THE DOCTRINE OF STANDING AS AN ESSENTIAL ELEMENT OF THE SEPARATION OF POWERS.

by Antonin Scalia*

The principle of separation of powers was set forth in the Constitution of the Commonwealth of Massachusetts well before it found its way into the federal document. The Massachusetts Constitution reads, with lawyerlike (if somewhat tedious) clarity: "the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them."[1] It goes on to emphasize the importance attached to this provision by adding: "to the end it may be a government of laws and not of men"[2]—as though that feature, above all others, was to assure the absence of despotism.

The federal prescription on the subject is not as wordy. Indeed, with an economy of expression that many would urge as a model for modern judicial opinions, the principle of separation of powers is found only in the structure of the document, which successively describes where the legislative, executive and judicial powers, respectively, shall reside.[3] One should not think, however, that the principle was any less important to the federal framers. Madison said of it, in Federalist No. 47, that "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."[4] And no less than five of the Federalist Papers were devoted to the demonstration that the principle was adequately observed in the proposed Constitution.[5]

My thesis is that the judicial doctrine of standing is a crucial and inseparable element of that principle, whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance.[6] More specifically, I suggest that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury

---

* Judge, United States Court of Appeals for the District of Columbia Circuit. This essay is a revised version of the Ninth Donahue Lecture at Suffolk University Law School.

[1] MASS. CONST. pt. 1, art. 30.

[2] *Id.*

[3] U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1.

[4] THE FEDERALIST No. 47 (J. Madison).

[5] *Id.* Nos. 47 (J. Madison), 48 (J. Madison), 49 (J. Madison), 50 (A. Hamilton or J. Madison), 51 (A. Hamilton or J. Madison).

[6] *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 4-5 (1977).

be a particularized one, which sets him apart from the citizenry at large.

I. THE DOCTRINE OF STANDING

The Supreme Court has described standing as "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[7] In more pedestrian terms, it is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: "What's it to you?" The requirement of standing has been made part of American constitutional law through (for want of a better vehicle) the provision of Art. III, Sec. 2, which states that "the judicial Power shall extend" to certain "Cases" and "Controversies."[8] There is no case or controversy, the reasoning has gone, when there are no adverse parties with personal interest in the matter.[9] Surely not a linguistically inevitable conclusion, but nonetheless 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. It is interesting how clear the framers thought the proper role of the judiciary to be. In Federalist No. 48, describing why the legislature is the most dangerous branch, Madison says:

> It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves.[10]

Few modern commentators would find the landmarks delimiting the judicial role so clear.[11] Indeed, by comparison the restrictions upon the mode and scope of operation of the legislative and executive branches are a model of definiteness.

The sea-change that has occurred in the judicial attitude towards the doctrine of standing—particularly as it affects judicial intrusion

---

[7] Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

[8] U.S. CONST. art. III, § 2.

[9] *See* Muskrat v. United States, 219 U.S. 346, 357 (1911); United States v. Ferreira, 54 U.S. (13 How.) 40, 46 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

[10] THE FEDERALIST No. 48 (J. Madison).

[11] *Compare* L. FULLER, THE FORMS AND LIMITS OF ADJUDICATION (1959) *with* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

into the operations of the other two branches—is evident from comparing recent opinions with the very first case in which the Supreme Court contemplated interference with high-level executive activities, and avoided such interference only by interfering with a congressional enactment. In *Marbury v. Madison*,[12] the Court was concerned that its issuance of a *mandamus* to the Secretary of State commanding delivery of Mr. Marbury's judicial commission, "should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive."[13] The Court replied to that concern by stating:

> It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.[14]

A similar attitude is reflected as late as 1944, in *Stark v. Wickard*,[15] a Supreme Court standing decision (generous for its day) which permitted milk producers to challenge a Department of Agriculture Milk Marketing Order:

> When . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts. . . . When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies *only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.* . . . This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. . . . These branches have the resources and personnel to examine into the workings of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringe-

---

[12] 5 U.S. (1 Cranch) 137 (1803).
[13] *Id.* at 169-70.
[14] *Id.* at 170.
[15] 321 U.S. 288 (1944).

ment of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.[16]

Compare these descriptions of the "province of the court" with the opening paragraph of the 1971 court of appeals decision in the landmark *Calvert Cliffs* case[17] which began the judiciary's long love affair with environmental litigation:

> These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the government to control, at long last, the destructive engine of material "progress." But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environmental Policy Act of 1969 (NEPA). We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.[18]

It would be a mistake to think that the difference between the first two opinions and the last represents merely the effect of legal realism—a healthy acknowledgment, after years of mind-clouding fiction, that the courts do indeed (in the 1980's as in 1803) assure the regularity of executive action. It goes beyond that. The point is not whether the courts *do* it; but whether the doing of it is alone sufficient justification to invoke their powers; whether the doing of it is itself "the judicial role," or rather merely the incidental effect of what *Marbury v. Madison* took to be the judges' proper business—"solely, to decide on the rights of individuals."[19] That there has been a change in function rather than merely in perception is suggested by comparing *Marbury v. Madison*'s careful description of the individual interest of Mr. Marbury,[20] and *Stark v. Wickard*'s description of "What's in it" for the plaintiff milk producer,[21] with *Calvert Cliffs*' description of the petitioner's interest. The last is easy to set

---

[16] *Id.* at 309-10 (emphasis added).

[17] Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

[18] *Id.* at 1111.

[19] 5 U.S. (1 Cranch) 137, 170 (1803).

[20] *Id.* at 154-62.

[21] 321 U.S. at 303-04.

forth, because it does not exist. From reading the opinion, one is unable to discern whether the Calvert Cliffs' Coordinating Committee, which brought construction of the Calvert Cliffs nuclear generating plant to a halt, was composed of environmentalists, or owners of land adjacent to the proposed plant, or competing coal-generating power companies, or was even, perish the thought, a front for the Army Corps of Engineers, which is reputed to prefer dams to atoms. For the 1971 court, the point was of no real consequence.

II. Recent Changes In The Doctrine

Having described the change, let me try to explain how and why it has occurred. At the outset, it is necessary to take note of a peculiar characteristic of standing: the fact that its existence in a given case is largely within the control of Congress. Standing requires, as noted earlier, 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. Thus, whether I have standing to complain of my neighbor's erection of a gas station in violation of zoning codes, depends upon whether the legislature has given *me personally* a right to be free of that action, or has rather left zoning enforcement (like the enforcement of parking limitations on the street in front of my house) exclusively to public authorities. The Supreme Court has chosen to take account of this element of legislative control over standing by splitting the doctrine into two separate parts. The first part consists of the so-called "prudential limitations of standing" allegedly imposed by the Court itself, subject to elimination by the Court or by Congress. This part explains those numerous situations, such as the zoning example just given, in which standing once denied will later be acknowledged, after passage of a statute removing (as the Court's analysis goes) the prudential bar.[22] The second part is the constitutional "core" of standing, that is, a minimum requirement of injury in fact which not even Congress can eliminate.[23] Personally, I find this bifurcation unsatisfying—not least because it leaves unexplained the Court's source of authority for simply granting or denying standing as its prudence might dictate. As I would prefer to view the matter, the Court must always hear the case of a litigant who asserts the violation of a legal right. In some cases, the existence of such a right is, on the basis

[22] *Compare* Warth v. Seldin, 422 U.S. 490, 512-14 (1975) *with* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring).

[23] Warth v. Seldin, 422 U.S. 490, 498-501 (1975).

of our common-law traditions, entirely clear—as is the case, for example, when a statutory provision requires an agent of the executive to provide a particular benefit directly to a particular individual. (That was the sort of right asserted in *Marbury v. Madison.*) In other cases, however, the legislative intent to create a legal right is much more problematic—for example, when Congress requires the executive to implement a general program (such as environmental protection) which will enhance the welfare of many individuals. In such cases, as I view the matter, the courts apply the various "prudential" factors, not by virtue of their own inherent authority to expand or constrict standing, but rather as a set of presumptions derived from common-law tradition designed to determine whether a legal right exists. Thus, when the legislature explicitly *says* that a private right exists, this so-called "prudential" inquiry is displaced. Ultimately, however (as I shall discuss in more detail shortly), there is a limit upon even the power of Congress to convert generalized benefits into legal rights—and that is the limitation imposed by the so-called "core" requirement of standing. It is a limitation, I would assert, only upon the *congressional* power to confer standing, and not upon the courts, since the courts *have* no such power to begin with.

In any event, using the Supreme Court's own terminology for the moment, federal courts have displayed a great readiness in recent years to discern a congressional elimination of traditional "prudential" standing barriers with regard to challenges of federal executive action. First, they have given existing standing provisions in substantive statutes a new breadth by interpretation. For example, in the famous *Scenic Hudson* case,[24] involving the Federal Power Commission's approval of the Storm King hydroelectric project, the Court of Appeals for the Second Circuit found that the old Federal Power Act provision according a right of review to "aggrieved" parties included "those who by their activities and conduct have exhibited a special interest" in "the aesthetic, conservational, and recreational aspects of power development."[25] Such a statement would have been unthinkable in the 1940's—much less when the Federal Power Act was passed.[26]

---

[24] Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[25] 354 F.2d at 616. Although the Supreme Court in dictum has since cited the quoted statement with approval, *see* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970), it does not appear to be the law. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

[26] See the same court's parsimonious interpretation of the "adversely affected" review provision of the Federal Food, Drug, and Cosmetic Act in American Lecithin Co. v. McNutt,

An even more important development has been the interpretation of the Administrative Procedure Act to create liberalized judicial review provisions where none existed before. It is worth a few moments to explain that development, which has been of enormous consequence. The judicial review provision of the 1947 Administrative Procedure Act stated that "any person suffering *legal* wrong because of any agency action, or adversely affected or aggrieved by such action *within the meaning of any relevant statute*, shall be entitled to judicial review thereof."[27] A "legal" wrong, of course, could only mean a wrong already cognizable in the courts—that is, one as to which standing already existed pursuant to traditional principles.[28] And the phrase "adversely affected or aggrieved . . . within the meaning of any relevant statute" was an obvious reference to the case law under various specific statutes which permitted any person "adversely affected or aggrieved" to sue,[29] and thereby had broadened the traditional rules in those particular fields.[30] (Quite evidently, one cannot be "adversely affected or aggrieved within the meaning of [a] statute" that does

---

155 F.2d 784, 785 (2d Cir. 1946) and United States Cane Sugar Refiners' Ass'n v. McNutt, 138 F.2d 116, 119-20 (2d Cir. 1943).

[27] Act of June 11, 1946, ch. 324, 60 Stat. 237, 243, 5 U.S.C. § 702 (1982) (emphasis added).

[28] A 1939 Supreme Court case discusses those traditional principles as follows:

> The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.

Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939) (footnotes omitted). The Court went on to find that the Tennessee Power Company did not have standing as a competitor of the TVA to challenge the TVA's constitutionality, because it had no legal right to be free of competition. *Id.* at 137-47. Other cases exemplifying the stinginess of traditional "legal wrong" standing are Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (iron and steel producers had no standing to challenge Secretary of Labor's definition of locality relevant for setting minimum wages because it invaded no recognized legal rights); Alabama Power Co. v. Ickes, 302 U.S. 464, 479-80 (1938) (private electric company had no standing to challenge legality of federal loans to competitors because it had suffered no injury to a legal right).

[29] Federal Food, Drug & Cosmetic Act § 401, 52 Stat. 1046 (June 25, 1938) (codified as amended at 21 U.S.C. § 346a (i) (1976)); Public Utility Act of 1935 § 313(b), 49 Stat. 860 (August 26, 1935) (codified as amended at 16 U.S.C. 8251 (1982)); Federal Communications Act § 402(b)(2), 48 Stat. 1093 (June 19, 1934) (codified as amended at 47 U.S.C. § 402(b)(6) (1976)).

[30] *Compare* cases cited *supra* note 28 *with* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940), which interpreted § 402(b) of the Federal Communications Act, 47 U.S.C. § 402(b)(6) (1982), conferring a right to review on "any . . . person aggrieved or whose interests are adversely affected," to allow a station to challenge the grant of a license to a competitor.

not contain those—or at least substantially similar—words.[31] Just as it would make no sense to speak of one "defamed within the meaning of the Constitution," since the Constitution does not contain the word "defamed".) This evident meaning is supported by authoritative portions of the legislative history—notably, the statement of Attorney General Clark,[32] quoted in the floor debate by Senator McCarran, the Senate Floor manager and chief architect of the legislation,[33] to the effect that the review provision "reflects existing law." It is also supported by the Attorney General's Manual on the Administrative Procedure Act (1947), "a contemporaneous interpretation . . . given some deference by [the Supreme] Court because of the role played by the Department of Justice in drafting the legislation,"[34] which indicates that the provision was "a restatement of existing law."[35] Through the 1960's, most of the cases adopted this plain interpretation of the statute.[36] They were repudiated by the Supreme Court's decisions, both issued the same day, in *Association of Data Process-*

---

[31] There were statutory review provisions that used terms other than "person adversely affected or aggrieved"—*see, e.g.,* Interstate Commerce Act, 49 U.S.C. § 1(20)(1976) ("party in interest"); Federal Aviation Act, 49 U.S.C. § 1486(a) (1976) ("person disclosing a substantial interest"). It would not do violence to the obvious intent of § 702 to consider the phrase "person adversely affected or aggrieved . . . within the meaning of a relevant statute" to be a sort of synecdoche, designed to cover as well a "party in interest . . . within the meaning of a relevant statute." Such an interpretation would have the elegant effect of causing the two provisions of § 702 ("person suffering legal wrong" and "person adversely affected or aggrieved . . . within the meaning of a relevant statute") to coincide precisely with what have come to be known as "nonstatutory review" and "statutory review," respectively. *See* Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 870 (1970).

[32] S. REP. No. 752, 79th Cong., 1st Sess. 44 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 230 (1946) [hereinafter cited as APA Legislative History].

[33] 92 CONG. REC. 2153 (1946), APA Legislative History, *supra* note 32, at 310.

[34] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546 (1978).

[35] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 96 (1947).

It must be acknowledged, however, that other portions of the floor debate, including formulations agreed to (quite inconsistently with his quotation of the Attorney General) by Sen. McCarran, display an intent on the part of some members of Congress to expand judicial review. *See* APA Legislative History, *supra* note 32, at 308-11, 318-19, 325-26, 384. These statements, some of which have the flavor of contrived legislative history, simply fly in the face of the statutory text. If they had represented a correct interpretation of the bill, it is inconceivable that the Justice Department would not have opposed it; and it is similarly inconceivable that they alone should form the basis for the historic transfer of power from the Executive to the Judicial Branch described below.

[36] The leading case was Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 932 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955). Other cases taking this view of the APA were Association of Data Processing Serv. Orgs. v. Camp, 406 F.2d 837, 843 (8th Cir. 1969); Rural Elec-

ing Service Organizations, Inc. v. Camp[37] and *Barlow v. Collins*.[38] These decisions read "adversely affected or aggrieved within the meaning of a relevant statute" to mean no more than "adversely affected or aggrieved in a respect which the statute sought to prevent." In other words, the courts converted the requirement of a statutory review provision into merely a requirement that the plaintiff be within the "zone of interests" that the statute seeks to protect.[39] An incorporation of existing liberalized standing provisions was transmogrified into an affirmative grant of standing in "all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language."[40]

It is difficult to exaggerate the effect which this interpretation of the "adversely affected or aggrieved" portion of the APA has had upon the ability of the courts to review administrative action. For those agency actions covered by the APA,[41] it effectively eliminated the difference in liberality of standing between so-called "statutory review" (i.e., review under generous standing provisions of particular substantive statutes such as the Federal Power Act) and so-called "nonstatutory review" (i.e., review on the basis of traditional, more restrictive notions of "legal wrong," through the use of common-law writs such as injunction and mandamus[42]). In fact, the Court's interpretation of the APA had the weird effect of precisely *reversing* the pre-existing scheme, causing many statutory review provisions to constrict, rather than expand, the ability to seek review that would otherwise be available. Thus, when Congress said in the Surface Mining Control and Reclamation Act of 1977 that review of regulations could be sought by "any person who participated in the administrative pro-

---

trification Admin. v. Northern States Power Co., 373 F.2d 686, 692 & n.9 (8th Cir. 1967); Braude v. Wirtz, 350 F.2d 702, 706-08 (9th Cir. 1965); Gonzalez v. Freeman, 334 F.2d 570, 574-76 (D.C. Cir. 1964); Duba v. Scheutzle, 303 F.2d 570, 574-75 (8th Cir. 1962); Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 370-71 (D.C. Cir. 1961). *But see* Road Review League v. Boyd, 270 F. Supp. 650, 660-61 (S.D.N.Y. 1967) *and* American President Lines v. Federal Maritime Bd., 112 F. Supp. 346, 349 (D.D.C. 1953), adopting a view of APA standing similar to that ultimately embraced by the Supreme Court.

[37] 397 U.S. 150, 154-55 (1970).

[38] 397 U.S. 159, 164-65 (1970). See Sierra Club v. Morton, 405 U.S. 727, 733 (1972), where the Court describes *Data Processing* as having overruled the courts of appeals cases *supra* note 36.

[39] Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153-54 (1970); Barlow v. Collins, 397 U.S. 159, 164-65 (1970).

[40] Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 872 (D.C. Cir. 1970).

[41] Not all actions by all agencies are covered by the judicial review provisions of the APA. *See* 5 U.S.C. § 701 (1982).

[42] *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 152-96 (1965) (student ed.).

ceedings and who is aggrieved by the action of the Secretary,"[43] it was *denying* rather than *according* judicial review—that is, denying it to those "aggrieved persons" who did not participate in the administrative proceedings. In other words, the Supreme Court's APA cases have done to federal legislation what state sales-law cases have done to product warranties. Just as the written warranty has become, by and large, a limitation rather than an extension of the seller's commitment; so also a legislative specification of standing that contains any qualifier has become a denial rather than a grant of ability to challenge agency action.

How diminutive the new APA requirements of standing may be is apparent from the *SCRAP* case,[44] which challenged the ICC's failure to prepare an environmental impact statement before it permitted a railroad freight surcharge to take effect. The suit was brought by a group of George Washington Law School students, who assertedly used park and forest areas, which areas assertedly would be rendered less desirable by increase of litter, which increase assertedly would result from decline in the use of recycled goods, which decline assertedly would follow from a rise in the cost of such goods, which rise assertedly would be produced by the freight surcharge.[45] And if that were not harm enough, the aggrieved plaintiffs also averred that each of them "breathes the air within the Washington metropolitan area, the area of his legal residence, and that this air has suffered increased pollution caused by the modified rate structure."[46] The Supreme Court held that these injuries were adequate to support the suit.[47] Indeed, the court intimated, with respect to this governmental action "all who breathe [the country's] air" could sue.[48]

III. Standing And The Separation of Powers

Thus far I have addressed the Court's progressive elimination of the so-called "prudential limitations" upon standing. Inevitably, I suppose, the "core" element—the portion that not even Congress itself could eliminate—came to be narrowed as well. The major development in this regard was the Court's 1968 opinion in *Flast v. Cohen*,[49]

---

[43] 30 U.S.C. § 1276 (Supp. III 1979).
[44] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).
[45] *Id.* at 676-77.
[46] *Id.* at 678.
[47] *Id.* at 685.
[48] *Id.* at 682.
[49] 392 U.S. 83 (1968).

which gave a federal taxpayer standing to challenge, on establishment clause grounds, federal expenditures that would assist denominational schools. Never before had an improper expenditure of federal funds been held to "injure" a federal taxpayer in such fashion as to confer standing to sue. And the reason, I would assert, is that never before had the doctrine of standing been severed from the principles of separation of powers. The Court wrote in *Flast* as follows:

> The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). . . . So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits, . . . or those which are feigned or collusive in nature. . . .
>
> . . . The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[50]

Standing, in other words, is only meant to assure that the courts can do their work well, and not to assure that they keep out of affairs better left to the other branches.

I must note at the outset (although it has been said often before)[51] that if the purpose of standing is "to assure that concrete adverseness which sharpens the presentation of issues," the doctrine is remarkably ill designed for its end. Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no "concrete injury in fact" whatever. Yet the doctrine of standing clearly excludes them, unless they can attach themselves

---

[50] *Id.* at 99-101.

[51] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-20, at 90 (1978); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-38 (1968); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673-74 (1973).

to some particular individual who happens to have some personal interest (however minor) at stake.[52]

Nor is it true, as *Flast* suggests, that the doctrine of standing cannot possibly have any bearing upon the allocation of power among the branches since it only excludes *persons* and not *issues* from the courts. This analysis conveniently overlooks the fact that if all persons who could conceivably raise a particular issue are excluded, the issue is excluded as well. *Flast* itself demonstrates the point. If the determination of whether a particular federal expenditure constitutes an establishment of religion cannot be made the business of the courts at the instance of a federal taxpayer, it is difficult to imagine who else could possibly bring it there. The determination of compliance with that constitutional provision would be left entirely to the legislative and executive branches[53]—just as the denial of taxpayer standing has left to those branches the determination of compliance with the constitutional requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money . . . be published from time to time."[54]

Even if it were true, moreover, that the doctrine of standing never excludes issues entirely from the courts, it would still have an enormous effect upon the relationship among the branches. The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them. As De Tocqueville observed:

> It will be seen . . . that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.[55]

The great change that has occurred in the role of the courts in recent years results in part from their ability to address issues that were previously considered beyond their ken. But in at least equal measure,

---

[52] *See* Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

[53] Of course where the establishment had the effect of restricting or coercing individual religious belief, it could be challenged in the courts under the "freedom of religion" clause of the first amendment, but that is quite a different issue. *See* McCollum v. Board of Education, 333 U.S. 203 (1948).

[54] U.S. CONST. art. I, § 9, cl. 7; *see* United States v. Richardson, 418 U.S. 166 (1974).

[55] 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 102 (T. Bradley ed. 1945).

in my opinion, it results from the courts' ability to address both new and old issues promptly at the behest of almost anyone who has an interest in the outcome. It is of no use to draw the courts into a public policy dispute after the battle is over, or after the enthusiasm that produced it has waned. The *sine qua non* for emergence of the courts as an equal partner with the executive and legislative branches in the formulation of public policy was the assurance of prompt access to the courts by those interested in conducting the debate. The full-time public interest law firm, as permanently in place as the full-time congressional lobby, became a widespread phenomenon only in the last few decades not because prior to that time the courts could not reach issues profoundly affecting public policy; but rather because prior to that time the ability to present those issues at will (to make "wanton assaults," to use De Toqueville's pejorative characterization) was drastically circumscribed. The change has been effected by a number of means, including such apparently unrelated developments as narrowing the constitutionally permissible scope of laws against champerty and maintenance[56] (so that the cause may now more readily seek a victim to represent), alteration in the doctrine of ripeness[57] (so that suits once thought premature may now be brought at once), and—to return to the point—alteration in the doctrine of standing.[58]

---

[56] *E.g.*, NAACP v. Button, 371 U.S. 415, 435-37 (1963); *id.* at 448-70 (Harlan, J., dissenting).

[57] *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

[58] A complete picture of how the change in the role of the courts has come about would include, in addition to the other judicial developments just alluded to in text, legislative developments as well; in particular, broad legislative grants of standing where judicial review of executive action is concerned. Congress has not only acquiesced in the judicial rewriting of the APA, but has pushed the courts further along the same road, by distributing rights to review under substantive statutes with a liberality that exceeds the rewritten APA. In recent years, it has probably even run afoul of the Supreme Court's scant remaining "core" limitation of injury in fact. In the 1972 Consumer Product Safety Act, for example, it was not content to accord standing for challenge of Commission rules to "any person adversely affected"; it added "or any consumer or consumer organization," 15 U.S.C. § 2060(a), a phrase that would seemingly be redundant if it referred only to a consumer of the product in question. In 1975, in the Magnuson-Moss Act, Congress was prepared to go even further:

> Not later than 60 days after a rule is promulgated . . . any interested person (including a consumer or consumer organization) may file a petition . . . for judicial review of such a rule.

15 U.S.C. § 57a(e)(1). The phrase "interested person" means no more than it says. The same language was used in the 1972 Consumer Product Safety Act, sec. 10(a), 15 U.S.C. § 2059 (1976), to describe who was entitled to participate in the rulemaking before the commission, and the legislative history of that provision makes it quite clear that no more than an intellectual attraction is necessary to qualify a person as "interested." *See* H.R. REP. No. 92-1593, 92d Cong. 2d Sess. at 47 (1972); S. REP. 92-835, 92d Cong. 2d Sess. at 14 (1972). The term is used with similar meaning in the APA. *Compare* 5 U.S.C. § 553(c) *with* 5 U.S.C. § 702. It is not my intent here to discuss legislative developments, but I must note that congressional

IV. The Separation Of Powers And The Rights Of Individuals

Having established, I hope, that the doctrine of standing does affect the separation of powers, I turn to the inquiry whether the manner in which it does so makes any sense. Is standing functionally related to the distinctive role that we expect the courts to perform? The question is not of purely academic interest, because if there is a functional relationship it may have some bearing upon how issues of standing are decided in particular cases.

There is, I think, a functional relationship, which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself.* Thus, when an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing. That is the classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a "generalized" one.[59]

Contrast that classic form of court challenge with the increasingly frequent administrative law cases in which the plaintiff is complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else.*[60] Such a failure harms the plaintiff, by depriving him, as a citizen, of governmental acts which the Constitution and laws require. But that harm alone is, so to speak, a *majoritarian* one. The plaintiff may *care* more about it; he may be a more ardent proponent of constitutional regularity or of the necessity of the governmental act that has been wrongfully omitted. But that does not establish that he has been harmed distinctively—only that he assesses the harm as more grave, which is a fair subject for democratic debate in which he may persuade the rest of us. Since our readiness to be persuaded is no less than his own (we are harmed just as much) there is no reason to remove the matter from the political process and place it in the courts. Unless the plaintiff can show some respect in which he is harmed *more* than the rest of us (for example,

---

approval and even encouragement cannot validate judicial disregard of the boundary between the second and third branches. The situation resembles what the Federalist Papers called "a combination of two of the departments against the third." Federalist No. 49 (J. Madison).

[59] *See* Matz v. United States, 581 F. Supp. 714 (N.D. Ill. 1984).

[60] *See* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

he is a worker in the particular plant where the Occupational Safety and Health Administration has wrongfully waived legal safety requirements) he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention.

That explains, I think, why "concrete injury"—an injury apart from the mere breach of the social contract, so to speak, effected by the very fact of unlawful government action—is the indispensable prerequisite of standing. Only that can separate the plaintiff from all the rest of us who also claim benefit of the social contract, and can thus entitle him to some special protection from the democratic manner in which we ordinarily run our social-contractual affairs. Of course concrete injury is a necessary but not necessarily sufficient condition. The plaintiff must establish not merely minority status, but minority status relevant to the particular governmental transgression that he seeks to correct. If the concrete harm that he will suffer as a consequence of the government's failure to observe the law is purely fortuitous—in the sense that the law was not specifically designed to avoid that harm, but rather for some other (usually more general) purpose—then the majority's failure to require observance of the law cannot be said to be directed *against him*, and his entitlement to the special protection of the courts disappears. That is the essential inquiry conducted under the heading of whether the plaintiff who claims standing has suffered any "legal wrong"[61]; or whether he comes within the definition of "adversely affected" or "aggrieved" party under the various substantive statutes that employ such terms; or whether he is within a substantive statute's protected "zone of interests" under the post-*Data Processing* distortion of the APA.

If I am correct that the doctrine of standing, as applied to challenges to governmental action, is an essential means of restricting the courts to their assigned role of protecting minority rather than majority interests, several consequences follow. First of all, a consequence of some theoretical interest but relatively small practical effect: it would follow that not *all* "concrete injury" indirectly following from governmental action or inaction would be capable of supporting a congressional conferral of standing. One can conceive of such a concrete injury so widely shared that a congressional specification that the statute at issue was meant to preclude precisely that injury would nevertheless not suffice to mark out a subgroup of the body politic requir-

[61] *See supra* note 28 and accompanying text.

ing judicial protection. For example, allegedly wrongful governmental action that affects "all who breathe."[62] There is surely no reason to believe that an alleged governmental default of such general impact would not receive fair consideration in the normal political process.

A more practical consequence pertains not to congressional power to confer standing, but to judicial interpretation of congressional intent in that regard. If the doctrine does serve the separation-of-powers function I have suggested, then in the process of answering the abstruse question whether a "legal wrong" has been committed, or whether a person is "adversely affected or aggrieved," so that standing does exist, the courts should bear in mind the *object* of the exercise, and should not be inclined to assume congressional designation of a "minority group" so broad that it embraces virtually the entire population. I have in mind a recent case which found a congressional intent to confer standing upon a group no less expansive than all consumers of milk.[63] It is hard to believe that the democratic process, if it works at all, could not and should not have been relied upon to protect the interests of that almost all-inclusive group.

But that is the ultimate question: Even if the doctrine of standing was once meant to restrict judges "solely, to decide on the rights of individuals,"[64] what is wrong with having them protect the rights of the majority as well? They've done so well at the one, why not promote them to the other? The answer is that there is no reason to believe they will be any good at it. In fact, they have in a way been specifically *designed* to be bad at it—selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result, and (just in case any connection with the man in the street might subsist) removed from all accountability to the electorate. That is just perfect for a body that is supposed to protect the individual against the people; it is just terrible (unless you are a monarchist) for a group that is supposed to decide what is good for the people. Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class.

---

[62] *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 682 (1973).

[63] Community Nutrition Inst. v. Block, 698 F.2d 1239 (D.C. Cir.), *cert. granted*, 52 U.S.L.W. 3422 (1983).

[64] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

Their greatest success in such an enterprise—ensuring strict enforcement of the environmental laws, not to protect particular minorities but for the benefit of all the people—met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia. It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the *genuine* desires of the people to be given effect; but those are not the premises under which our system operates.

Does what I have said mean that, so long as no minority interests are affected, "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?" Of *course* it does—and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday's herald is today's bore—although we judges, in the seclusion of our chambers, may not be *au courant* enough to realize it. The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.

V. Return To The Original Understanding

In the early 1970's—after *Flast* had pronounced that the doctrine of standing "does not, by its own force, raise separation of powers problems related to judicial interference in areas committed to other branches of the Federal Government,"[65] and after *Data Processing*[66] *Barlow v. Collins*,[67] and *SCRAP*[68] had demonstrated the Supreme Court's apparent intent to operate on that assumption—the subject addressed by the present paper would have been of merely historical interest. It might have been retitled "Former Relevance of Standing to the Separation of Powers." Since that time, however, the Supreme Court's theory has returned to earlier traditions, and there may be reason to believe that its practice will as well. The dictum of *Flast* has been disavowed by opinions that explicitly acknowledge that stand-

[65] 392 U.S. 83, 100-01 (1968).
[66] 397 U.S. 150 (1970).
[67] 397 U.S. 159 (1970).
[68] 412 U.S. 669 (1973).

ing and separation of powers are intimately related.[69] And the essential element that links the two—the requirement of *distinctive* injury not shared by the entire body politic—has been resurrected. *Flast* was essentially a repudiation of *Frothingham v. Mellon*,[70] where the Court had disallowed a taxpayer suit to prevent expenditures in violation of the commerce clause, because it was not enough to allege an injury suffered in "some indefinite way in common with people generally."[71] More recent cases, however, such as *United States v. Richardson*[72] and *Schlesinger v. Reservists Committee to Stop the War*,[73] not only restore *Frothingham* to a place of honor, but quote the following passage from the venerable case of *Ex parte Lévitt*:[74]

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.[75]

It is unlikely that this reversion to former theory will not ultimately entail some degree of reversion to former practice. Apparently, *Flast* has already been limited strictly to its facts,[76] and I anticipate that the Court's *SCRAP*-era willingness to discern breathlessly broad congressional grants of standing will not endure. There is already indication of this in opinions demonstrating a reluctance to "imply" in federal statutes rights of action against private parties,[77] which opin-

---

[69] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-74 (1982); Warth v. Seldin, 422 U.S. 490, 498 (1975).

[70] 262 U.S. 447 (1923).

[71] *Id.* at 488.

[72] 418 U.S. 166, 171-74 (1974).

[73] 418 U.S. 208, 220 n.8 (1974).

[74] 302 U.S. 633 (1937).

[75] *Id.* at 634, *quoted in* United States v. Richardson, 418 U.S. 166, 177-78 (1974), *and* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 219-20 (1974).

[76] The Court refers to this as "the rigor with which the *Flast* exception . . . ought to be applied." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 481 (1982). The basis for distinguishing *Flast* in both *Valley Forge*, 454 U.S. at 479-80, and *Richardson*, 418 U.S. at 174-75, is differences that seem utterly irrelevant to what *Flast* sought to accomplish. The Court seems to have adopted the suggestion by Justice Powell in *Richardson*, that it "limit the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the *results* in *Flast* and *Baker v. Carr*." 418 U.S. at 196 (Powell, J., concurring).

[77] *See, e.g.*, California v. Sierra Club, 451 U.S. 287, 292-98 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-25 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1974).

ions have been cited in the context of suits against executive officials as well.[78] Though the APA's phrase "adversely affected or aggrieved within the meaning of a relevant statute" will not likely be restored to its original meaning, the effectively substituted phrase "adversely affected or aggrieved under a relevant statute" (involving application of the so-called "zone of interests" test) leaves plenty of room for maneuvering. I expect the direction of that maneuvering to be in the direction of separation of powers.

[78] California v. Sierra Club, 451 U.S. 287 (1981). *But see* California v. Watt, 683 F.2d 1254, 1270 (9th Cir. 1982); Glacier Park Foundation v. Watt, 663 F.2d 882, 884-85 (9th Cir. 1981).