that the adverse effect must be an illegal effect."

I will not discuss here the question how to interpret statutes that are ambiguous on the existence of a private cause of action. For present purposes, the key point is that the APA did not require an explicit grant, but instead inferred a cause of action (standing) from the existence of an interest that the agency was entitled to consider.

n95 See supra text accompanying notes 90-92; see also Sunstein, supra note 15, at 1440-51 (discussing the APA and beneficiary standing).

-End Footnotes-

The third category did not involve legal wrong at all. People could bring suit if they could show that "a relevant statute" -- a statute other than the APA -- granted them standing by providing that people "adversely affected or aggrieved" were entitled to bring suit. In this way, the APA recognized that Congress had allowed people to have causes of action, and hence standing, even if their interests were not entitled to consideration by the relevant agency. Such people could act as "private attorneys general." This had already occurred under the Federal Communications Act. n96 The APA thus provided for congressional authorization of actions by people lacking legal injuries.

-Footnotes-

n96 See 47 U.S.C. @ 402(b)(6) (1988); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940).

-End Footnotes-

This, then, was the APA framework: standing for people whose common law or statutory interests were at stake, as well as for people expressly authorized to bring suit under statutes other than the APA. Under the APA, there was considerable continuity with previous law, in the sense that the principal question, for purposes of standing, was whether the law had conferred a cause of action. Injury in fact was neither a necessary nor a sufficient element.

[\*183] D. From "Legal Injury" to "Injury in Fact"

The fourth stage of standing law spanned from the early 1960s until about 1975. It included several dramatic new departures.

1. Beneficiary Suits

The shift in this fourth period began when courts interpreted the "legal wrong" test to allow many people affected by government decisions -- including beneficiaries of regulatory programs -- to bring suit to challenge government action. For example, courts concluded that displaced urban residents, listeners of radio stations, and users of the environment could proceed against the government to redress an agency's legally insufficient regulatory protection. n97 To understand these developments, a little background is again in order.

-Footnotes-

n97 See Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 932-37 (2d Cir. 1968); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1967); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 615-17 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). Then-Judge Burger wrote, in an influential passage:

The theory that the [FCC] can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide. United Church of Christ, 359 F.2d at 1003-04.

The general idea that courts might review unlawful inaction was hardly inconsistent with the APA as originally understood. See U.S. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. (1941):

[T]he problem of whether the administrator's refusal to take action is reviewable still remains. . . . In some instances review may be unavailing because the determination of whether or not action should be taken in the circumstances may have been committed to the exclusive judgment of the administrator as to the public interest and convenience. But if the denial is based on an erroneous interpretation of law, judicial review is available to remove at least that barrier. Id. at 86 (emphasis added).

-End Footnotes-

In the 1960s and 1970s, observers of regulatory law claimed that congressional purposes could be undermined not merely by excessive regulation, but also by insufficient regulation or agency hostility to statutory programs. n98 If conformity to law was a goal of administrative law, there was no reason to distinguish between the beneficiaries and the objects of regulation. Suits brought by beneficiaries might well serve to promote agency fidelity to legislative enactments.

-Footnotes-

n98 Much of this is catalogued in JAMES FREEDMAN, CRISIS AND LEGITIMACY (1976) and Stewart, supra note 92, at 1682-87.

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In the same period, there was also a good deal of empirical literature suggesting that agencies were sometimes subject to sustained [\*184] political pressure from regulated industries. n99 The result was agency "capture." Through this process, statutory enactments could be defeated during implementation, principally as a result of the continuous exercise of power by well-organized private groups, or "factions." Collective action problems faced by the often-diffuse members of the beneficiary class made it hard for them to exert the same kind of continuous influence on government. Just as unorganized interests would be at a systemic disadvantage in economic ordering, so they would face serious problems in the political process. Government failure would therefore mimic market failure.

- - - - -Footnotes- - - - -

n99 MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOOD AND THE THEORY OF GROUPS (1971), is the best-known general overview. See also RUSSELL HARDIN, COLLECTIVE ACTION (1982). For an important study addressing the "capture" phenomenon, see MARVIN H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). For general discussion, see THE POLITICS OF REGULATION (James Q. Wilson ed., 1980); PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981); KAYE LEHMAN SCHLOZMAN & JAMES T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986).

- - - - -End Footnotes- - - - -

This account was extremely influential in the 1960s and 1970s, and it has continuing popularity today. n100 But it should not be overdrawn. The empirical literature did not establish a systemic risk of administrative abdication, and it did not demonstrate that regulated industries are always in a better position to influence government than beneficiaries. Sometimes the opposite seemed true. n101 But the empirical literature was sufficient to cast into severe doubt the idea that regulatory objects, and not beneficiaries, should have access to judicial review. That idea seemed to stem from partisan considerations or judicial hostility to regulatory programs enacted by Congress; it did not appear to have any better pedigree. In view of the empirical evidence, it seemed positively perverse to grant standing to objects and not to beneficiaries. Thus it was that the legal injury test came, quite naturally and plausibly, to be read to allow standing for beneficiaries, who often faced statutory harm -- "legal injury" -- by virtue of inadequate regulatory action.

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n100 See, e.g., Alan B. Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 HARV. L. REV. 1059 (1986).

n101 See WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 18-20 (1971).

- - - - -End Footnotes- - - - -

These modest expansions in standing were entirely compatible with the language and framework of the APA. They built on the "legal wrong" idea to grant standing to many individuals and groups intended to be benefited by statutory enactments. It was fully reasonable to think that the beneficiaries of regulation suffered a legal injury when government failed to protect their legal interests. But a huge [\*185] and far less justified conceptual break occurred in Justice William O. Douglas' opinion for the Court in Association of Data Processing Organizations v. Camp, n102 which provides the basic underpinnings for the modern law of standing. In Data Processing, the Court essentially jettisoned the entire framework of the APA, even as it purported to interpret that very statute.

-Footnotes-

n102 397 U.S. 150 (1970).

-End Footnotes-

In a remarkably sloppy opinion, the Data Processing Court concluded that a plaintiff no longer needed to show a "legal interest" or "legal injury" to establish standing. That test "goes to the merits. The question of standing is different." n103 Instead of a careful examination of the governing law to see if Congress had created a legal interest, the standing inquiry would be a simple one barely related to the underlying law. Henceforth the issue would turn on facts, not on law.

-Footnotes-

n103 397 U.S. at 153.

-End Footnotes-

In the new test, standing existed for anyone who could show (a) "injury in fact, economic or otherwise" n104 and (b) injury "arguably . . . within the zone of interests" n105 of the regulatory statute. The zone-of-interests test was intended to be exceptionally lenient n106 and for present purposes may be put to one side. n107 The result of Data Processing was thus an entirely new focus for determining the class of persons entitled to bring suit. The Court appeared fully to endorse the 1960s expansions in the legal interest test; under its new test, beneficiaries of regulatory programs would generally have standing. But they no longer were required to show any legal interest. Instead they had to show an injury in fact.

-Footnotes-

n104 397 U.S. at 152.

n105 397 U.S. at 156.

n106 See Data Processing, 397 U.S. at 154-55 (noting instances where standing exists).

n107 There has, however, been a recent rebirth in the zone-of-interests test -- unintended in Data Processing, but perhaps presaging a partial return to the legal interest test. Thus the first Supreme Court case denying standing on

zone-of-interest grounds came in 1991. See Air Courier Conference of Am. v. American Postal Workers Union, 111 S. Ct. 913 (1991). If the analysis in this essay is right, this development should be enthusiastically welcomed as a return to the correct understanding of the APA and Article III.

- - - - -End Footnotes- - - - -

One might well ask: What was the source of the injury-in-fact test? Did the Supreme Court just make it up? The answer is basically yes. n108 The concept of "injury in fact" first arose in a 1958 treatise by [\*186] Kenneth Culp Davis, purporting to interpret the Administrative Procedure Act. n109 Davis relied on the APA's "adversely affected or aggrieved" language in support of this conclusion. In his view, someone is "adversely affected" if he suffers an injury "in fact." n110

- - - - -Footnotes- - - - -

n108 Here I agree entirely with Justice Scalia. See Scalia, supra note 1, at 887-89. Others have also rejected the conclusion that the APA requires an injury in fact. The most famous is Louis L. Jaffe, Standing Again, 84 HARV. L. REV. 633, 636 (1971); see also Fletcher, supra note 15, at 229 ("More damage to the intellectual structure of the law of standing can be traced to Data Processing than to any other single decision."); Richard Stewart, Standing for Solidarity, 88 YALE L.J. 1559, 1569 (1979) (book review) (describing Data Processing as an "unredeemed disaster").

n109 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE @ 22.02, at 211-13 (1958).

n110 Id. After Data Processing, Davis argued that injury in fact should be the principal test of standing in Kenneth C. Davis, The Liberalized Law of Standing, 37 U. CHI. L. REV. 450, 471-73 (1970).

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For reasons set forth above, this was a misreading of the APA; the language and history of that statute suggested no such renovation of standing law. n111 The words "adversely affected or aggrieved" are not freestanding, but are followed by "within the meaning of a relevant statute." This juxtaposition shows that Congress was thinking of other laws that created private attorneys general. n112 But Davis' misreading received an authoritative endorsement in Data Processing. The Court's opinion was opaque on the connection between injury in fact and Article III. The test seemed to stem from the APA, but the opinion can be read to suggest that Article III is also highly relevant. n113

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n111 See supra section I.C.

n112 Currie, supra note 15, at 43-44; see also Scalia, supra note 1, at 887; Stewart, supra note 92, at 1725-30.

n113 See the somewhat confusing passage, 397 U.S. at 151-52.

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2. Conceptual Confusion, the New Deal, and the Metaphysics of "Injury"

Data Processing was poorly written, because it left obscure the relationship between standing and Article III, and more fundamentally because it did not explain the legal source of its novel, indeed unprecedented approach to standing. In its basic orientation, however, Data Processing reflected the emerging and highly tenable view, reflected in more plausible interpretations of the APA, that saw regulatory beneficiaries as suffering "legal injuries." n114 The case thus bears some resemblance to the lower court opinions on that point, opinions that could claim to rest on the basic APA framework. n115

-Footnotes-

n114 See supra note 94 and accompanying text.

n115 See supra note 97 and accompanying text; see also Stewart, supra note 92, at 1735.

-End Footnotes-

a. Beneficiaries as objects, objects as beneficiaries. I have suggested that the emerging principles of standing could be associated with a particular belief about what caused administrative failure. The grant of beneficiary standing stemmed in part from understandings about the diffuse and disorganized character of the class of regulatory beneficiaries. If the beneficiaries had no greater influence than the objects, [\*187] and often even less, it seemed odd to say that the objects would be the only ones entitled to seek judicial review.

In a deeper sense, however, we might understand the grant of standing to regulatory beneficiaries as a broad judicial effort to adapt administrative law to the principles and aspirations of the modern state. The New Deal reformation of the American legal system would ultimately make it impossible and indeed hubristic for courts to say that the "objects" of regulation, equipped with common law interests, would receive greater protection than the beneficiaries, equipped with statutory interests. The New Deal had itself been a wholesale attack on the idea that common law interests deserved special constitutional status. n116 Under the New Deal view, the common law was a regulatory system that should be evaluated pragmatically, in terms of whether it served human liberty and welfare. When it failed to do so, the system had to be supplemented or replaced.

-Footnotes-

n116 See CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION ch. 2 (forthcoming 1993).

-End Footnotes-

The New Deal, of course, produced a number of new measures designed to protect new interests and to regulate unfair and deceptive trade practices, the securities market, and much more. n117 The resulting set of legislative and administrative initiatives generally reflected a democratic judgment that the new interests now protected by statute -- the interests of consumers, listeners, poor people, and so forth -- should receive no less protection than the

interests traditionally protected by the common law.

- - - - -Footnotes- - - - -

n117 See THEODORE LOWI, THE PERSONAL PRESIDENT 44-66 (1985).

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By repudiating the distinction between objects and beneficiaries, the new law of standing served to adapt traditional administrative doctrines to the nature and aspirations of modern government. In the context of standing, the reluctance to take this step has been embodied in a private law model of standing -- that is, in the idea that standing should be reserved principally to people with common law interests and denied to people without such interests. This idea reflects a Lochner-like conception of public law. n118 It defines modern public law by reference to common law principles that appear nowhere in the Constitution.

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n118 On injury in fact as a form of disguised substantive due process, see Fletcher, supra note 15, at 233.

- - - - -End Footnotes- - - - -

The private law model of standing is based on understandings that are not only without constitutional foundation, but that seemed to be foreclosed by democratic judgments following the New Deal. Indeed, that model seemed to draw upon the discredited view that common law and laissez-faire principles are part of the Constitution, to be [\*188] deployed by unelected judges as the vehicle for the definition of a system of public law sharply opposed to modern regulatory institutions.

We can go even further. After the New Deal, the very distinction between regulatory beneficiaries and regulatory objects seemed based on a conceptual mistake. That distinction treated the common law as the normal and natural state of affairs; it saw a deviation from the common law as an intrusion on some "object," and as a protection of some "beneficiary." Indeed, the definition of the "object" and the "beneficiary" was parasitic on common law. But this was a way for courts to load the dice. Indeed, this understanding was no longer consistent with the practices and values of modern government.

The so-called regulatory objects were in fact beneficiaries of law, insofar as it was law -- statutory or common -- that conferred on them the set of entitlements that created a protected sphere of action. Suppose, for example, that an industry attempted to fend off an occupational safety regulation that it believed unlawful. The industry's relevant rights were legal ones, and these established it as a "beneficiary" of positive law. Similarly, the beneficiaries of regulation could equally be seen as "objects" of law insofar as it was the law -- statutory or common -- that authorized private and public intrusions on their interests. Workers, for example, were the "objects" of the common law insofar as that law enabled employers to exclude them from the employer's land whenever employers so chose. n119 The rise of the regulatory state rendered the distinction between regulatory objects and regulatory beneficiaries a conceptual anachronism, a relic of the Lochner period.

-Footnotes-

n119 Cf. Jeremy Waldron, Homelessness and the Issue of Freedom, 39 UCLA L. REV. 295, 309-15 (1991) (arguing that property law invades negative rights of the homeless).

-End Footnotes-

b. The impossibility of "injury [solely] in fact." There is a related and even deeper conceptual issue, connected with the notion of injury in fact, and bearing both on the current discussion and on the developments culminating in Lujan. The Data Processing Court appears to have thought that it was greatly simplifying matters by shifting from a complex inquiry of law (is there a legal injury?) to an exceedingly simple, law-free inquiry into fact (is there a factual harm?). That Court, and its successors (the Lujan Court among them), seem to assume that whether there is an "injury" can be answered as if it were a purely factual matter -- as if the existence of injury depended on some brute fact, not on evaluation, and not on law. But this is false. n120

-Footnotes-

n120 See Fletcher's fine discussion to this effect, supra note 15, at 231-34, from which I draw here.

-End Footnotes-

In classifying some harms as injuries in fact and other harms as [\*189] purely ideological, n121 courts must inevitably rely on some standard that is normatively laden and independent of facts. If the point seems obscure, it is only because there are reasonably well-established conventions on what counts as an injury, and these conventions tend to disguise the normative judgments and make them seem purely factual. But in every case, the person who brings a lawsuit believes that she has indeed suffered an injury in fact.

-Footnotes-

n121 See Sierra Club v. Morton, 405 U.S. 727 (1972).

-End Footnotes-

When blacks challenge a grant of tax deductions to segregated schools, they believe that the grant is an injury in fact, not that it is purely ideological. n122 When an environmentalist complains about the destruction of a pristine area, he believes that the loss of that area is indeed an injury to him. When we deny these claims, we are making a judgment based not on any fact, but instead on an inquiry into what should count as a judicially cognizable injury. This judgment may be right, but it has little to do with facts or concreteness.

-Footnotes-

n122 But cf. Allen v. Wright, 468 U.S. 737, 755-56 (1984) (treating this harm as "abstract").

-End Footnotes-

As stated, my claim may seem obscure, even exotic. It is tempting to respond that there is a real, factual difference between someone who has been fined \$100 and someone in New York who objects to a policy of racial discrimination in California. One might think that in the former case there "just is" an injury, and that in the latter case there "just isn't." n123 The loss of money is a real and tangible harm; the offense produced by objectionable government policy may be intense, but it is merely offense.

-Footnotes-

n123 Here, as elsewhere in the law, believing is seeing. As Einstein once said, "It is the theory which decides what we can observe." WERNER HEISENBERG, PHYSICS AND BEYOND: ENCOUNTERS AND CONVERSATIONS 63 (1971).

-End Footnotes-

There are indeed factual differences between these cases, but it is not true that the first case involves a factual harm and the second does not. Both cases involve harm, as evidenced by the fact that people in both cases have been prompted to take the time, trouble, and expense to initiate proceedings. We might deny that someone objecting to government policy has suffered harm, and even label him a bystander; n124 but, if we do this, we are importing our own, value-laden ideas about what things ought to count. We are not simply describing some fact about the world.

-Footnotes-

n124 See Sierra Club, 405 U.S. at 739-40.

-End Footnotes-

If the claim remains obscure, the Havens Realty case n125 may be helpful. One of the issues in that case was whether standing could be conferred on "testers" -- people who do not intend to rent or [\*190] purchase a home or apartment but who pose as renters or purchasers in order to collect information about unlawfully discriminatory racial steering. Without any statute, testers could not possibly have standing. It would not matter if they perceived an "injury in fact" when they were given false, discriminatorily motivated information about the housing market. But Congress declared it unlawful "[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available" and created a cause of action to enforce this right. n126 The Havens Realty Court held that, in view of this statute, Congress had conferred a sort of legal interest on testers and provided that it could be legally redressed. The injury to the "statutorily created right to truthful housing information" was sufficient for constitutional purposes. n127

-Footnotes-

n125 Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); cf. Fallon, supra note 15, at 47-59 (discussing congressional power to grant standing).

n126 42 U.S.C. @@ 3604(d), 3612(a) (1988).

n127 455 U.S. at 374.

-----End Footnotes-----

It cannot be right to say that the plaintiff in Havens Realty suffered no injury in fact before Congress had acted, and that the civil rights statute somehow conjured up an injury ("in fact!"). In stead the relevant statute created a legally cognizable harm where none had existed before. Despite the Havens Realty Court's bow in the direction of injury in fact, n128 the case shows that the real question is what harms that people perceive as such ought to be judicially cognizable. The outcome in the case had nothing to do with "injury in fact." It had everything to do with the set of legal rights that Congress had conferred. n129

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n128 See 455 U.S. at 374.

n129 Consider also the closely related case of Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). There, two tenants of a large apartment complex in California complained about their landlord's racially discriminatory practices. They contended that these practices deprived them of "important benefits from interracial association." 409 U.S. at 210. The Court allowed standing under a statute explicitly granting the right to sue. In a concurring opinion, Justice White rightly said that, without the statute, he "would have great difficulty in concluding" that there was a case or controversy. 409 U.S. at 212. Without the statute, we would say that the plaintiffs had a merely ideological injury; perhaps we would not be able to see the harm they suffered as an injury at all. After the enactment of the statute, however, a unanimous Court concluded that standing could be found. Is it even plausible to think that there was no "injury in fact" before the statute, and thus that the California plaintiffs came to experience an injury ("in fact!") the day that Congress passed a law in the District of Columbia?

-----End Footnotes-----

In these circumstances, whether there is a so-called nonjusticiable ideological interest, or instead a legally cognizable "actual injury," is a product of legal conventions and nothing else. To people who are part of the legal culture, some harms obviously count as such, but only because those claims are so familiar. Their familiarity often stems from the fact that they were protected at common law. To the same people, some harms are not perceived as such, but only because they [\*191] are unfamiliar. Their unfamiliarity often stems from the fact that they are foreign to the common law.

Whether an injury is cognizable, however, should not depend on its familiarity or its common law pedigree; this approach would represent a conspicuous reintroduction of Lochner-era notions of substantive due process. Whether an injury is cognizable should depend on what the legislature has said, explicitly or implicitly, or on the definitions of injury provided in the various relevant sources of positive law. The Court should abandon the metaphysics of injury in fact. It should return to the question whether a cause of action has been conferred on the plaintiff.

c. On law and fact. If my point still remains unclear, we might think a bit about what it really means for someone to have a legal interest in a problem or dispute. If I am offended because Jones commits a tort against Smith, I apparently have no such interest, and I have no standing to sue Jones. But if Smith is my spouse, or my employee, the law may well have given me a legal interest, and I may well have standing to sue. If the actions of the U.S. government result in destruction of the rainforest, I have no legal interest and no standing to sue the government, and there is no case or controversy under Article III. But suppose that Congress grants American citizens standing to sue their government for acts destructive of the rainforest. If it does so, it has, in effect, granted every American both a beneficial interest in the rainforest and a legal right to protect that interest in court. A cause of action, of course, is a property interest. n130

-Footnotes-

n130 See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (noting that denial of right to bring suit can constitute a deprivation of property).

-End Footnotes-

When Congress creates a cause of action enabling people to complain against racial discrimination, consumer fraud, or destruction of environmental assets, it is really giving people a kind of property right in a certain state of affairs. n131 Invasion of that property right is the relevant injury. If some of these things seem to be "property" only ambiguously, we might recall a lesson from law school's first year: property is simply a bundle of sticks, and property rights can exist in a wide variety of tangible and intangible matters. Nothing in the Constitution forbids Congress from creating property interests of these various kinds or from allowing people to vindicate those interests in court. n132

-Footnotes-

n131 I am grateful to Michael McConnell for help with the points in this paragraph, though he bears no responsibility for the use to which I have put them here.

n132 Compare Joseph Vining's eloquent meditation on standing, written in the heyday of the apparent rejection of the legal interest test. See JOSEPH VINING, LEGAL IDENTITY (1978). Vining contends that American law had witnessed an abandonment of property-based thinking to ward a new emphasis on the definition and implementation of public values. See id. at 23-27. If what I am suggesting is right, however, abandoning the touchstone of property is not so easy. Standing depends on some legal interest, however much we might try to redirect the inquiry, and if it depends on legal interest, it depends on something like property.

-End Footnotes-

[\*192] The resistance to this general approach stems from the deep familiarity of the common law catalogue of legal rights; people, or more importantly judges pondering "injury in fact," tend to think of property in terms of that particular catalogue. But the notion that the common law

exhausts Congress' power, and that the Constitution forbids it from intruding on that catalogue or creating new legal rights, is (I repeat) simply a modern form of substantive due process. Indeed, the parallel with substantive due process is very precise. In the early twentieth century, the common law catalogue was similarly thought to be part of the state of nature, or of "how things are," and thus to operate as a barrier to legislative efforts to redefine property interests. n133 The examples suggest that there are innumerable "injuries in fact" produced by public and private action. Many of those injuries might well produce lawsuits. But an injury can become judicially cognizable if and only if it has received legal status from some source of law. To this extent, the Data Processing Court's attempted shift from law to fact was doomed to fail from the beginning.

-Footnotes-

n133 See supra note 80 and accompanying text.

-End Footnotes-

I conclude with an analogy. For many decades, a conflict of laws between two jurisdictions would be resolved by seeing where the right had "vested." n134 If the right had vested in state A, that state's law would apply; if it had vested in state B, the parties would be governed by the law of state B. Courts approached the question where has the right vested? as if it were a simple issue of fact. But eventually it became clear that this was no factual inquiry, but instead a policy judgment, to be answered by reference to the law of the relevant states and, where these did not speak, to the best possible judicial inferences on the matter. n135

-Footnotes-

n134 See Alabama Great So. R.R. Co. v. Carroll, 11 So. 803 (Ala. 1892) (applying the "place of the wrong" rule).

n135 See Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277 (1990).

-End Footnotes-

The same should be true of the law of standing. In the long run, the injury-in-fact test will, I believe, be seen as the contemporary analogue of the discredited notion of "vested rights" in the law of conflicts.

### 3. The Congressionally Created Citizen Suit

So much for conceptual matters. A final development is relevant to the period under discussion. Spurred by judicial developments and [\*193] suspicion of agency "capture," Congress created a wide range of citizens' suits. n136 These suits would be available against (a) private defendants operating in violation of statute and (b) administrators failing to enforce the law as Congress required. Congress was especially enthusiastic about such suits in the environmental area, addressing the fear that statutory commitments would be threatened by bureaucratic failure. With a number of devices, including the citizen suit, Congress hoped to overcome administrative laxity and unenthusiasm, and also to counteract the relatively weak political influence of

beneficiaries. n137 Congress did not, however, devote much attention to the constitutionality of citizen standing, and the issue was to remain open for many years.

-Footnotes-

n136 See supra note 11.

n137 In my view, this is an inadequate diagnosis of the basic problem of bureaucratic failure. A large part of that problem is command and control regulation and inadequate congressional attention to the problem of incentives imposed on administrative agencies and industries alike. The question is therefore not whether we should have "more" as opposed to "less" enforcement, but instead how to create incentives for the right level of enforcement. Command and control regulation accompanied by the citizen suit is hardly an ideal solution. See R. Shep Melnick, Pollution Deadlines and the Coalition for Failure, in ENVIRONMENTAL POLITICS 89 (Michael S. Greve & Fred L. Smith, Jr., eds., 1992); infra text accompanying note 265-69. For a more general diagnosis, see Cass R. Sunstein, Democratizing America Through Law, 25 SUFFOLK U.L. REV. 949 (1991); Cass R. Sunstein, Paradoxes of the Regulatory State, 57 U. CHI. L. REV. 407 (1990).

-End Footnotes-

E. Redressability, Causation, and the Separation of Powers

The fifth stage of standing law is the contemporary one. I begin with description and then turn to some apparent motivating assumptions.

1. New Departures

This period is defined principally by a series of cases establishing that the plaintiff does not suffer injury in fact unless he can show that (a) the injury is attributable to the conduct of the defendant and (b) the injury is likely to be redressed by a decree on his behalf. A less obvious but equally important development is the Court's tacit insistence that the requisite injury in fact be defined in common law-like terms. A still less obvious development is the renewed use of Article II in standing cases; indeed, it may not be unfair to say that Article II concerns are coming to dominate the interpretation of Article III. As I will suggest, the Lujan opinion is motivated by many of the concerns expressed in Justice Scalia's dissenting opinion in Morrison v. Olson, n138 the independent counsel case.

-Footnotes-

n138 487 U.S. 654 (1988).

-End Footnotes-

[\*194] Notably, most of the key cases have involved attempts by some plaintiff to require the executive branch to fulfill its statutory responsibilities by enforcing the law more vigorously. The initial step was Linda R.S. v. Richard D., n139 in which a mother of an illegitimate child brought suit against the local prosecutor, contending that his failure to

initiate child support proceedings against the child's father caused her harm. The Court denied standing on the ground that it was unclear whether a decree in the plaintiff's favor would remedy that harm. The father might simply go to jail, leaving the mother no better off than before. According to the Court, this possibility rendered purely "speculative" whether prosecutorial proceedings would yield the desired outcome. n140

-Footnotes-

n139 410 U.S. 614 (1973).

n140 410 U.S. at 618.

-End Footnotes-

The Linda R.S. decision was followed by Simon v. Eastern Kentucky Welfare Rights Organization. n141 There, the Court denied standing to indigent people protesting a change in tax policy which reduced the obligation of hospitals to provide medical services to the indigent. The plaintiffs claimed that they had sought and been denied medical treatment as a result of this ruling. According to the Court, the plaintiffs could not show that the changed policy actually affected their own situation. "It is purely speculative whether the denials of service . . . fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." n142

-Footnotes-

n141 426 U.S. 26 (1976).

n142 426 U.S. at 42-43.

-End Footnotes-

The third key case was Allen v. Wright. n143 In that case, the Court said that parents of black children attending public schools that were undergoing desegregation lacked standing to challenge the grant of tax deductions to segregated private schools. The pivotal point was that the plaintiffs could not show that a decree in their favor would actually affect their children. Denial of the tax deduction would not necessarily benefit the plaintiffs. Any causal relationship between the deduction and the progress of any particular desegregation plan was, again, fatally "speculative." n144

-Footnotes-

n143 468 U.S. 737 (1984); see also Duke Power Co. v. Carolina Env'tl. Study Group, Inc., 438 U.S. 59 (1978); Warth v. Seldin, 422 U.S. 490 (1975).

n144 468 U.S. at 758.

-End Footnotes-

An especially important section of the Allen opinion referred to Article II and to the separation of powers. The Court explained that, if the plaintiffs were to have standing, judges would become "virtually [\*195] continuing

monitors of the wisdom and soundness of Executive action." n145 The Court also suggested that standing here would risk judicial usurpation of the President's power to "take Care that the Laws be faithfully executed." n146 Standing should thus be unavailable "in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." n147 These suggestions -- with Article II concerns prominently appearing in an Article III setting -- have proved extremely important.

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n145 468 U.S. at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

n146 468 U.S. at 761 (quoting U.S. CONST. art. II, @ 3).

n147 468 U.S. at 761.

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2. General Trends in Administrative Law

The cases in this fifth period of standing law reveal a more general trend in administrative law, a trend of which Lujan is very much a part. The fourth stage had witnessed a fundamental assault on the distinction between regulated objects and regulatory beneficiaries. In the past fifteen years, however, the Supreme Court has unmistakably if usually implicitly insisted on that very distinction.

Professor Antonin Scalia of the University of Chicago Law School made his enthusiasm for the object-beneficiary distinction clear in an influential 1978 article on the Vermont Yankee case. n148 In one of the first statements of this position, Scalia wrote that aggressive judicial review of administrative action would be most understandable when regulated industries were at risk and least understandable when regulatory beneficiaries sought greater regulation. n149 The Vermont Yankee case itself had nothing to do with standing. But there the Court expressed firm disapproval of active judicial policing of administrative policies, and perhaps it was not a coincidence that the case involved a suit by regulatory beneficiaries who wanted to bring about more stringent regulatory controls on nuclear power. n150

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n148 Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345; see Vermont Yankee Nuclear Power Corp. v. Natural Resources Council, Inc., 435 U.S. 518 (1978).

n149 See Scalia, supra note 148, at 388-89.

n150 For a powerful defense of Vermont Yankee's treatment of the substantive issue, see Stephen Breyer, Vermont Yankee and the Court's Role in the Nuclear Energy Controversy, 91 HARV. L. REV. 1833 (1978).

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A key case, highly representative of current tendencies, is Heckler v. Chaney. n151 There the Court held that agency inaction, unlike agency action, would be presumed immune from judicial review. In so [\*196] holding, the Court apparently drew a distinction between regulated objects and regulatory beneficiaries. Indeed, the Court defended its conclusion in part by suggesting that, when an agency fails to act, it "does not exercise its coercive power . . . and thus does not infringe upon areas that courts are often called upon to protect." n152 Apparently, only the interests of the objects generally are protected. The Chaney Court also referred to the Take Care Clause of Article II, suggesting that this provided a further reason for judicial reluctance to supervise administrative inaction. In this way, Heckler v. Chaney is of a piece with Allen v. Wright and Lujan. In many other cases, the Court has rejected challenges to administrative decisions by regulatory beneficiaries. n153

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n151 470 U.S. 821 (1985).

n152 470 U.S. at 832.

n153 See, e.g., Robertson v. Methow Valley Citizen Council, 490 U.S. 332 (1989); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983).

- - - - -End Footnotes- - - - -

As noted, most of the key standing cases involved efforts by regulatory beneficiaries to require enforcement of regulatory statutes. Before Lujan, the law thus stood poised for an explicit judicial distinction between suits by objects and suits by beneficiaries.

3. "Beneficiaries" Versus "Objects"

What underlies the current trend? There are several possibilities, and all of them have probably contributed to a growing enthusiasm for the apparently discredited distinction between regulatory beneficiaries and regulated objects. The possibilities should be seen as a modern theoretical rejoinder to the 1960s and 1970s fear of agency capture by regulated objects.

Some observers, for example, think that government regulation of private ordering is constitutionally suspect. n154 The academic enthusiasm for greater constitutional checks on the regulatory state has apparently found modest judicial support. n155 Whether or not government regulation is unconstitutional, many people think that it is morally problematic, and perhaps this view too has support on the Supreme Court. n156 Other people think that government regulation does not work in practice -- that it produces high social costs for dubious [\*197] benefits. n157 This view has influenced the executive branch, and it has appeared to play a role in the courts as well. n158 Many people think that administrators are systematically inclined toward overenforcement of regulatory statutes, or toward "capture" by regulatory beneficiaries. n159 Quite apart from issues of substance, some urge that judicial compulsion of regulatory action is unconstitutional on Article II grounds or at least constitutionally troublesome. n160 Others think that courts cannot possibly play a fruitful role in assuring adequate implementation of regulatory statutes. n161 Some or all of these ideas undoubtedly help explain what has become an unmistakable trend in favor of

greater judicial insistence on the distinction between suits by regulating beneficiaries and suits by regulated objects. n162

-Footnotes-

n154 See RICHARD EPSTEIN, TAKINGS (1985).

n155 See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (finding that environmental regulation was a taking).

n156 Something of this kind may be implicit in Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 645 (1980) (plurality opinion of Stevens, J.) (agency's argument for stricter regulatory standards would "justify pervasive regulation limited only by the constraint of feasibility . . . [and] would give [the agency] power to impose enormous costs that might produce little, if any, discernible benefit").

n157 See, e.g., CHICAGO STUDIES IN POLITICAL ECONOMY (George J. Stigler ed., 1988).

n158 See Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981); Exec. Order No. 12,498, 50 Fed. Reg. 10,316 (1985).

n159 See, e.g., NISKANEN, supra note 101, at 210-11.

n160 See JEREMY RABKIN, JUDICIAL COMPULSIONS (1989).

n161 See R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

n162 I will not respond to all of these claims here; I believe that, at best, they capture some partial truths. See CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990).

-End Footnotes-

II. LUJAN: DESCRIPTION AND APPRAISAL

In this Part, I turn to Lujan. n163 I first discuss what the Court said and then evaluate its reasoning. Two detours will be necessary: first, to address Justice Scalia's conception of standing; and second, to deal with the role of the citizen suit in environmental and regulatory policy. I conclude with a brief suggestion about how Lujan should have been written.

-Footnotes-

n163 Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992).

-End Footnotes-

A. What the Court Said

The Lujan case arose under the Endangered Species Act of 1973 (ESA). n164 The ESA is an aggressive set of protections for endangered species. n165 Its key

provision says that "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . ." n166

-Footnotes-

n164 Pub. L. No. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. @ 1531-44 (1988)).

n165 TVA v. Hill, 437 U.S. 153 (1978), is the celebrated illustration confirming this point.

n166 16 U.S.C. @ 1536(a)(2) (1988).

-End Footnotes-

[\*198] For many years it has been uncertain whether the obligations of the ESA apply to actions of the U.S. government that are taken in foreign countries. In 1978, the relevant authorities agreed that the ESA did indeed apply outside the United States. n167 But in 1983, the Interior Department initiated a change in its position. An important new regulation, ultimately issued in 1986, announced that the ESA would apply only to actions within the United States or on the high seas. n168

-Footnotes-

n167 See 43 Fed. Reg. 874 (1978).

n168 48 Fed. Reg. 29,990 (1983) (proposing this result); 50 C.F.R. @ 402.01 (1991) (codifying final regulation).

-End Footnotes-

The regulation had a number of important consequences. American agencies funding foreign projects were no longer required to consult with the Secretary of the Interior if their projects would jeopardize the existence of endangered species. The ESA would provide no obstacle to the expenditure of American taxpayer dollars to projects that would threaten to eliminate endangered species outside U.S. borders.

Environmental organizations, including Defenders of Wildlife, brought suit, claiming that the new regulation violated the statute. To establish standing, two members of Defenders of Wildlife claimed that they suffered an injury in fact. Joyce Kelly swore in an affidavit that she had traveled to Egypt in 1986 and viewed the habitat of the endangered Nile crocodile. She claimed that she "intended to do so again, and hoped to observe the crocodile directly." Amy Skilbred claimed that she had traveled to Sri Lanka in 1981 and observed the habitat of "endangered species such as the Asian elephant and the leopard." She also claimed that she intended to return to Sri Lanka to see members of these species. In a deposition, she acknowledged that she did not have a certain date for return. n169

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n169 Lujan, 112 S. Ct. at 2138.

-End Footnotes-

The Court's opinion, devoted entirely to the issue of standing, is quite straightforward. It falls into four parts: a general statement about standing; a discussion of injury in fact; an assessment of redressability; and a treatment of the citizen suit.

The general statement begins with a description of the function of standing in a system of separation of powers. According to the Court, Article III requires an "irreducible constitutional minimum of standing," with three elements: (1) an injury in fact that is both (a) concrete and particularized and (b) actual or imminent rather than conjectural or hypothetical; (2) a demonstration that the injury is fairly traceable to the acts of the defendant, rather than of some third party; and (3) a [\*199] showing that it is likely that the injury will be redressed by a decision favorable to the plaintiff. n170

-Footnotes-

n170 112 S. Ct. at 2136.

-End Footnotes-

This opening statement breaks little new ground. But the Court added that the standing issue will often be affected by "whether the plaintiff is himself an object of the action (or forgone action) at issue." n171 If the plaintiff is an object, the three requirements will ordinarily be met. But when an "injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed." n172 In such cases, there is the problem that "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction -- and perhaps on the response of others as well." n173 The Court suggested that in such cases standing "is ordinarily 'substantially more difficult' to establish." n174 The Court had implicitly drawn this distinction in Allen v. Wright, n175 but Lujan was the first case explicitly to mark out the categories.

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n171 112 S. Ct. at 2137.

n172 112 S. Ct. at 2137.

n173 112 S. Ct. at 2137.

n174 112 S. Ct. at 2137.

n175 468 U.S. 737 (1984); see supra notes 143-47 and accompanying text.

-End Footnotes-

So much for the preliminaries. The Court's first specific holding was that an injury in fact had not been established. The intention to visit the places harboring endangered species was not enough. The plaintiffs had set out no particular plans. They specified no time when their indefinite plans would

materialize. Thus they had shown no "actual or imminent" injury. n176 Nor could plaintiffs show injuries in fact by demonstrating a nexus linking the affected habitats with all the world's ecosystems, or linking their own "professional" interests in observing endangered species with the interests of all persons so engaged. n177 The fact that ecosystems are generally interrelated was not enough, because the plaintiffs could not show that they used portions of an ecosystem "perceptibly affected by the unlawful action in question." n178 Standing was similarly not available to anyone having an interest in studying or seeing endangered species, because of a professional commitment or otherwise. There must be "a factual showing of perceptible harm." n179 This, then, was the Court's reasoning [\*200] on injury in fact.

-Footnotes-

n176 112 S. Ct. at 2138.

n177 112 S. Ct. at 2139.

n178 112 S. Ct. at 2139.

n179 112 S. Ct. at 2139. The plurality did not foreclose the "nexus" approach to injury in fact. Justice Kennedy's concurrence preserved the possibility that similar "nexus" theories might serve to establish injuries in fact in other cases. See 112 S. Ct. at 2146 (Kennedy, J., concurring); infra text accompanying note 189.

-End Footnotes-

The second conclusion in Justice Scalia's opinion, accepted by only a plurality of the Court, was that the plaintiffs could not show redressability. According to the plurality, the difficulty lay in the fact that the plaintiffs were challenging a general regulation not requiring consultation with the Secretary of the Interior for funding actions outside of the United States. There were two problems, suggesting that the plaintiffs might not benefit from a decree in their favor.

First, suppose that the district court awarded relief against the Secretary; suppose that it required the Secretary to issue a regulation mandating consultation with him for foreign projects threatening an endangered species. It would remain unclear that the funding agencies would be bound by this regulation. They might simply ignore it; they might not consult at all. For this reason, there would be no clear benefits to the plaintiffs from a favorable ruling.

Second, the American agencies provide only part of the funding for the relevant foreign projects. Most of the money comes from elsewhere. "AID, for example, has provided less than 10% of the funding" for one of the projects at issue in the case. n180 Justice Scalia found it unclear whether the elimination of that partial fraction would affect the projects or the species in question. "[I]t is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency action they seek to achieve." n181 The plaintiffs could not show redressability, because a decree on their behalf might not yield their desired result.

-Footnotes-

n180 112 S. Ct. at 2142.

n181 112 S. Ct. at 2142.

-End Footnotes-

The Court's third conclusion was its most important. The court of appeals had relied on the citizen-suit provision of the ESA, permitting "any person [to] commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." n182 In a discussion with large consequences, the Court held in effect that this provision was unconstitutional as applied.

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n182 16 U.S.C. @ 1540(g)(1) (1988).

-End Footnotes-

The Court emphasized that Article III requires something more than "a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and [\*201] tangibly benefits him than it does the public at large." n183 To support this contention, the Court cited cases from the 1920s and 1930s rejecting suits by citizens complaining about government action on constitutional grounds. It also pointed to a number of post-1970 cases appearing to suggest that Article III in fact required a particularized injury. n184

-Footnotes-

n183 112 S. Ct. at 2143.

n184 112 S. Ct. at 2144.

-End Footnotes-

The Court acknowledged that in none of these cases had Congress explicitly granted citizens a right to bring suit. But in the Court's view, this difference did not matter. The Court emphasized that "[v]indicating the public interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive." n185 In particular, the Court said that if Congress could turn "the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts," n186 it would be transferring "from the President to the courts the Chief Executive's most important constitutional duty," that is, "to 'take Care that the Laws be faithfully executed.'" n187 Thus, the Court's decision rested on the fear that, if Congress could grant standing here, it would turn the judges into overseers, and usurpers, of the President himself. Here Article II helped give context to Article III.

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n185 112 S. Ct. at 2145.

n186 112 S. Ct. at 2145.

n187 112 S. Ct. at 2145 (quoting U.S. CONST. art II, @ 3).

-End Footnotes-

Justice Kennedy, joined by Justice Souter, offered an intriguing and somewhat ambiguous concurring opinion. He emphasized that, had the plaintiffs purchased an airplane ticket, set a specific date to visit the habitat of the endangered species mentioned, or used the relevant sites on a regular basis, they might have established standing in a case of this kind. n188 Indeed, Justice Kennedy was not willing to foreclose the possibility that standing might be allowed on the basis of some "nexus" theory. n189 He indicated that courts "must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition." n190 Thus "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." n191 But in this [\*202] case Congress refused to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." n192 In any case, Article III does not permit Congress to allow courts "to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way." n193

-Footnotes-

n188 112 S. Ct. at 2146 (Kennedy, J., concurring).

n189 112 S. Ct. at 2146 (Kennedy, J., concurring).

n190 112 S. Ct. at 2146 (Kennedy, J., concurring).

n191 112 S. Ct. at 2146-47 (Kennedy, J., concurring).

n192 112 S. Ct. at 2147 (Kennedy, J., concurring).

n193 112 S. Ct. at 2147 (Kennedy, J., concurring).

There were two other separate opinions. Justice Stevens concurred in the judgment. 112 S. Ct. at 2147. He concluded that plaintiffs had standing because some of them had visited a critical habitat of an endangered species, shown a professional interest in preserving the species and its habitats, and intended to revisit them in the future. They did not need to show that the return visit was imminent. They would suffer the relevant injury, sufficient for Article III purposes, as soon as the species was destroyed. Justice Stevens also contested the matter of redressability. He would have presumed that, if the Court required funding agencies to consult with the Secretary, the agencies would abide by the Court's interpretation, and that consultation would yield tangible results. Justice Stevens concurred only because he concluded that, on the merits, the ESA did not apply overseas.

Justice Blackmun dissented in an opinion joined by Justice O'Connor. 112 S. Ct. at 2151. Justice Blackmun emphasized that Kelly and Skilbred swore that they would soon return to relevant project sites. In his view, a reasonable finder of fact could find that this was likely, thus confirming plaintiffs' injury in fact. The distant location of the Asian elephant was irrelevant to the fact that its destruction would impose a professional injury on the plaintiffs. Moreover, plaintiffs met the redressability requirement, for a threatened withdrawal of American funding might well affect foreign government conduct. If American funds were withdrawn, the possibility that the project might be scaled back or eliminated was sufficient to establish redressability. 112 S. Ct. at 2156-57.

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B. Evaluation

Each conclusion in the principal opinion is of considerable interest. I take them up in sequence.

1. Injury

The Court's conclusion on the matter of injury raises three different issues. The first is whether the plaintiffs did indeed show an injury, assuming the Court's definition of what the injury was. The second is whether the plaintiffs could have been permitted to recharacterize their injury in a different way. The third has to do with the general problems in the very notion of injury in fact.

If we accept the Court's definition of injury, its conclusion was perhaps an innovation, but not an entirely implausible one. Its chief importance lay in the insistence that the injury must be "imminent." It is true that none of the plaintiffs could prove that they would revisit the relevant sites. So long as injury in fact is required, perhaps this point is decisive. Perhaps the plaintiffs failed to show with sufficient [\*203] certainty that they would be affected by the government decisions at issue in the case.

An argument to the contrary would suggest that one of the original purposes of the injury-in-fact test, made explicit in Data Processing, n194 was to ensure that standing could be a simple, threshold determination, without an elaborate process of assessing the pleadings. In any case, it would be strange and unfortunate if jurisdictional issues turned out to rest on complex factual inquiries. In this light, it might seem to make little sense to require plaintiffs to purchase an airline ticket. Perhaps this is unnecessary formalism. But the Court's point is at least one on which reasonable people can differ. If we put the congressional creation of citizen suits to one side, and if the outcome in Lujan turns on the fact that plaintiffs made an inadequate showing that they would indeed return to the relevant sites, the Court's decision is hardly implausible.

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n194 See Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152-54 (1970).

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A trickier issue, not dealt with in any of the opinions, involves the appropriate characterization of the injury. To understand the point, we need to look at a famous case that is seemingly far afield. Regents of the University of California v. Bakke n195 presented an often-over-looked problem of standing. Bakke himself could not show that without the affirmative action program he challenged, he would have been admitted to the medical school of the University of California at Davis. It was therefore argued that he could not meet the Article III requirement of injury in fact.

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n195 438 U.S. 265 (1978).

- - - - -End Footnotes- - - - -

The Court responded in a way that has potentially major implications:

[E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. . . . The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. n196

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n196 438 U.S. at 280-81 n.14.

- - - - -End Footnotes- - - - -

What happened here was that the Bakke Court found injury, causation, and redressability by the simple doctrinal device of recharacterizing the injury. In Bakke, the Court described the injury as involving not admission to medical school but the opportunity to compete on equal terms. The Court has not explicitly used this technique in any other case, n197 but it might easily have done so. In Simon v. Eastern Kentucky Welfare Rights Organization [EKWRO], for example, the [\*204] Court might have said that the injury consisted not of a refusal of admission to a hospital, but instead of a decision not to permit the plaintiffs to have an opportunity to be admitted on the terms specified by law, simply because of unlawful incentives created by the IRS. n198 In this way, Bakke and EKWRO were structurally similar. Likewise, in Allen v. Wright, n199 the Court might have recharacterized the injury as an opportunity not to have the desegregation process distorted by the incentives created through the grant of unlawful tax deductions to private schools.

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n197 But see the housing discrimination cases discussed supra text accompanying notes 125-29. The idea that there was redressability there, in the ordinary sense, is odd. See Logan, supra note 15, at 77-81. The Court did not require ordinary redressability because there was a clear invasion of a statutory right and a clear congressional grant of standing. See id.

n198 426 U.S. 26 (1976); see supra notes 141-42 and accompanying text (discussing case).

n199 468 U.S. 737 (1984).

- - - - -End Footnotes- - - - -

Suppose that, in Lujan itself, the plaintiffs had claimed that their injury consisted not of an inability to see certain species but of a diminished opportunity to do so. This diminished opportunity allegedly resulted from unlawful government action. On this view, the ESA was designed to ensure not that no species would become extinct -- that was not an adequate description of the injury at issue -- but more precisely that endangered species would not be subject to increased threats of extinction because of federal governmental action. The injury of which the plaintiffs complained was the harm to their professional and tourist opportunities created by those increased risks.

On this view, the injury in Lujan would therefore run parallel to that created by violations of the Equal Protection Clause, which is designed not to ensure that certain people get into medical school, but instead that they are not subject to increased risks of exclusion because of racial factors. Structurally, a plausible conception of the harm in Lujan would accord with that in Bakke -- a harm to an opportunity, here the opportunity to observe certain species.

If Bakke is right on the standing question, it is not so easy to explain why the same approach would have been wrong in Lujan. If there is a difference between the relevant injuries, it may stem from the fact that the Equal Protection Clause conspicuously protects the right to compete on an equal basis; this is not a contestable interpretation (however much we may dispute what "equal" means). The clause does not confer the right to a certain set of favorable outcomes. The ESA is far more ambiguous on this score. Perhaps the injury against which it guards is the actual loss of an endangered species because of U.S. government action, rather than the diminished opportunity to view such a species in its natural habitat.

But this interpretation is far from clear. Why could we not view [\*205] the ESA as protecting the right to have the opportunity to see endangered species unaffected by adverse action by government agencies? Surely Congress has the constitutional power to create such a right. But courts may wish to avoid this interpretation in the absence of an especially clear congressional statement. The recharacterization of injuries to include less particularized, "opportunity" harms does expand the category of people entitled to bring suit. At some point the recharacterization will mean that all, or almost all, citizens are harmed in the same way. Prudential considerations might well counsel against this step. n200

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n200 Cf. Fletcher, supra note 15, at 278-79 (arguing that broadened congressional grants of standing may undercut rights of those most directly affected).

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This point suggests that, when Congress has not spoken clearly, courts should not allow injuries to be characterized in such broad terms that the plaintiff is not particularly affected. But in Lujan, there was no such problem. The plaintiffs had a fully plausible professional and educational interest in the species at issue. If the plaintiffs had tried to characterize their injury as the diminished opportunity to promote their interests, they should have been permitted to do so. There is little law on this issue, but perhaps inventive plaintiffs will be permitted to make efforts in this direction in the future.

I conclude that, as the case was litigated, the Court's conclusion on injury in fact was probably incorrect, but plausible, and in any case no great innovation. Because of the way the case was litigated, there was no occasion to think hard about the appropriate characterization of the injury. Thus the implications of Bakke remain unclear.

The third problem involves the notion of injury in fact. I have suggested that whether there is such an injury turns not merely on facts but also on whether the law has recognized certain harms as legal ones. n201 This principle means, for example, that a person in New York has no standing to challenge racial discrimination in Iowa, as no law treats distant discrimination as an injury. The same result would occur with a Lujan-style action brought before enactment of the ESA. But now suppose that Congress has given to all Americans a kind of beneficial legal interest in the survival of the Nile crocodile, at least in the sense that it has granted each of us a jointly held property right, operating against acts of the U.S. government that threaten to destroy the species. Suppose too that Congress has granted every American the right to sue to vindicate that property right. What in the Constitution forbids this action? Surely not the Due Process Clause; surely not Article II; and surely not Article III.

-Footnotes-

n201 See supra notes 120-29 and accompanying text.

-End Footnotes-

[\*206] I suggest that this is very much what happened in the ESA itself. By creating citizen standing, Congress in essence created the relevant property interest and allowed citizens to vindicate it. To this extent, Congress did indeed create the requisite injury in fact, and the Court should have recognized it as such. If a problem remains, perhaps it lies in Congress' failure to be explicit on the point. This may ultimately be the meaning of Justice Kennedy's concurring opinion, and if so it remains possible for Congress to solve the problem through more careful drafting. I discuss these points in Part III. n202

-Footnotes-

n202 See infra text accompanying notes 295-310.

-End Footnotes-

2. Redressability

On the question of redressability, there was no majority for the Court. Three justices saw no problem with redressability; two Justices refused to

speak to the issue; four Justices found a constitutional defect. Because no majority spoke, the Lujan case has little precedential value on this question.

To evaluate the issue of redressability in the recent cases, it is important to understand why courts require redressability at all. The basic reason is akin to that underlying the prohibition on advisory opinions. Let us suppose that an injury in fact is required. If a decree in the plaintiff's favor will not remedy that injury, is not such a decree an advisory opinion, at least with respect to the plaintiff? If the harm to the plaintiff will persist after the decree, why should the court become involved at all? For this reason, the redressability requirement seems to be a reasonable inference from the requirement of injury in fact. In the abstract, it makes perfect sense.

The difficulty arises in cases in which Congress has attempted to restructure administrative and private incentives so as to bring about structural or systemic change, but in a way that will not necessarily yield the particular outcomes sought in particular cases. Assume, for example, that Congress expressly forbids the grant of federal funds to international projects that threaten endangered species. If the agency withholds the funds, no particular project will necessarily be stopped, nor will any particular species necessarily be saved. The project may go forward without American participation, or the species may not survive even without the project. Or suppose that Congress forbids universities receiving federal funds from discriminating on the basis of race. If the funds are withheld, discrimination may continue. No prediction on this score can avoid being "speculative."

In cases of this kind, the relevant harm consists of a grant of funds [\*207] that makes certain harms more likely as a result of the contribution of American tax dollars -- the loss of a species or the incidence of discrimination. The examples illustrate what Congress frequently attempts to do in the areas of funding requirements, environmental protection, and risk regulation in general: it attempts to change incentives in a way that should produce aggregate changes without necessarily affecting outcomes in particular cases. The reduction of sulfur dioxide emission levels in California will reduce the risk that people will suffer from respiratory disease. But it will usually be speculative in any particular case whether the mandated reduction will make any difference to a particular human life.

In such cases, whether an injury is redressable depends on how it is characterized. If the injury is described in sharply particularistic, common law-like terms, it will not be redressable, since the consequences of victory for any particular plaintiff cannot be ascertained in advance. But if it is characterized as an increased risk of harm -- if that is the relevant injury -- it will certainly be redressed by a decree in the plaintiff's favor. A decision to require compliance with national ambient air quality standards will make the air cleaner, and that will decrease the risk of harm to people in the relevant territory. Cases of this sort are a staple of modern administrative law. Much the same analysis might be applied to a decision to withdraw funds from schools that discriminate on the basis of race or sex.

The point casts light on Justice Kennedy's suggestion that courts "must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition." n203 Indeed, in these sorts of cases it makes little sense to ask if a decree in the plaintiff's favor will remedy a common law-like injury. The question is: What is the harm that Congress

sought to prevent? To answer this question, a court has to engage in statutory interpretation. In the end, the issue of redressability, like that of injury in fact, turns on what Congress has provided. Redressability might even be understood as a crude proxy for an inquiry into legislative instructions about who is entitled to bring suit.

-Footnotes-

n203 Lujan, 112 S. Ct. at 2146 (Kennedy, J., concurring).

-End Footnotes-

In Lujan, the harm Congress sought to prevent would indeed have been redressed by the decree. The alleged violation was a procedural one -- that is, a failure to require consultation with the Secretary of the Interior on the fact that the project threatened an endangered species. If we suppose that the injury-in-fact requirement is met, the redressability issue poses no further obstacle. If plaintiffs were injured [\*208] by the failure to consult, then a decree ordering consultation would have redressed the harm. Of course, survival of the endangered species is not a necessary consequence of the requirement to consult. Perhaps the agencies would refuse to consult; perhaps removal of funding would not affect any species. But none of this is relevant. For purposes of redressability, a requirement of consultation must merely affect incentives in the statutorily required way.

On this point, Lujan is self-contradictory, and the internal contradiction helps show why redressability should have presented no problem. The Court acknowledged (without any real explanation) that in some cases involving procedural violations, plaintiffs need not show redressability. The Court stated that "[t]his is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs . . ." n204 and added in a crucial footnote: "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." n205

-Footnotes-

n204 112 S. Ct. at 2142.

n205 112 S. Ct. at 2142 n.7.

-End Footnotes-

As noted, the Court did not explain this conclusion; I try to do so below. n206 But if plaintiffs need not meet the normal standards for redressability for procedural violations, it follows that plaintiffs in Lujan itself need not have met the normal standards for redressability. Indeed, under this reasoning, redressability need not be shown in a wide range of cases in which a plaintiff contends that the executive branch has failed to comply with a procedural requirement imposed by law. n207

-Footnotes-

n206 See infra text accompanying notes 280-81.

n207 Hence Allen v. Wright, 468 U.S. 737 (1984), and Simon v. Eastern Ky. Welfare Rights Org. [EKWRO], 426 U.S. 26 (1976), are incorrect if they are understood as redressability cases. They may be right, but only because of likely congressional instructions. Congress does not ordinarily allow one taxpayer to litigate the tax liability of another. This well-established background principle is probably the concern to which these cases legitimately respond. See EKWRO, 426 U.S. at 46 (Stewart, J., concurring).

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A contrary conclusion would produce surprising results. It would mean that Article III imposed a constitutional obstacle to most ordinary administrative law cases. In the usual case, a litigant contends that an agency has failed to follow some procedural requirement -- by holding inadequate hearings, failing to give notice, meeting with private people, or attending to a statutorily irrelevant factor. In all such cases, it might well be said, under the apparent standard in Lujan, that the redressability requirement has not been met. In such cases, it is [\*209] entirely "speculative" whether a decree in the defendant's favor will remedy the alleged injury. Lujan cannot be understood to say that these conventional cases have all of a sudden become nonjusticiable.

I will attempt to sort out these very complex issues below. n208 For the moment, we should think of redressability as a crude device for determining whether Congress intended to confer a cause of action. n209 When Congress has not spoken, the absence of redressability -- understanding the injury in relatively concrete, personalized terms -- may argue for the conclusion that the national legislature has not conferred standing on the plaintiff. This idea may be part of the prudential notion that standing will not be recognized for "generalized grievances." n210 Certainly courts should not recognize standing when the injury, however characterized, will not be redressed by a decree in the plaintiff's favor. As an independent Article III requirement, however, the notion of redressability makes little sense in the cases under discussion.

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n208 See infra text accompanying notes 280-82.

n209 See Fletcher, supra note 15.

n210 See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).

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3. Citizen Suits

By far the most important and novel holding in Lujan was that Congress cannot grant standing to citizens. The largest conclusion, also set out in Justice Scalia's 1983 Suffolk Law Review article, is that Article III requires a concrete, particularized, actual, or imminent injury in fact that also satisfies the causation and redressability requirements. This conclusion rested on the Court's own precedents, on the Take Care Clause, and on a particular understanding of Article III. n211 I take these in order.

-Footnotes-

n211 The Court did not address some of the staples of standing law: that injury in fact assures "concrete adversariness"; that it guards against collusive suits; that it ensures that suits will not be hypothetical or remote. The Court was wise not to emphasize these points, since they have nothing to do with standing. See Sunstein, supra note 15, at 1448.

-End Footnotes-

a. Precedents. The Court relied on two sets of cases. The first, from the 1920s and 1930s, rejected on standing grounds some odd constitutional challenges to governmental decisions. In Fairchild v. Hughes, n212 the Court dismissed a suit that challenged the process behind ratification of the Nineteenth Amendment; in Massachusetts v. Mellon, n213 the Court did the same for a taxpayer suit challenging federal [\*210] expenditures; in Ex parte Levitt, n214 the Court dismissed an action challenging Justice Hugo Black's appointment to the Supreme Court.

-Footnotes-

- n212 258 U.S. 126 (1922).
- n213 262 U.S. 447 (1923).
- n214 302 U.S. 633 (1937).

-End Footnotes-

None of these cases involved a congressional grant of standing. All involved constitutional claims. Following the discussion in Part I, I suggest that all of these cases are best understood as attempts to persuade the Court to create private rights of action under constitutional provisions, as in the 1971 case of Bivins v. Six Unknown Named Agents. n215 In Bivins, the Court concluded that the Fourth Amendment implicitly creates a private right of action -- that is, it implicitly authorizes people to bring suit for damages to vindicate their Fourth Amendment rights. n216 But not every constitutional provision creates a private right of action. It seems especially implausible to say that constitutional provisions create such rights when the relevant duty runs to the public as a whole rather than to affected individuals. Under traditional standards, a law that creates a duty to the general public does not give rise to privately enforceable rights. n217

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- n215 403 U.S. 388 (1971).
- n216 403 U.S. at 395.

n217 See, e.g., Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted) ("First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted' . . .?"); J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

-End Footnotes-

Fairchild, Mellon, and Ex parte Levitt should be seen as suits attempting to create private rights of action under constitutional provisions that did not contemplate such actions. This understanding accords with the language of the opinions, which indeed suggests that the relevant constitutional provisions do not create private rights. Hence the words in Fairchild: "Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys not be wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit . . . ." n218

-Footnotes-

n218 258 U.S. at 129-30. It follows that if Flast v. Cohen, 392 U.S. 83 (1968), is correct, it is because the Establishment Clause indeed provides a Bivins-type cause of action to restrain unlawful expenditures. Thus Justice Brennan's dissenting opinion in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), directs attention to the right issue -- the existence of a private right. 454 U.S. at 492 (Brennan, J., dissenting). I believe, however, that his favorable conclusion was incorrect in the particular case.

-End Footnotes-

In thinking about these precedents, we may go a bit further. A well-established view holds that courts should be reluctant to invoke constitutional provisions as a check on democratic processes. n219 Except when absolutely necessary, constitutional adjudication should be [\*211] avoided. Many of the justiciability doctrines -- standing, ripeness, mootness, political questions -- can be understood as an effort to exemplify the relevant "passive virtues." n220

-Footnotes-

n219 The classic discussion is ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

n220 See id. at 111-98.

-End Footnotes-

Ideas of this sort were close to the heart of the jurisprudence of Justices Brandeis and Frankfurter, who were, as we have seen, the central figures behind the rise of standing limitations. However controversial these ideas may be to some, n221 they are fully intelligible. But there is a huge difference between cases reflecting judicial reluctance to invoke the Constitution to challenge legislative outcomes and cases in which Congress, the national lawmaker, has explicitly created standing so as to ensure bureaucratic conformity with democratic will.

-Footnotes-

n221 See Gerald Gunther, The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964).

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In the latter sort of case, considerations of democracy support the grant of standing. The democratic process has produced citizen standing, which it perceived as necessary to promote compliance with the democratic will as reflected in the governing statute. The normal notions of "passive virtues" have no role. Hence the cases from the 1920s and 1930s seem irrelevant to the issue in Lujan.

The second set of precedents relied on in Lujan consist of cases from the 1970s and 1980s, announcing the three Article III requirements. Some of these cases had the same form as the cases from the 1920s and 1930s. They too involved efforts to persuade courts to create private rights of action under constitutional provisions. n222 In the other cases, the Court was not dealing with an express congressional grant of standing. This is a crucial difference. If standing depends on positive law, decisions denying standing without an express grant are hardly authority for cases with an express grant. Indeed, in some of these cases the Court expressly suggested that such a grant could make a critical difference. n223

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n222 See Valley Forge, 454 U.S. at 464; United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

n223 See, e.g., Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

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On the basis of all these considerations, it seems clear that the result in Lujan has no firm support in the precedents. The issue of citizen standing had never been decided.

b. Article II and the Take Care Clause. The Court's second argument is that standing limitations for citizens are necessary in order to protect against intrusions on the President's power under the Take Care Clause. n224 This is an extremely important claim. It links Justice [\*212] Scalia's Lujan opinion with his insistence elsewhere on a "unitary executive," one that is free from interference by others. n225 We may speculate that, on Justice Scalia's view, the notion of a "unitary executive" equally forbids citizen suits that allow judicial intrusions on the "Take Care" power and statutory initiatives that remove executive power from the President in favor of independent counsels. But what is the precise relationship between standing limitations and the President's power to take care that the laws be faithfully executed?

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n224 Lujan, 112 S. Ct. at 2145.

n225 See Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting).

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From its text and history, it seems clear that the Take Care Clause confers both a duty and a power n226 and that it does indeed impose limits on what courts can do to the bureaucracy. The Take Care Clause confers a power insofar as it grants to the President, and no one else, the authority to oversee the execution of federal law. n227 The provision therefore carries implications for the perennial question of the President's power over the administration. It also suggests that oversight of bureaucratic implementation falls to the President, not to Congress or the courts.

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n226 See Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389 (1987).

n227 I do not mean to take a position on the complex issues raised by presidential displacement of administrative authority. For a discussion of these issues, see generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

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But the Take Care Clause confers a duty insofar as it imposes on the President both a responsibility to be faithful to law and an obligation to enforce the law as it has been enacted, rather than as he would have wished it to be. It is for this reason that the standard administrative law case raises no issue under the Take Care Clause. If an object of regulation establishes that an agency has enforced the law in an unlawful way, the President has violated his duty under the Take Care Clause. A judicial decree to this effect raises no problem under that clause; it merely enforces the constitutional obligation in the constitutionally authorized way.

This point is not limited to cases involving regulated objects. If a regulatory beneficiary with standing persuades a court that the President is violating the law, and the court so holds, there is no constitutional difficulty. Imagine, for example, that the plaintiffs in *Lujan* had purchased their plane tickets and made plans to leave for the relevant countries on a certain date. The *Lujan* Court acknowledged that such circumstances would give rise to standing. n228 If the plaintiffs proceeded [\*213] to win on the merits, no problem would arise under the Take Care Clause. A judicial decision for the plaintiffs would signal that the President had violated his constitutional command to respect and enforce the ESA as enacted.

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n228 See *Lujan*, 112 S. Ct. at 2138. I put to one side the issue of redressability; it is irrelevant for present purposes.

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We can thus conclude that the Take Care Clause poses no problems in suits by regulated objects, and also no problem in suits by regulatory beneficiaries, even if they are requiring the executive to enforce certain laws against his

will. All of this suggests that the relationship between standing limits and the Take Care Clause is at best ambiguous -- and in the end, I believe, nonexistent. If a court could set aside executive action at the behest of plaintiffs with a plane ticket, why does the Take Care Clause forbid it from doing so at the behest of plaintiffs without a ticket? Why do courts become "virtually continuing monitors of the wisdom and soundness of Executive action" n229 if they hear claims of official illegality in the second class of cases?

-Footnotes-

n229 112 S. Ct at 2145.

-End Footnotes-

These questions do not establish that there are no limits on standing. But they do raise doubts about the relevance of the Take Care Clause. In fact they suggest that the clause, however relevant it may be to many issues on administrative law, is irrelevant to the question of standing.

Lujan seems to be built in key part on the idea that citizen standing -- like other legislative interference with the President's power to execute the law n230 -- is unacceptable under Article II. Indeed, many of the recent standing cases might be thought to be Article II cases masquerading under the guise of Article III; we may even say that the Article II tail is wagging the Article III dog. But the conflation of Article II and Article III concerns has led to serious confusion. If a plaintiff with a plane ticket can sue under the ESA without offense to Article II, then it makes no sense to say that Article II is violated if a plaintiff lacking such a ticket initiates a proceeding. Beneficiary standing poses no Article II issue. The two articles raise quite different concerns; they should be analyzed separately.

-Footnotes-

n230 See Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); Buckley v. Valeo, 424 U.S. 1 (1976).

-End Footnotes-

The Court's answer, set out in a brief passage, appears to take the following form. It is one thing for judges to protect "individual rights." Courts can properly engage in this task, which is uniquely theirs. But it is another thing to protect "public rights that have been legislatively pronounced to belong to each individual who forms part of the public." n231 In the end, however, this argument seems to have [\*214] little to do with the Take Care Clause. Instead, it must rest on the understanding that Article III places a substantive limitation on what sorts of harms can count as legally cognizable injuries.

-Footnotes-

n231 Lujan, 112 S. Ct. at 2145.

-End Footnotes-

That leaves the question of the content of the limitation. If we supplement the cryptic passages in Justice Scalia's Lujan opinion with the fuller ones in

Judge Scalia's Suffolk Law Review essay, we can offer some speculation. Perhaps individual rights count as such only when they are minority rights -- when they are not widely shared. I will return to this point below. n232 For the moment let us explore the question of substantive limits on congressional power to create causes of action.

-Footnotes-

n232 See infra text accompanying notes 240-57.

-End Footnotes-

c. Article III. In the end the best defense of Lujan must be that Article III allows federal courts to assume jurisdiction only when the plaintiff has a certain sort of interest. The core of the argument appears in Justice Scalia's 1983 article: Cases involving the requisite interests comport with "an accurate description of the sort of business courts had traditionally entertained, and hence of the distinctive business to which they were presumably to be limited under the Constitution." n233 The statement is surprisingly casual. No historical argument is offered for the claim about the traditional "sort of business." Moreover, the word "presumably" takes the place of a complex historical argument.

-Footnotes-

n233 Scalia, supra note 1, at 882.

-End Footnotes-

As a matter of history, we have seen that Scalia's claim is not sound; in fact, it is baseless. As discussed in Part I, courts had "traditionally entertained" a wide variety of suits instituted by strangers. n234 Neither English nor American practice supports the view that stranger suits are constitutionally impermissible. There is no evidence that Article III was designed to forbid Congress from entertaining such suits. On the contrary, the practice of the early Congress -- freely creating the qui tam and informers' action without a hint of constitutional doubt -- suggests that there were no limits on congressional creation of standing.

-Footnotes-

n234 See supra text accompanying notes 32-71.

-End Footnotes-

The absence of a firm basis for Lujan in constitutional text or history should probably be decisive against the Court's reasoning. If the text and history are compatible with what Congress has done in creating citizen suits, courts have no warrant to intervene. To reach this conclusion, it is not necessary to linger over Justice Scalia's more abstract and speculative argument about the appropriate role of the [\*215] courts in a democracy, an argument that stems from political theory. But because that argument is obviously influencing the development of standing principles in the Supreme Court and elsewhere, it is worthwhile to address the argument here.