

# VIRGINIA LAW REVIEW

---

VOLUME 105

JUNE 2019

NUMBER 4

---

## ARTICLES

### “STANDING” AND REMEDIAL RIGHTS IN ADMINISTRATIVE LAW

*Caleb Nelson\**

*Modern doctrine about judicial review of administrative action traces back to Association of Data Processing Service Organizations v. Camp (1970). There, the Supreme Court announced a new test for deciding whether a plaintiff has “standing” to challenge the legality of an action taken by a federal agency. Judges were simply supposed to ask (1) “whether the plaintiff alleges that the challenged action has caused him injury in fact” and (2) “whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee” that the challenged action allegedly violated.*

*Partly because of intervening scholarship, modern courts and commentators have translated Data Processing’s discussion of “standing” into the language of remedial rights (or “rights of action”). At least since the 1980s, Data Processing has been understood to hold that when a federal agency oversteps its authority, the Administrative Procedure Act normally confers remedial rights upon everyone who satisfies Data Processing’s test for “standing.” That is an exceptionally important aspect of modern administrative law. But it is mistaken—not just about the Administrative Procedure Act, but also about what Data*

---

\* Emerson G. Spies Distinguished Professor of Law and Caddell & Chapman Professor of Law, University of Virginia. This Article grew out of conversations with John Harrison. I am also indebted to Harold Edgar, Tom Merrill, Henry Monaghan, David Pozen, Ann Woolhandler, and participants in a faculty workshop at Columbia Law School for very helpful comments on an earlier draft. I am solely responsible for all mistakes.

*Processing itself held. This Article shows that Data Processing's concept of "standing" was only a preliminary screen, not the last word about whether plaintiffs have a claim for relief. The Supreme Court has never made a considered decision that when an agency is behaving unlawfully, the Administrative Procedure Act confers the same remedial rights upon plaintiffs whose interests are only "arguably" within a protected zone as upon plaintiffs whose interests are actually protected.*

INTRODUCTION.....	705
I. JUDICIAL REVIEW OF AGENCY ACTION BEFORE <i>DATA PROCESSING</i> ....	711
A. <i>Doctrine Before the Administrative Procedure Act</i> .....	712
1. <i>Judicial Review in the Absence of Special Statutory Review Provisions</i> .....	712
2. <i>Special Statutory Review Provisions</i> .....	721
B. <i>The Administrative Procedure Act and Its Interpretation Before 1970</i> .....	725
II. <i>DATA PROCESSING</i> .....	733
A. <i>"Standing" as a Preliminary Screen that Is Relatively Easy to Satisfy</i> .....	733
1. <i>Justice Douglas's Opinion in Data Processing</i> .....	733
2. <i>Justice Brennan's Position</i> .....	739
B. <i>Early Commentary on Data Processing</i> .....	751
C. <i>Why Bother?</i> .....	755
1. <i>Caution About Ruling on the Merits at the Outset of a Case</i> .....	756
2. <i>Jurisdictional Issues</i> .....	759
D. <i>Summary</i> .....	763
III. WHEN AND WHY DID <i>DATA PROCESSING</i> 'S TEST FOR "STANDING" BECOME A DEFINITIVE TEST FOR REMEDIAL RIGHTS UNDER THE APA? .....	765
A. <i>The Transformation of Data Processing</i> .....	766
1. <i>The Initial Distinction Between "Standing" and Remedial Rights</i> .....	766
2. <i>Justice Stewart's Opinion in Investment Co. Institute v. Camp</i> .....	770
3. <i>Open Questions in the 1970s</i> .....	773
4. <i>Data Processing as a Test for Remedial Rights</i> .....	777
B. <i>Some Factors that Contributed to the Transformation of Data Processing</i> .....	784

1. <i>The Influence of Kenneth Culp Davis</i> .....	784
2. <i>Changing Perceptions of Administrative Agencies</i> .....	785
3. <i>Confusion Generated by the Word “Standing”</i> .....	788
a. <i>Lee Albert’s Clarification of Earlier Cases</i>	
<i>About “Standing”</i> .....	788
b. <i>Justice Powell’s Separate Concept of “Prudential”</i>	
<i>Standing</i> .....	792
c. <i>“Prudential” Standing and Rights of Action</i> .....	794
C. <i>The Zone-of-Interests Test as a Limitation on Express</i>	
<i>Rights of Action</i> .....	797
CONCLUSION .....	800

### INTRODUCTION

People who behave unlawfully are not necessarily subject to suit by everyone who suffers any sort of harm as a result. Would-be plaintiffs can win relief in court only if some applicable source of law gives them remedial rights.<sup>1</sup> That is a fundamental requirement for any civil lawsuit: to get the court to award relief at their behest, plaintiffs need what lawyers call a “right of action” (also known as a “cause of action” or a “claim for relief”).<sup>2</sup>

---

<sup>1</sup> For seminal discussions of the difference between “primary” and “remedial” law, see Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 122–25, 127–38 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (tent. ed., 1958); John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action, According to the Reformed American Procedure* 1–3 (Boston, Little, Brown, & Co. 1876).

<sup>2</sup> See Stephen N. Subrin & Margaret Y.K. Woo, *Litigating in America: Civil Procedure in Context* 64 (2006) (“In order to sue in an American court you always need at least one cause of action.”).

The phrases “right of action” and “cause of action” have not always been synonymous. In the late nineteenth century, John Norton Pomeroy taught readers that

[e]very judicial action must . . . involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself.

Pomeroy, *supra* note 1, at 487. According to Pomeroy, the phrase “cause of action” referred to the combination of “the primary right and duty and the delict or wrong,” while the phrase “right of action” referred to “the ‘remedial right.’” *Id.*; see also Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 *Colum. L. Rev.* 1, 28 (1989) (“Pomeroy’s views on the cause of action were shared by most late nineteenth and early twentieth century jurists.”).

In the 1920s, Charles Clark agreed that the phrase “right of action” normally refers to “the ‘remedial right,’” but he criticized Pomeroy’s definition of “cause of action.” According to

In suits brought in federal district court to obtain relief against unlawful behavior by federal administrative agencies, though, judges frequently do not speak in these terms.<sup>3</sup> If the challenged behavior amounts to “final agency action” within the meaning of the Administrative Procedure Act (“APA”),<sup>4</sup> and if Congress has not enacted special provisions either precluding judicial review or establishing a different way of obtaining it, the court will simply ask whether the plaintiff satisfies the test for “standing” articulated in *Ass’n of Data Processing Service Organizations, Inc. v. Camp*.<sup>5</sup> To establish “standing,” the plaintiff must allege an “injury in fact” caused by the challenged action, and the interest that the plaintiff

---

Clark, a “cause of action” should be understood as a set of *facts* that give rise to one or more recognized claims for relief (and thus provide an occasion, or cause, for litigation). See Charles E. Clark, *The Code Cause of Action*, 33 *Yale L.J.* 817, 823–31 (1924) (discussing various definitions of “cause of action”); see also Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 *How. L.J.* 73, 78–86 (2008) (putting these debates into historical context).

In the 1930s, under Clark’s guidance, the Federal Rules of Civil Procedure avoided the phrase “cause of action” altogether. See Fed. R. Civ. P. 8(a) (referring instead to a “claim for relief”); Simona Grossi, *The Claim*, 55 *Hous. L. Rev.* 1, 7–12 (2017) (discussing this choice). Perhaps as a result, the old terminological debates have since faded. Most modern courts “appear to use the terms ‘right of action’ and ‘cause of action’ interchangeably.” Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 *Colum. L. Rev.* 1082, 1141 n.238 (1992). But see *Cherrie v. Va. Health Servs., Inc.*, 787 S.E.2d 855, 857 (Va. 2016) (continuing to follow a version of Clark’s usage, and asserting that “[t]he distinction between a *right* of action and a *cause* of action should not be dismissed as an odd, rhetorical anachronism”).

Despite the modern convergence of these phrases, this Article usually refers to remedial rights as “rights of action” rather than “causes of action.” For purposes of this Article, a “right of action” is the type of legal principle that enables a plaintiff to win a remedy from a court of competent jurisdiction upon proof of certain elements (unless the defendant establishes a valid defense). But when the phrase “cause of action” appears in passages that I quote from other sources, it typically means the same thing.

<sup>3</sup> This phenomenon is not new. See Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *Yale L.J.* 425, 442 (1974) (discussing an earlier series of cases in which courts held that the plaintiffs lacked “standing,” and concluding that “courts did not realize that they were directly confronting and deciding a cause of action”).

<sup>4</sup> See 5 U.S.C. § 704 (2012).

<sup>5</sup> 397 U.S. 150 (1970); cf. Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 *Notre Dame L. Rev.* 1807, 1811 (2016) (noting that even outside the APA context, “*Data Processing’s* description of the elements of constitutional and prudential standing” has tended to obscure “the importance of the existence of a cause or right of action”); *id.* at 1813–14 (expressing hope that *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), will remind courts that plaintiffs need a right of action in addition to meeting the minimum constitutional requirements for standing).

is trying to protect must at least “arguably” be “within the zone of interests to be protected or regulated by the statute or constitutional guarantee” that the agency is allegedly flouting.<sup>6</sup> As the Supreme Court has repeatedly confirmed, however, the arguably-within-the-zone-of-interests requirement “is not meant to be especially demanding.”<sup>7</sup> If the plaintiff has “standing,” the court will proceed to ask whether the agency action that the plaintiff is challenging is indeed unlawful—and if it is, the court will set it aside.<sup>8</sup>

This practice rests on the premise that plaintiffs who meet *Data Processing*’s test for “standing” are entitled to a remedy for the unlawful behavior that they have identified. But what is the source of that remedial right? In other words, where do these plaintiffs get their right of action?

To the extent that modern courts address this issue at all, they say that *Data Processing* read the APA to confer a right of action upon everyone who meets *Data Processing*’s test for “standing.” Subject to certain qualifications,<sup>9</sup> 5 U.S.C. § 702 says that “[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.”<sup>10</sup> In conjunction with Section 704 (describing which agency actions are reviewable) and Section 706 (describing the scope of

---

<sup>6</sup> *Data Processing*, 397 U.S. at 152–53.

<sup>7</sup> *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)). The *Match-E-Be-Nash-She-Wish* case is as good an example as any. Section 5 of the Indian Reorganization Act of 1934 authorized the Secretary of the Interior to acquire land in the name of the United States and to hold it in trust for an “Indian tribe.” Ch. 576, § 5, 48 Stat. 984, 985 (1934) (codified as amended at 25 U.S.C. § 5108 (2012)). In 2005, the Secretary agreed to acquire land for the benefit of the Match-E-Be-Nash-She-Wish Band, which planned to use the land for a casino. A nearby resident who did not want a casino in his community brought a lawsuit challenging the Secretary’s authority to acquire land for the benefit of the Band; as the plaintiff noted, the Indian Reorganization Act’s definition of “Indian” referred to “any recognized Indian tribe now under Federal jurisdiction,” and the Band had not been federally recognized when the Act was enacted. *Id.* § 19, 48 Stat. at 988 (emphasis added) (codified at 25 U.S.C. § 5129 (2012)); see also *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009) (adopting this interpretation of the Act). The Supreme Court held that the plaintiff had “standing” to challenge the Secretary’s authority to acquire the land and to hold it in trust for the Band; according to the Court, the plaintiff’s interest “at least arguably” came within the zone protected or regulated by § 5. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 227; cf. *Patchak v. Zinke*, 138 S. Ct. 897, 903–04 (2018) (plurality opinion) (discussing subsequent developments in the case).

<sup>8</sup> See 5 U.S.C. § 706(2) (2012).

<sup>9</sup> See, e.g., *id.* § 701(a) (“This chapter applies . . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”).

<sup>10</sup> *Id.* § 702.

review), this language can indeed be described as creating a right of action.<sup>11</sup> Starting around 1980, moreover, federal circuit courts began portraying *Data Processing* as an interpretation of the scope of this right of action.<sup>12</sup> A few years later, the Supreme Court echoed this understanding of *Data Processing*,<sup>13</sup> and the Court has never looked back. For more than a generation, then, courts have assumed that when an agency violates statutory or constitutional limitations on its authority, everyone who is suffering “injury in fact” and whose interests are even “arguably” within a relevant “zone” can obtain relief under the APA (unless a more specific statute supplants this right of action).<sup>14</sup>

Thus interpreted, *Data Processing* is both exceptionally important and a marked departure from prior understandings of remedial rights in administrative law.<sup>15</sup> Leading casebooks on administrative law therefore describe *Data Processing* as a “watershed,”<sup>16</sup> a “Revolution,”<sup>17</sup> and even an “Earth-Shattering Kaboom.”<sup>18</sup> In modern times, the plaintiffs in many significant cases owe their eligibility for relief to the idea that the APA

---

<sup>11</sup> See, e.g., Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 Colum. L. Rev. 233, 253–54 (1991) (acknowledging that the APA does not use this vocabulary, but observing that “section 702 provides a general ‘right of action’”); see also *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (“The APA confers a general cause of action upon persons ‘adversely affected or aggrieved by agency action within the meaning of a relevant statute,’ 5 U.S.C. § 702, but withdraws that cause of action to the extent the relevant statute ‘preclude[s] judicial review,’ 5 U.S.C. § 701(a)(1).”).

<sup>12</sup> See *R.T. Vanderbilt Co. v. Occupational Safety & Health Review Comm’n*, 708 F.2d 570, 576 (11th Cir. 1983) (“The *Data Processing* Court . . . found that Congress . . . intended to provide a right of action under the APA to all those who assert an interest that is arguably within the ‘zone of interests’ of a relevant statute.”); *James v. Home Constr. Co. of Mobile*, 689 F.2d 1357, 1358 n.1 (11th Cir. 1982) (“The ‘zone of interest’ test is used to determine what parties are ‘adversely affected or aggrieved’ and thus entitled to a right of action under the APA.”); see also *Soc’y Hill Civic Ass’n v. Harris*, 632 F.2d 1045, 1054–55 (3d Cir. 1980) (appearing to take the same view of *Data Processing*).

<sup>13</sup> See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 231 n.4 (1986) (observing that because the plaintiffs satisfy *Data Processing*’s “injury in fact” and “zone of interests” requirements, “[i]t is clear that [the plaintiffs] may avail themselves of the right of action created by the APA”); accord *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 394–96, 395 n.9 (1987).

<sup>14</sup> See, e.g., *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479 (1998) (acting upon this premise).

<sup>15</sup> See, e.g., Joseph Vining, *Legal Identity: The Coming of Age of Public Law 39* (1978) (taking *Data Processing* to reflect “a shift in the axioms of legal thinking”).

<sup>16</sup> Jerry L. Mashaw et al., *Administrative Law: The American Public Law System* 1281 (7th ed. 2014).

<sup>17</sup> Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 816 (8th ed. 2017).

<sup>18</sup> Gary Lawson, *Federal Administrative Law* 1087 (8th ed. 2019).

confers remedial rights upon everyone who meets *Data Processing*’s test for “standing.”<sup>19</sup> Likewise, distinguished commentators have long agreed that *Data Processing* established a “remedial system” and reflected “a presumption that judicial remedies are available whenever official actions adversely affect private interests.”<sup>20</sup>

The thesis of this Article is that *Data Processing* itself did no such thing. To be sure, modern scholars have become accustomed to linking the non-constitutional aspects of “standing” doctrine with rights of action. That linkage traces back to an important article that Professor Lee Albert published in 1974 (and that Professor William Fletcher later built upon).<sup>21</sup> As Professor Albert observed, in cases seeking injunctive or declaratory relief against administrative officials, earlier judicial opinions had often used the word “standing” to discuss whether the plaintiffs would be entitled to relief if they were correct that the officials were behaving unlawfully—that is, whether any applicable source of law gave these particular plaintiffs a right of action under the circumstances.<sup>22</sup> But *Data Processing* did not use the word “standing” this way. Instead, *Data Processing*’s test for “standing” was a threshold screen for access to the courts—a preliminary measure of whether the plaintiffs *might* have a right of action. Under *Data Processing*, if a plaintiff was not even “arguably” within the zone of interests to be protected or regulated by the statute or constitutional guarantee that the agency allegedly was violating, courts could safely dismiss the plaintiff’s suit early on (unless a special statutory scheme allowed the plaintiff to act as a “private attorney[ ] general”<sup>23</sup>). By

---

<sup>19</sup> For high-profile examples with different political valences, see *Hawaii v. Trump*, 878 F.3d 662, 681–82 (9th Cir. 2017) (holding that the APA gives the State of Hawaii and various other plaintiffs a claim for relief against the Trump Administration’s restrictions on travel to the United States from some predominantly Muslim countries, and partially affirming a preliminary injunction), rev’d on other grounds, 138 S. Ct. 2392 (2018), and *Texas v. United States*, 809 F.3d 134, 162–63 (5th Cir. 2015) (holding that the APA gives the State of Texas a claim for relief against the Obama Administration’s program of Deferred Action for Parents of Americans and Lawful Permanent Residents, and affirming a preliminary injunction), aff’d by an equally divided Court, 136 S. Ct. 2271 (2016).

<sup>20</sup> Jerry L. Mashaw, “Rights” in the Federal Administrative State, 92 Yale L.J. 1129, 1135 (1983).

<sup>21</sup> See Albert, *supra* note 3; William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1988).

<sup>22</sup> See Albert, *supra* note 3, at 427–42 (explicating the concept of “legal interest standing” and its relation to whether the plaintiff has a claim for relief).

<sup>23</sup> See *Data Processing*, 397 U.S. at 153 n.1 (mentioning this concept, though observing that it is “inapplicable to the present case”); cf. *id.* at 154 (referring again to the concept as if it might be relevant after all).

contrast, if the plaintiff was at least in the ballpark of having a claim for relief, courts would need to think about the suit more carefully. But to say that a plaintiff met *Data Processing*'s test for "standing" was not to say that the plaintiff definitely was a proper party to get relief if the agency was indeed behaving unlawfully. *Data Processing* simply held that instead of deciding that issue on a motion to dismiss for want of "standing," courts should handle it as part of "the merits" of the plaintiff's claim.<sup>24</sup>

In the 1970s and 1980s, the two scholars who did the most to link "standing" with rights of action both read *Data Processing* this way. Professor Albert specifically criticized *Data Processing* for reflecting an "inappropriate notion of access standing" that courts were supposed to apply "before focusing upon the claims for relief."<sup>25</sup> He referred to *Data Processing*'s version of standing doctrine as a "threshold test," an "initial inquir[y]," a "screen," and a "new preliminary proceeding."<sup>26</sup> As he understood *Data Processing*, a plaintiff who enjoyed "standing" in the Court's sense could still lose on the merits for want of a "protected legal interest," even if the agency was indeed acting unlawfully.<sup>27</sup> Professor Fletcher agreed with this reading: "Under *Data Processing*'s view of the matter, whether plaintiff *actually* has the right to sue is a question of law on 'the merits.'"<sup>28</sup> In the same period, several other scholars either articulated the same understanding of *Data Processing*<sup>29</sup> or at least considered the opinion unclear on this point.<sup>30</sup>

This reading of *Data Processing* has largely faded away.<sup>31</sup> Ironically, Professors Albert and Fletcher are partly responsible for its demise; we

---

<sup>24</sup> See *id.* at 158.

<sup>25</sup> Albert, *supra* note 3, at 476, 495. The term "access standing" comes from Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 *Harv. L. Rev.* 645 (1973).

<sup>26</sup> Albert, *supra* note 3, at 494–97.

<sup>27</sup> See *id.* at 494; see also *infra* text accompanying note 270.

<sup>28</sup> Fletcher, *supra* note 21, at 236 n.76.

<sup>29</sup> See John H. Garvey, *A Litigation Primer for Standing Dismissals*, 55 *N.Y.U. L. Rev.* 545, 568–69 (1980); Robert H. Marquis, *The Zone of Interests Component of the Federal Standing Rules: Alive and Well After All?*, 4 *U. Ark. Little Rock L.J.* 261, 284 (1981).

<sup>30</sup> See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 *N.Y.U. L. Rev.* 1, 20 n.107 (1984); Louis L. Jaffe, *Standing Again*, 84 *Harv. L. Rev.* 633, 634 & n.9 (1971).

<sup>31</sup> But cf. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 *Tex. L. Rev.* 1061, 1065–66 (2015) (noting that in the 1960s and 1970s, "the Court purported to distinguish the question of standing from the question of whether a plaintiff had a legal right to relief on the merits," and citing *Data Processing* as the clearest example); Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require*

remember their general insight that “standing” should be associated with rights of action, and we forget that they both understood *Data Processing* to use the word in a different sense. But *Data Processing* did not really hold what today’s conventional wisdom takes it to have held. Thus, current doctrine about rights of action under the APA rests on a misunderstanding of the seminal precedent. The Supreme Court has never made a considered decision that when an agency is behaving unlawfully, the APA confers the same remedial rights upon plaintiffs whose interests are only “arguably” within a protected zone as upon plaintiffs whose interests are indeed protected.

This Article proceeds as follows: Part I provides historical background necessary for understanding *Data Processing*. Part II analyzes *Data Processing* and the companion case of *Barlow v. Collins*,<sup>32</sup> drawing upon the Justices’ internal correspondence as well as their published opinions. Part III speculates about why those opinions came to be seen as addressing remedial rights rather than simply procedural sequencing.

#### I. JUDICIAL REVIEW OF AGENCY ACTION BEFORE *DATA PROCESSING*

Before one can sensibly approach either *Data Processing* or later glosses on it, one needs some historical context. In particular, because the modern Supreme Court takes *Data Processing* to identify the scope of “the cause of action for judicial review conferred by the Administrative Procedure Act,”<sup>33</sup> one must understand how courts had interpreted the APA’s provisions about judicial review before *Data Processing*. To appreciate those interpretations, moreover, one must understand doctrines that existed before the APA and that many courts understood the APA to reflect. Scholars are already familiar with the relevant history, but this Part summarizes it for the benefit of non-specialists.

---

Proximate Causation, 2012 Mich. St. L. Rev. 869, 919–21 (invoking *Data Processing* in support of the conclusion that “[c]ourts should apply a relatively liberal approach in deciding standing issues for private plaintiffs pursuing climate change suits even if courts conclude that it is inappropriate to grant relief on the merits to those same plaintiffs”).

<sup>32</sup> 397 U.S. 159 (1970).

<sup>33</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014).

*A. Doctrine Before the Administrative Procedure Act**1. Judicial Review in the Absence of Special Statutory Review Provisions*

In the early twentieth century, when lawyers spoke about judicial review of an administrative agency's orders or regulations, they were not always talking about private rights of action that would enable people challenging such orders or regulations to initiate lawsuits of their own. Often, when an agency wanted to enforce an order or regulation against a regulated entity, the agency itself had to go to court.<sup>34</sup> Where that was true, a regulated entity that doubted the legality of a particular order or regulation sometimes could simply violate the order or regulation, wait until the agency brought an enforcement proceeding in court, and then defend itself on the ground that the order or regulation was contrary to law or otherwise invalid.<sup>35</sup>

This route to judicial review, however, was available only to people who would themselves be targets of enforcement proceedings, and it was not always fully satisfactory even for them.<sup>36</sup> Rather than violating an order or regulation and waiting to be sued, people disputing the legality of agency action sometimes wanted to initiate proceedings as plaintiffs.

In the absence of special statutory provisions waiving the federal government's sovereign immunity and authorizing suits against agencies themselves, people who wanted to bring suit to challenge acts undertaken on behalf of the federal government were relegated to suing the responsible officers.<sup>37</sup> Assuming that Congress had not supplied a right of action by statute, moreover, would-be plaintiffs needed to assert remedial rights supplied by other sources of law. Sometimes, plaintiffs who had suffered harm to their persons or property at the hands of federal

---

<sup>34</sup> A number of federal statutes that empowered agencies to issue orders against regulated entities did not make those orders "self-executing"; the targets had no duty to comply until the agency obtained a judicial decree. See Thomas W. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 *Colum. L. Rev.* 939, 950–51 (2011) (discussing the original version of the Interstate Commerce Act); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 *Geo. L.J.* 833, 890–91 (2001) (discussing cease-and-desist orders issued by the Federal Trade Commission and the National Labor Relations Board).

<sup>35</sup> See Ernst Freund, *Administrative Powers Over Persons and Property: A Comparative Survey* 234 (1928); cf. *id.* at 234–35 (discussing possible limitations on this defense).

<sup>36</sup> See *id.* at 234.

<sup>37</sup> See, e.g., Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 *Colum. L. Rev.* 1612, 1624 (1997).

officials could sue those officials for damages under rights of action supplied by the common law.<sup>38</sup> In specialized circumstances, people could also obtain judicial review of certain administrative determinations by seeking writs of habeas corpus<sup>39</sup> or mandamus.<sup>40</sup> But in the early part of the twentieth century, the most common path for plaintiffs who wanted courts to control the behavior of federal officials was to bring a suit in equity for an injunction.<sup>41</sup>

In equity as at law, though, courts recognized only limited rights of action. Indeed, the rights of action available in equity corresponded closely to rights of action available at law.

One important right of action that was available in equity, and that regulated parties could use under certain circumstances to obtain judicial review of administrative decisions, was the mirror image of proceedings that government officials might bring at law. Imagine that an administrative agency had issued a rule or order purporting to regulate

<sup>38</sup> See Freund, *supra* note 35, at 242–44; Frank J. Goodnow, *The Principles of the Administrative Law of the United States* 396–408 (1905); see also Comm. on Admin. Procedure, Office of the Att’y Gen., *Final Report of the Attorney General’s Committee on Administrative Procedure* 81 (1941) (asserting that “the basic judicial remedy for the protection of the individual against illegal official action is a private action for damages against the official,” but noting that “the plaintiff must allege conduct by the officer which, if not justified by his official authority, is a private wrong to the plaintiff, entitling the latter to recover damages”).

<sup>39</sup> See Freund, *supra* note 35, at 240 (noting the use of habeas to challenge certain administrative determinations in connection with “the detention and deportation of aliens”); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 *Colum. L. Rev.* 961, 1004–20 (1998) (surveying the role of habeas in this area of federal administrative law between the 1880s and the 1950s); *Developments in the Law—Remedies Against the United States and its Officials*, 70 *Harv. L. Rev.* 827, 922 (1957) (“Habeas corpus has since [*Gegiow v. Uhl*, 239 U.S. 3 (1915),] served as the main road to review of actions of the immigration service.”).

<sup>40</sup> See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 615–26 (1838) (acknowledging that under existing precedent, “the circuit courts of the United States, in the several states, have not authority to issue a mandamus against an officer of the United States,” but holding that the circuit court for the District of Columbia could do so); Freund, *supra* note 35, at 245–46 (discussing this line of cases); see also Louis L. Jaffe, *Judicial Control of Administrative Action* 157 (1965) (noting that in 1962, Congress gave all federal district courts jurisdiction over mandamus actions against federal officers and agencies).

<sup>41</sup> See Freund, *supra* note 35, at 248 (“The relief in equity has . . . become the normal form of relief where it is not (as in revenue cases) shut out by statute.”); Comm. on Admin. Procedure, *supra* note 38, at 81 (agreeing that in the absence of special statutory provisions authorizing suits to review administrative action, “the injunction is the remedy normally used” in the federal courts); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *Tex. L. Rev.* 113, 121–30 (1998) (emphasizing the historical importance of the federal courts’ equity jurisdiction for litigants seeking judicial review of agency action).

behavior, and imagine that violators ran the risk of being prosecuted or sued by the government for penalties. Without yet committing a violation, regulated parties sometimes could bring a suit in equity arguing that the rule or order was invalid and asking the court to enjoin officials from enforcing it against them. As Professor John Harrison has explained, “an injunction to restrain proceedings at law” (such as the enforcement proceedings that the government might bring) was “a standard tool of equity,” and plaintiffs sometimes could seek such injunctions on the strength of arguments that would be defenses in the proceedings at law (such as the invalidity of the rule or order).<sup>42</sup> In the first half of the twentieth century, regulated parties could and did use this mechanism to

---

<sup>42</sup> See John Harrison, *Ex Parte Young*, 60 *Stan. L. Rev.* 989, 990 (2008). To obtain equitable relief, the plaintiffs would need to establish that they lacked an adequate remedy at law—meaning, in this context, that they should not be expected to violate the rule or order and litigate its validity as part of their defense to an enforcement proceeding. See *id.* at 998–99. Sometimes, though, plaintiffs could satisfy this requirement simply by pointing out that violations could trigger “severe penalties.” See *Stafford v. Wallace*, 258 U.S. 495, 512 (1922). As Professor Harrison notes, the underlying suit in *Ex parte Young*, 209 U.S. 123 (1908)—where railroad shareholders sought to enjoin the Attorney General of Minnesota from enforcing allegedly unconstitutional rate-regulation statutes against their companies, *id.* at 129–30—illustrates this idea. See Harrison, *supra*, at 1000 (“The railroads . . . were . . . using a familiar mode of proceeding by which a potential defendant at law could sue in equity and present a legal position that would be a defense at law.”); see also *Ex parte Young*, 209 U.S. at 163–65 (discussing reasons why the railroads lacked an adequate remedy at law, including not only the severity of the penalties for violations but also the complexity of deciding whether the rates set by state law were confiscatory and the unsuitability of that question for a jury).

Professor James Pfander and Jessica Dwinell suggest that *Ex parte Young* “broke new ground” by recognizing an argument that would have been available at law (“the defense of unconstitutionality”) as a basis for granting injunctive relief against a criminal prosecution. James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 *Va. L. Rev.* 153, 213 (2016). My impression is that courts had previously entertained suits in equity under circumstances similar to the underlying suit in *Ex parte Young*. See, e.g., *City of Hutchinson v. Beckham*, 118 F. 399, 401–02 (8th Cir. 1902) (entertaining a suit to restrain enforcement of a city ordinance purporting to criminalize transactions by the agents of certain wholesalers who failed to pay a license tax, and discussing the requirements for what the court characterized as “a ‘bill of peace’” to avoid the need “to defend a multitude of suits”); *Bank of Ky. v. Stone*, 88 F. 383, 390–91 (C.C.D. Ky. 1898) (concluding that the threat of daily penalties for failure to pay an allegedly unconstitutional tax meant that “the remedy at law by defending a tax suit . . . is attended with a great and oppressive burden of risk” and “is therefore entirely inadequate”), *aff’d* by an equally divided Court, 174 U.S. 799 (1899); see also *Recent Case*, 20 *Harv. L. Rev.* 238, 238 (1907) (“Ordinarily equity will not interfere with criminal proceedings. But where irreparable damage would otherwise follow, the majority of the many conflicting cases will be found to hold that equity will restrain the enforcement of penalties under a statute affecting property rights which the court deems unconstitutional.”). Whatever the doctrine before 1908, though, the right of action recognized in *Ex parte Young* was available thereafter.

obtain judicial review of administrative rules or orders that they believed to be unlawful.<sup>43</sup>

By and large, this particular right of action in equity was available only to the direct targets of regulation—the individuals or entities who would have been defendants in the enforcement proceeding that they were asking the court to enjoin. What is more, it was essentially defensive—a means for regulated parties to litigate arguments that they would have raised in defense if they were sued for violating the administrative rule or order that purported to restrict their behavior.<sup>44</sup> Regulated parties that invoked this right of action were simply trying to establish that they did not have a duty to comply with the rule or order.

As one would expect, equity also supplied rights of action that were more offensive, and that were available not only to regulated parties but also to other people who were suffering harm at the hands of administrative officials. Again, though, these rights of action were limited; to a considerable extent, they protected the same kinds of primary rights against the same kinds of invasions as the rights of action that were available at law. Even in the nineteenth century, courts of equity had granted injunctions to prevent tortious invasions of certain types of property rights.<sup>45</sup> By the early twentieth century, courts were entertaining suits in equity to prevent other types of torts as well.<sup>46</sup> Thus, if governmental officials were interfering with a would-be plaintiff’s person, property, or contractual relationships in a manner that would be tortious if not authorized by statute, and if the officials did not have valid authority for what they were doing, the plaintiff might be able to get a court of equity to enter an injunction restraining the officials’ future behavior—just as the plaintiff might be able to get a court of law to award

---

<sup>43</sup> See, e.g., *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 183 (1938).

<sup>44</sup> See Harrison, *supra* note 42, at 1000.

<sup>45</sup> See C.C. Langdell, *A Brief Survey of Equity Jurisdiction* (pt. 2), 1 *Harv. L. Rev.* 111, 122 (1887) (noting that courts of equity exercised jurisdiction to prevent “torts[] to immovable property[] and to incorporeal property,” though not “torts to the person and to movable property”).

<sup>46</sup> See William F. Walsh, *A Treatise on Equity* 259–60 (1930); cf. Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 *Yale L.J.* 115, 132 (1923) (“[T]here has already accumulated a respectable body of decisions in which courts of equity have protected personal rights, either frankly dealt with as such or thinly camouflaged as property rights.”). But cf. Andrew Fureseth, *Government by Injunction—The Misuse of the Equity Power*, 71 *Cent. L.J.* 5, 5 (1910) (complaining about “[t]he modern use of the Writ of Injunction, especially in labor disputes,” and criticizing the idea that “the right to carry on or continue in business [is] a property right” of the sort that can justify injunctive relief against strikes or boycotts).

damages for the torts that had already occurred. Likewise, if governmental officials were refusing to perform duties that they owed to a particular plaintiff, the plaintiff might be able to get injunctive relief under the same circumstances that would warrant mandamus from a court of law.<sup>47</sup>

Over time, the Supreme Court made clear that rights of action supplied by general principles of equity jurisprudence could be used to protect not only primary rights that existed at common law but also primary rights that were created by statute.<sup>48</sup> In the words of an opinion from 1944, “[w]hen . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law,” the rights-holder sometimes could get a federal court to enjoin administrative officials who were acting or threatening to act in disregard of those rights—even if the statute that created the rights said nothing about remedies for their violation.<sup>49</sup> For purposes of this doctrine, moreover, the requirement that the statutory rights in question be “similar in kind to those customarily treated in courts of law” might not have been very restrictive; according to Professor Louis Jaffe, “legally protected interest[s]” of various sorts could serve as the foundation for rights of action in equity.<sup>50</sup> Still, equity did not supply a right of action to every would-be plaintiff who was suffering harm as a result of unlawful behavior by administrative officials. To qualify for relief under general principles of equity jurisprudence, the plaintiff normally needed to establish not only that the defendants were behaving unlawfully, but also that their behavior amounted to “an invasion of recognized legal rights” (or legally protected interests) that the law conferred upon the plaintiff in particular.<sup>51</sup>

The Supreme Court never fully specified the criteria for determining whether a particular statutory or constitutional provision gave “legal rights” to particular people. Looking back on the relevant cases in the

---

<sup>47</sup> See, e.g., 2 James L. High, *A Treatise on the Law of Injunctions* § 1310 (Shirley T. High ed., 4th ed. 1905).

<sup>48</sup> See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1725 (1975).

<sup>49</sup> *Stark v. Wickard*, 321 U.S. 288, 309 (1944) (explaining that at least “in the absence of an administrative remedy,” Congress’s mere “silence . . . as to judicial review” should not “be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction”).

<sup>50</sup> See Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 *Harv. L. Rev.* 255, 264 (1961).

<sup>51</sup> *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940).

early 1960s, Professor Jaffe argued that the key was the purpose behind the provision: if the provision had been enacted to protect the interests of a discrete group, the provision might well give each member of that group a personal legal right of the sort that would support a claim to enjoin administrative officials from violating the provision.<sup>52</sup> According to Professor Richard Stewart, though, courts applied this concept more aggressively in the 1960s than in the 1940s.<sup>53</sup> In any event, whatever the precise test for deciding whether a limitation on administrative power conferred “legal rights” upon would-be plaintiffs, the Supreme Court was quite clear that plaintiffs who lacked such rights normally were not eligible for remedies against administrative officials who were violating the limitation, even if the plaintiffs were being harmed by the officials’ unlawful behavior.<sup>54</sup>

---

<sup>52</sup> See Jaffe, *supra* note 50, at 266. Professor Jaffe based this conclusion in part on the *Chicago Junction Case*, 264 U.S. 258 (1924). There, however, the Supreme Court arguably attributed the plaintiffs’ right of action to a special statutory provision. See Commerce Court Act, ch. 309, § 5, 36 Stat. 539, 543 (1910) (providing that whenever the Interstate Commerce Commission issued an order or requirement, “any party or parties in interest to the [administrative] proceeding . . . may appear as parties . . . as of right . . . in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party”); *Chicago Junction Case*, 264 U.S. at 267–68 (acknowledging that this language “does not in terms provide that such party may institute a suit to challenge the order,” but concluding that “this is implied”).

<sup>53</sup> See Stewart, *supra* note 48, at 1725 (“The development of the statutory beneficiary concept was at first hesitant.”). Professor Stewart suggests that before the 1960s, courts were willing to treat statutes as creating personal legal rights when the statutes were intended to benefit relatively small groups, but “broader classes of putative beneficiaries, such as consumers, were frequently denied standing in the absence of an express statutory warrant.” *Id.* at 1725–26.

<sup>54</sup> See, e.g., *Stark*, 321 U.S. at 290 (indicating that in the absence of special statutory rights of action, plaintiffs seeking to enjoin enforcement of an administrative order “must . . . show that the act of the Secretary amounts to an interference with some legal right of theirs”); *Perkins*, 310 U.S. at 125 (“[N]o legal rights of respondents were shown to have been invaded or threatened . . . Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public’s interest in the administration of the law.”); *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137–38 (1939) (“The [plaintiffs] 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.” (footnotes omitted)); *R.R. Co. v. Ellerman*, 105 U.S. 166, 174 (1882) (“The only injury of which [the plaintiff] can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right.”); see also *Gudgel v. Iverson*, 87 F. Supp. 834,

The Court repeatedly made this point in the context of suits brought by businesses to challenge benefits that the government was bestowing upon the businesses' competitors. For instance, in *Alabama Power Co. v. Ickes*,<sup>55</sup> a utility company sought to enjoin the Federal Emergency Administrator of Public Works from providing loans and grants that would help municipalities build their own electric plants in the region that the company served. The company alleged both that the Administrator lacked authority to provide these subsidies and that the Administrator's unlawful behavior would harm and might even ruin the company (because the company would lose business to the new plants). But according to the Supreme Court, even if the loans and grants were indeed unauthorized, they did not violate any "legal or equitable right" belonging to the company.<sup>56</sup> As a result, the harm that the company would suffer was *damnum absque injuria*—a loss that "does not lay the foundation of an action."<sup>57</sup> Just as a plaintiff would not be entitled to injunctive relief against a corporation that was lending money to one of the plaintiff's competitors under circumstances not permitted by the corporation's charter, so too the Alabama Power Company had no right of action against the federal officials who were making loans that federal law allegedly did not authorize.<sup>58</sup>

Admittedly, the *Alabama Power* opinion did not use the phrase "right of action." Instead, the Supreme Court announced its conclusion in the same terms that the court below had used: the plaintiff "was without standing to challenge the validity of the administrator's acts."<sup>59</sup> Prior cases had already used the word "standing" this way,<sup>60</sup> and later cases would continue to do so.<sup>61</sup> But as Professor Albert explained in the mid-1970s, this concept of "standing" is fundamentally about whether the applicable substantive law gives the plaintiff a claim for relief (that is, a

---

841 (W.D. Ky. 1949) ("It is a well-settled rule of law that only a person whose 'legal right' is violated by the unlawful conduct of another is entitled to maintain a suit.").

<sup>55</sup> 302 U.S. 464 (1938).

<sup>56</sup> *Id.* at 475.

<sup>57</sup> *Id.* at 479; see also *Tenn. Elec. Power*, 306 U.S. at 140 ("[T]he damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue.").

<sup>58</sup> See *Ala. Power*, 302 U.S. at 481.

<sup>59</sup> *Id.* at 475.

<sup>60</sup> See, e.g., *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 254 (1930).

<sup>61</sup> See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Tenn. Elec. Power*, 306 U.S. at 147.

right of action) under the circumstances that the plaintiff is alleging.<sup>62</sup> The reason that the plaintiff in *Alabama Power* lacked “standing” to challenge the Administrator’s acts was that even if those acts were unlawful, the plaintiff would be eligible for relief only if the acts violated some “legal or equitable right” belonging to the plaintiff—and because no such right was at stake, the Court could already tell that the plaintiff had no claim for relief.<sup>63</sup>

The same would have been true even if the plaintiff had been seeking a declaratory judgment rather than an injunction. In two limited respects, the combination of the Declaratory Judgment Act of 1934<sup>64</sup> and the underlying substantive law can be thought of as creating new rights of action. First, the Act enabled some people who previously would have been in federal court only as defendants to initiate suits as plaintiffs and to obtain declaratory relief.<sup>65</sup> Second, the Act also enabled some disputants to obtain a determination of their legal relations before any legal wrong had been committed and hence before anyone incurred liability for damages or penalties.<sup>66</sup> But the Declaratory Judgment Act did not otherwise expand the universe of proper parties. By the Act’s terms, only an “interested” party could seek declaratory relief, and courts could enter declaratory judgments only with respect to the party’s “rights and

---

<sup>62</sup> See Albert, *supra* note 3, at 426; see also *id.* at 497 (“[C]larity would be served if we conceived of standing as involving the recognition of claims against the government.”).

<sup>63</sup> Cf. *Ala. Power*, 302 U.S. at 479 (“[W]here, although there is damage, there is no violation of a right[,] no action can be maintained.”).

<sup>64</sup> Ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. § 2201(a) (2012)).

<sup>65</sup> See, e.g., Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn’t Looking*, 36 *UCLA L. Rev.* 529, 553, 582–83 (1989).

<sup>66</sup> See *id.* at 554. Of course, even before Congress enacted the Declaratory Judgment Act, people could sometimes seek injunctions against the enforcement of administrative rules or orders that they had not yet violated. See *supra* text accompanying notes 42–44; see also Harrison, *supra* note 42, at 1000 (noting “the resemblance between [these] injunctions and declaratory judgments”). Traditionally, however, injunctive relief was available only where there was no adequate remedy at law. The Declaratory Judgment Act sometimes allowed plaintiffs to get anticipatory relief under circumstances where it would not previously have been available. See, e.g., *Anderson v. Aetna Life Ins. Co.*, 89 F.2d 345, 347–48 (4th Cir. 1937) (holding that the Act made declaratory relief available “irrespective of whether the suit would have been cognizable in equity or whether plaintiff would have had an adequate remedy at law in defending actions at law instituted by the defendants”); see also Fed. R. Civ. P. 57 (“The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate.”).

other legal relations.”<sup>67</sup> In keeping with those words, the Supreme Court and leading commentators agreed that declaratory relief was available only in cases involving “the legal relations of parties having adverse legal interests” and that the point of the Act was simply to permit “an immediate and definitive determination of the legal rights of the parties.”<sup>68</sup> Thus, plaintiffs seeking to challenge administrative action could not normally use the Declaratory Judgment Act to circumvent the holding of cases like *Alabama Power*.<sup>69</sup>

---

<sup>67</sup> 48 Stat. at 955. Yale professor Edwin Borchard co-wrote the Act, and the phrase “rights and other legal relations” was inspired by the work of his late colleague Wesley Hohfeld. See Edwin Borchard, *Declaratory Judgments*, at v (2d ed. 1941) (dedicating book to Hohfeld) [hereinafter *Borchard, Declaratory Judgments*]; Edwin Borchard, *The Federal Declaratory Judgments Act*, 21 Va. L. Rev. 35, 45 (1934) (invoking Hohfeld and observing that “[t]he term ‘rights and other legal relations’ was designed to insure technical accuracy”). Hohfeld had complained that courts and commentators often use the term “rights” in a loose sense that conflates several distinct types of legal advantages. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30 (1913). To facilitate precision, Hohfeld had developed a taxonomy of the different “legal relations” that might exist between two people. In Hohfeld’s lexicon, A has a “right” with respect to B when B owes A a duty to act or refrain from acting in a particular way; A has a “liberty” (or “privilege”) with respect to B when A does not owe B a duty to act or refrain from acting in a particular way; A has a “power” with respect to B when A has the authority to alter B’s legal relations; and A has an “immunity” with respect to B when B does not have the authority to alter A’s legal relations. See id. at 30–58; Arthur L. Corbin, *Legal Analysis and Terminology*, 29 Yale L.J. 163, 167–70 (1919) (providing a glossary of Hohfeldian terms). According to Hohfeld, these basic legal relations are the fundamental building blocks of our law; even complex legal positions can be disaggregated into some combination of these relations. See Hohfeld, *supra*, at 20, 58–59. But cf. Hart & Sacks, *supra* note 1, at 135 (“Hohfeld was primarily concerned with analyzing the relations of private persons with each other, and . . . his analysis is not at all adapted to the accurate or comprehensive description of private-official relationships.”); Monaghan, *supra* note 5, at 1816 nn.61, 63 (noting Hart and Sacks’s criticism of Hohfeld).

I am indebted to John Harrison both for teaching me about Hohfeld and for alerting me to the Hohfeldian roots of the Declaratory Judgment Act.

<sup>68</sup> *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937); see also Borchard, *Declaratory Judgments*, *supra* note 67, at 49 (emphasizing that in suits seeking declaratory relief, courts must ask “whether the plaintiff has a ‘legal interest’ in the relief he seeks”); cf. Edwin Borchard, *The Next Step Beyond Equity—The Declaratory Action*, 13 U. Chi. L. Rev. 145, 149 (1946) (observing that the availability of declaratory relief “expand[s] the conception of ‘rights’ to include the dilemmas of . . . a prospective defendant” who faces the threat of suit if he behaves in a particular way, but suggesting that “the criterion of ‘legal interest’” simply reflects the fact that “the defeat and denial of an unfounded claim which disturbs and renders insecure a person’s rights . . . is as much an interest . . . in need of judicial protection as the assertion of the claim itself”).

<sup>69</sup> Cf. 1 F. Trowbridge vom Baur, *Federal Administrative Law* 167 (1942) (stating, as a general rule, that “a party has legal standing to bring judicial review only . . . where the administrative action complained of adversely affects his legal rights”); Henry P. Giessel,

## 2. Special Statutory Review Provisions

Apart from the rights of action that the common law and equity jurisprudence might supply to people seeking judicial relief from administrative orders or requirements, Congress could also create special rights of action by statute. By the 1940s, Congress had enacted a broad variety of provisions enabling people to go to court to challenge particular acts by particular federal agencies.<sup>70</sup>

A leading example is Section 402(b)(2) of the Communications Act of 1934,<sup>71</sup> which addressed judicial review of the Federal Communications Commission’s decisions on applications for construction permits and radio-station licenses. Under Section 402(b), not only someone whose application had been denied but also “any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application” could “appeal” the Commission’s decision to what is now the United States Court of Appeals for the D.C. Circuit.<sup>72</sup> In *FCC v. Sanders Bros. Radio Station*,<sup>73</sup> the Commission had granted an application to build a new radio station in Dubuque, Iowa. Seeking to avoid competition, an existing licensee in the same market appealed. Neither the common law nor the Communications Act gave the existing licensee “legal rights” of the sort that might have supported a suit in equity absent Section 402(b)(2).<sup>74</sup> According to the Supreme Court, indeed, the Communications Act required the Commission to base licensing decisions entirely on the public interest and not to worry about the risk of “economic injury to an existing station” (except insofar as such injury would in turn harm the public interest).<sup>75</sup>

---

Comment, The Federal Declaratory Judgments Act in Public Law Cases, 28 Tex. L. Rev. 709, 713 (1950) (taking the Supreme Court to have established that “a threatened invasion of legal rights must be shown in order to secure declaratory relief”).

<sup>70</sup> See, e.g., *Stark v. Wickard*, 321 U.S. 288, 312–15 (1944) (Frankfurter, J., dissenting) (emphasizing the differences among these provisions, and suggesting that courts should not recognize non-statutory rights of judicial review except where required by the Constitution).

<sup>71</sup> Ch. 652, § 402(b)(2), 48 Stat. 1064, 1093 (1934) (codified as amended at 47 U.S.C. § 402(b)(6) (2012)).

<sup>72</sup> *Id.*

<sup>73</sup> 309 U.S. 470 (1940).

<sup>74</sup> See, e.g., Elizabeth Magill, *Standing for the Public: A Lost History*, 95 Va. L. Rev. 1131, 1139 (2009).

<sup>75</sup> *Sanders Bros.*, 309 U.S. at 473–76 (concluding that “the purpose of the Act” was “to protect the public,” not “to protect a licensee against competition”); see also Jaffe, *supra* note 50, at 272 (observing that the existing licensee therefore lacked a “legally protected interest”—an interest that the law required the Commission to consider).

Nonetheless, the Court interpreted Section 402(b)(2) to let the existing licensee appeal the Commission's decision; to the extent that the new station would reduce the existing licensee's profits, the existing licensee was a "person aggrieved or whose interests are adversely affected by [the] decision of the Commission" within the meaning of Section 402(b)(2).<sup>76</sup> Of course, the existing licensee would not be able to win on the merits simply by pointing out that it would make less money if it faced more competition. But if the existing licensee could persuade the reviewing court that the Commission's conclusions about the public interest lacked support, or that the Commission's decision flouted the Communications Act in some other respect, then the reviewing court would set the decision aside.

On this interpretation, Section 402(b)(2) created an unusual disjunction between standing and the merits: the financial interest that made the existing licensee eligible to seek judicial review differed from the arguments about the public interest that the existing licensee would need to advance in order to win relief on the merits.<sup>77</sup> To explain why Congress would set up such a system, the Supreme Court offered the following thought:

Congress . . . may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.<sup>78</sup>

Two years later, in *Scripps-Howard Radio v. FCC*,<sup>79</sup> the Court expressed the point this way:

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2) Congress gave the right of appeal to persons "aggrieved or whose interests are adversely affected" by Commission action. But these private litigants have standing only as representatives of the public interest.<sup>80</sup>

---

<sup>76</sup> See *Sanders Bros.*, 309 U.S. at 476–77.

<sup>77</sup> See Peter L. Strauss et al., Gellhorn and Byse's *Administrative Law: Cases and Comments* 1132–34 (10th ed. 2003) (noting this feature of *Sanders Bros.*, and reading *Data Processing* to extend a similar idea to the judicial-review provision in the Administrative Procedure Act).

<sup>78</sup> *Sanders Bros.*, 309 U.S. at 477.

<sup>79</sup> 316 U.S. 4 (1942).

<sup>80</sup> *Id.* at 14 (citation omitted).

As Dean Elizabeth Magill has observed, Justice Douglas’s dissent in *Scripps-Howard* expressed some doubts about the constitutionality of this arrangement.<sup>81</sup> Article III of the Constitution extends the federal government’s judicial power only to “Cases” and “Controversies,”<sup>82</sup> and earlier opinions of the Supreme Court had suggested that those words require parties who are claiming “adverse legal interests.”<sup>83</sup> Justice Douglas therefore wondered whether someone who had not been given “an individual substantive right” could be authorized by statute “to call on the courts to review an order of the Commission.”<sup>84</sup> In the wake of *Scripps-Howard*, though, Justice Douglas ultimately articulated a different limitation:

[I]f we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has standing only as a representative of the public interest, then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise . . . we will most assuredly run afoul of the constitutional requirement of case or controversy.<sup>85</sup>

---

<sup>81</sup> See Magill, *supra* note 74, at 1141–45.

<sup>82</sup> U.S. Const. art. III, § 2.

<sup>83</sup> See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–41 (1937); see also, e.g., *Coleman v. Miller*, 307 U.S. 433, 438–41 (1939) (surveying precedents about the Supreme Court’s jurisdiction to review the judgment of a state court, and referring to “[t]he principle that the applicant must show a legal interest in the controversy”); Edwin Borchard, *Challenging “Penal” Statutes by Declaratory Action*, 52 *Yale L.J.* 445, 451 n.16 (1943) (indicating that before *Sanders Bros.*, “[i]t had . . . been assumed that an indispensable condition of a ‘case’ or ‘controversy’ was the requisite legal interest in the plaintiff to obtain an adjudication”).

<sup>84</sup> *Scripps-Howard*, 316 U.S. at 21 (Douglas, J., dissenting) (acknowledging that “Congress could have said that the holder of a radio license has an individual substantive right to be free of competition resulting from the issuance of another license and causing injury,” and “[i]n that event . . . there would be a cause of action for invasion of a substantive right,” but questioning whether a litigant who had *not* been given a substantive right could present the federal courts with a “case or controversy”); see also *FCC v. Nat’l Broad. Co. (KOA)*, 319 U.S. 239, 265 (1943) (Douglas, J., dissenting) (noting that in *Scripps-Howard*, in addition to expressing doubts about the Court’s interpretation of § 402(b)(2), “I also expressed my concern . . . with the constitutionality of a statutory scheme which allowed one who showed no invasion of a private right to call on the courts to review an order of the Commission”).

<sup>85</sup> *KOA*, 319 U.S. at 265 (Douglas, J., dissenting) (footnote omitted). A few months before Justice Douglas wrote these words, Judge Jerome Frank proposed a different way of reconciling *Sanders Bros.* and *Scripps-Howard* with what he called “the usual ‘standing to sue’ cases.” *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), vacated, 320 U.S. 707 (1943); see also Magill, *supra* note 74, at 1145–47 (discussing Judge

In other words, Justice Douglas suggested that if private litigants did not always have to be claiming *legal* interests, Article III at least required them to have *practical* interests at stake. This idea appears to be an early version of the “injury in fact” requirement that Justice Douglas’s opinion in *Data Processing* would later associate with Article III.<sup>86</sup>

---

Frank’s views). Consistent with Justice Douglas’s dissent in *Scripps-Howard*, Judge Frank understood the earlier cases to mean that

[i]n a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable “controversy” [within the meaning of Article III] . . . unless the citizen shows that such conduct . . . will invade a private substantive legally protected interest of the plaintiff citizen.

*Associated Indus.*, 134 F.2d at 700 (footnote omitted). But Judge Frank observed that “Congress . . . can constitutionally authorize one of [the federal government’s] own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers”; such a suit amounted to a “controversy” between the public and the defendant, and the public’s authorized representative did not need a private legal interest of his own. *Id.* at 704. According to Judge Frank, moreover, Congress could validly authorize “any person, official or not,” to represent the public in this way. *Id.* Judge Frank saw § 402(b)(2) of the Communications Act in these terms: to the extent that it let existing licensees go to court “to vindicate the public interest,” it was authorizing them to serve as “private Attorney Generals” who were suing on behalf of the public and therefore did not need private legal interests. *Id.* at 704–05; see also Magill, *supra* note 74, at 1133, 1139–48 (giving Judge Frank’s views renewed prominence).

In my view, Judge Frank overread both *Scripps-Howard* and § 402(b)(2). Rather than purporting to authorize suit by random citizens, § 402(b)(2) authorized suit only by people with concrete interests of their own. What is more, § 402(b)(2) did not empower those people to represent anyone other than themselves. If someone “appealed” an FCC order under § 402(b), any other “interested person” had a right to “intervene and participate in the proceedings had upon said appeal.” Communications Act of 1934, ch. 652, § 402(d), 48 Stat. 1064, 1094.

Why, then, did *Scripps-Howard* describe these “private litigants” as “representatives of the public interest”? 316 U.S. at 14. I suspect that the Court was simply referring to the motivation behind Congress’s decision to let interested private parties seek judicial review of the Commission’s decisions. As a policy matter, legislatures sometimes create private rights of action for the purpose of vindicating public interests, and § 402(b)(2) might reflect that goal: Congress was trying to benefit the public by allowing interested parties to challenge the legality of the Commission’s orders. But the fact that these challenges might redound to the public’s benefit (by helping to enforce the public’s laws) does not imply that Congress was authorizing the challengers to act as true litigating agents for the public. Indeed, I myself am skeptical that Congress *can* empower self-appointed private citizens to litigate on behalf of the public in the way that the Attorney General does, so that the resulting judgments will have preclusive effect against the public and other purported representatives of the public. See Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689, 724–25 (2004) (discussing possible constitutional limits on Congress’s ability to let private citizens represent the public in court).

<sup>86</sup> See *infra* text accompanying notes 141–143.

Whatever limits the Constitution might impose on provisions like Section 402(b)(2), though, cases like *Sanders Bros.* made clear that Congress has broad power to create rights of action that the unwritten law would not have recognized. As Congress created more and more statutory rights of action to challenge administrative action, lawyers used the label “statutory review” to refer to review pursuant to those rights of action.<sup>87</sup>

By contrast, review pursuant to rights of action supplied by general principles of equity jurisprudence was a leading example of “nonstatutory review.”<sup>88</sup> Of course, statutory questions could arise even in cases of “nonstatutory review”: plaintiffs who wanted a court to enjoin conduct by administrative officials needed to establish not only that the conduct was unauthorized but also that it violated their own “legal rights,” and both of those issues usually required close analysis of the relevant statutes. Still, the proceedings themselves were “nonstatutory” in the sense that the plaintiffs’ right of action came from unwritten law.

### *B. The Administrative Procedure Act and Its Interpretation Before 1970*

As the power of administrative agencies expanded in the 1930s, so did calls to reform administrative law and to subject agencies to more judicial checks. In the words of Professor George Shepherd, the result was “more than a decade of political combat” that amounted to “one of the major political struggles . . . between supporters and opponents of the New Deal.”<sup>89</sup>

In 1940, Congress came close to enacting a new framework statute that not only would have regulated the operating procedures of many different federal agencies but also would have dramatically expanded judicial review of the agencies’ actions. Under the Walter-Logan Bill,<sup>90</sup> whenever a federal administrative agency issued a rule, “any person substantially interested in the effects of [the] rule” would have been able to petition the United States Court of Appeals for the District of Columbia (now the D.C. Circuit) to determine whether the rule “is in conflict with the Constitution

---

<sup>87</sup> See, e.g., Comm. on Admin. Procedure, *supra* note 38, at 80, 82–83.

<sup>88</sup> See *id.* at 80–82.

<sup>89</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. Rev.* 1557, 1560 (1996). Professor Shepherd’s article exhaustively analyzes major legislative proposals from 1929 until the enactment of the APA in 1946. For close examination of the 1940s and 1950s, see also Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (2012).

<sup>90</sup> H.R. 6324, 76th Cong. (3d Sess. 1940).

of the United States or the statute under which issued.”<sup>91</sup> Likewise, whenever an agency issued a final decision or order in an administrative proceeding, “[a]ny party to [the] proceeding . . . who may be aggrieved by the final decision or order” would have been able to “file a written petition . . . for review of the decision” in a federal circuit court, which would then have “jurisdiction of the proceeding and of the questions determined therein” and power to “set aside the decision” or to “direct the agency . . . to modify [the] decision.”<sup>92</sup> Both houses of Congress passed this bill in 1940, but President Roosevelt vetoed it.<sup>93</sup>

In comparison, the judicial-review provisions in the Administrative Procedure Act of 1946 were more modest. Section 10(c) of the APA did identify a fairly broad universe of agency actions that were “subject to judicial review,” including not only “[e]very agency action made reviewable by statute” but also “every final agency action for which there is no other adequate remedy in any court.”<sup>94</sup> When describing who could obtain judicial review of such agency actions, though, Section 10(a) did not refer to everyone who was “substantially interested” or who was “aggrieved” in a factual sense. Instead, Section 10(a) said that “[a]ny 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.”<sup>95</sup> Section 10(b) added that if Congress had established an adequate “special statutory review proceeding,” review would proceed as designated in the relevant statute.<sup>96</sup> Otherwise, the judicial review promised by Section 10(a) could occur in “proceedings for judicial enforcement” of agency orders or through “any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction.”<sup>97</sup>

---

<sup>91</sup> H.R. Doc. No. 76-986, at 13 (1940) (printing § 3 of the bill).

<sup>92</sup> *Id.* at 15 (printing § 5(a)).

<sup>93</sup> *Id.* at 1–4 (printing the veto message). See generally Shepherd, *supra* note 89, at 1598–632 (tracing the bill and describing it as “the most powerful attack on the New Deal during the Roosevelt presidency”).

<sup>94</sup> Administrative Procedure Act, ch. 324, § 10(c), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 704 (2012)). Section 10 did not apply where “(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.” *Id.* § 10, 60 Stat. at 243 (codified as amended at 5 U.S.C. § 701).

<sup>95</sup> *Id.* § 10(a), 60 Stat. at 243 (codified as amended at 5 U.S.C. § 702).

<sup>96</sup> See *id.* § 10(b), 60 Stat. at 243 (codified as amended at 5 U.S.C. § 703).

<sup>97</sup> *Id.*

Scholars largely agree that rather than expanding judicial review (as the Walter-Logan Bill would have), Section 10(a) of the APA was simply meant to codify existing doctrines and to accommodate the variety of forms of review that were already in use.<sup>98</sup> Under the prevailing ideas about what had previously been called "nonstatutory review," plaintiffs had long been eligible to seek injunctive relief against administrative officials who were invading or threatening to invade the plaintiffs' "legal rights,"<sup>99</sup> and such plaintiffs sometimes had been said to be suffering "legal wrong."<sup>100</sup> In addition, cases like *Sanders Bros.* had recognized Congress's power to create special statutory rights of action for people who were "adversely affected" or "aggrieved" by agency action even though they were not suffering "legal wrong" in the conventional sense.<sup>101</sup> The two prongs of Section 10(a) seemed designed to reflect, but not to enlarge, these existing mechanisms for obtaining review.

In the 1950s, however, Professor Kenneth Culp Davis started to advocate a different principle: anyone "who is in fact adversely affected"

---

<sup>98</sup> See, e.g., Breyer et al., *supra* note 17, at 816–17 ("This provision is best understood as codifying the bases for standing that had been developed by the courts at the time the APA was enacted."); Magill, *supra* note 74, at 1150 ("The widely accepted view of the history is that [§ 10(a)] was a declaration of existing law."); see also S. Rep. No. 79-752, app. B, at 44 (1945) (reprinting Attorney General Tom Clark's section-by-section analysis of the bill that became the APA, which asserted that § 10(a) "reflects existing law"); U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 96 (1947) ("This construction of section 10(a) was not questioned or contradicted in the legislative history."); Jaffe, *supra* note 40, at 528 (agreeing with those who regarded § 10(a) "as no more than declaratory of existing law"); Note, Competitors' Standing to Challenge Administrative Action Under the APA, 104 U. Pa. L. Rev. 843, 858–60 (1956) (reviewing the legislative history and concluding that, on balance, it "indicates that section 10(a) simply codified prior law"). But see Duffy, *supra* note 41, at 130, 134 n.105 (arguing that "[t]he enactment of the APA should have changed the federal courts' method of determining the availability and scope of review," and asserting that "courts and commentators continue to be misled by the *AG's Manual*").

<sup>99</sup> See *supra* notes 48–54 and accompanying text.

<sup>100</sup> See *Ala. Power*, 302 U.S. at 479–80 (concluding that even if the defendant officials were behaving unlawfully and the plaintiff was being harmed as a result, the officials were not invading any "legal right" belonging to the plaintiff, and the plaintiff therefore was not suffering "legal wrong"); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 256–57 (1930) (holding that although the appellants had lost "a competitive advantage" because of the administrative order that they were trying to challenge, they "were not subjected to or threatened with any legal wrong"); see also Jaffe, *supra* note 50, at 255 (associating the phrase "legal wrong" with "the violation of a 'legal right'"). But cf. Bureau of Nat'l Affairs, *Administrative Procedure Act: Summary and Analysis* 33 (1946) (calling the phrase "legal wrong" in § 10(a) of the APA a "new term" that "will undoubtedly be the subject of considerable litigation").

<sup>101</sup> See *supra* notes 71–76 and accompanying text.

by governmental action, including actions taken by federal administrative agencies, should presumptively be entitled to bring suit to challenge the legality of that action and to win relief if the court agrees that the action is unlawful.<sup>102</sup> According to Professor Davis, the “strongest reason” for recognizing this default rule was “the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy.”<sup>103</sup> But Professor Davis argued that Section 10(a) of the APA also supported his position: “When the Administrative Procedure Act is applicable, one who is adversely affected in fact should be allowed to challenge governmental action even though the rights asserted are those of others.”<sup>104</sup> Based on a line in the relevant committee reports, Professor Davis claimed that “the intent behind the Administrative Procedure Act”<sup>105</sup> was to authorize suit by “any person adversely affected in fact by agency action”<sup>106</sup> (unless the particular type of agency action in question was not subject to judicial review at all<sup>107</sup>). On this view, the “adversely affected or aggrieved” language in Section 10(a) amounted to a more general version of Section 402(b)(2) of the Communications Act as interpreted in *Sanders Bros.*—with the result that anyone who was aggrieved in a practical sense by agency action should be able to go to court to challenge the lawfulness of that action.<sup>108</sup>

Careful lawyers have not thought highly of Davis’s argument.<sup>109</sup> To be sure, the words “adversely affected or aggrieved” do appear in Section 10(a). But on the most natural understanding of the syntax, Section 10(a)

---

<sup>102</sup> See Kenneth Culp Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353, 365 (1955).

<sup>103</sup> *Id.* at 355.

<sup>104</sup> *Id.* at 429.

<sup>105</sup> *Id.* at 355.

<sup>106</sup> *Id.* at 355–56 (quoting S. Rep. No. 79-752, at 26 (1945), and H.R. Rep. No. 79-1980, at 42 (1946)) (internal quotation marks omitted).

<sup>107</sup> See *id.* at 355 (limiting discussion to “reviewable” actions); cf. *supra* note 94 and accompanying text.

<sup>108</sup> See Davis, *supra* note 102, at 367 (“No good reason is apparent why the *Sanders* doctrine, as further developed by the later cases, should not be of general applicability whenever either the APA or another statute containing an ‘adversely affected’ provision is applicable.”); cf. *supra* text accompanying notes 71–76 (describing *Sanders Bros.*).

<sup>109</sup> See, e.g., Jaffe, *supra* note 40, at 529–30 (“[I]f we put aside this ‘conflicting’ legislative history, the case for Professor Davis’ view is logically very difficult to support. . . . I think it is clear that the APA as it stands was not meant to give standing to parties ‘adversely affected in fact’ . . . .”); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359, 365 n.29 (1972) (“[Davis’s] argument depended upon a somewhat strained interpretation of an ambiguous legislative history and an ungrammatical reading of the statute.”).

qualifies those words. Instead of promising judicial review to everyone who is harmed by agency action, Section 10(a) refers to people who are “adversely affected or aggrieved by such action *within the meaning of any relevant statute.*”<sup>110</sup>

By the time Congress enacted the APA, a number of federal regulatory statutes contained provisions allowing certain decisions by specific federal agencies to be reviewed in court at the behest of people who were “aggrieved” (or, occasionally, “adversely affected”), but who might not otherwise have been eligible for judicial relief.<sup>111</sup> These statutes, however, did not take a one-size-fits-all approach: “[T]here can be no general definition laid down as to who is an ‘aggrieved person.’”<sup>112</sup> Those twin facts may account for the peculiar wording of Section 10(a) of the APA. According to many courts and commentators, when Section 10(a) referred to “[a]ny person . . . adversely affected or aggrieved by [agency] action within the meaning of any relevant statute,” it was merely recognizing the existence of rights of action conferred by other statutes.<sup>113</sup> On that view, this portion of Section 10(a) *accommodated* special statutory review provisions that authorized suit by aggrieved parties even in the absence of “legal wrong,” but it did not *extend* those provisions’ approach into new fields. Through the late 1960s, this was probably the dominant understanding of the “adversely affected or aggrieved” clause in Section 10(a) (and the parallel language in 5 U.S.C. § 702, which

---

<sup>110</sup> Administrative Procedure Act, ch. 324, § 10(a), 60 Stat. 237, 243 (1946) (emphasis added); see also *Kan. City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955) (criticizing a district court for failing to take adequate account of the italicized words).

<sup>111</sup> See Note, *Statutory Standing to Review Administrative Action*, 98 U. Pa. L. Rev. 70, 71 n.13a (1949) (citing more than a dozen such statutes).

<sup>112</sup> *Id.* at 72. Some of the judicial opinions that are famous for having expanded standing did so by broadly interpreting the words “aggrieved” or “adversely affected” as used in a particular statutory review provision. That was true not only of *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940) (interpreting § 402(b)(2) of the Communications Act), but also of *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 615–16 (2d Cir. 1965) (interpreting § 313(b) of the Federal Power Act).

<sup>113</sup> See, e.g., Stewart, *supra* note 48, at 1727 n.285 (endorsing this view); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 Mich. L. Rev. 163, 182 (1992) (“People could bring suit [under the ‘adversely affected or aggrieved’ part of § 10(a)] 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.”); see also *Sapp v. Hardy*, 204 F. Supp. 602, 606 (D. Del. 1962) (“A convincing analysis of the legislative history and meaning of this Section . . . demonstrates that the words . . . ‘adversely affected or aggrieved . . . within the meaning of any relevant statute’ required the plaintiff to cite as relevant one of the several federal statutes . . . which use these words to describe a person entitled to review.”).

replaced Section 10(a) when Congress enacted Title 5 of the United States Code in 1966).<sup>114</sup>

Without yet disputing this understanding, the Warren Court did establish various doctrines that effectively expanded rights of action in many areas of federal practice. For instance, in *J.I. Case Co. v. Borak*,<sup>115</sup> the Court indicated that if a plaintiff sued a defendant for violating a statutory provision in a way that harmed the plaintiff, and if Congress had enacted the provision for the purpose of protecting people like the plaintiff against harms of this sort, the fact that the provision “made no specific reference to a private right of action” would not prevent courts from “provid[ing] such remedies as are necessary to make effective the congressional purpose.”<sup>116</sup> With respect to administrative law in particular, Justice Harlan’s majority opinion in *Abbott Laboratories v. Gardner*<sup>117</sup> also (1) relaxed doctrines of “ripeness” that had hampered pre-enforcement challenges to allegedly unlawful regulations<sup>118</sup> and (2) articulated a strong presumption against interpreting federal statutes to preclude judicial review that the APA or general principles of equity jurisprudence would otherwise authorize.<sup>119</sup>

---

<sup>114</sup> See Magill, *supra* note 74, at 1150; see also *S. Suburban Safeway Lines, Inc. v. City of Chicago*, 416 F.2d 535, 537 (7th Cir. 1969) (“[T]he prevailing judicial interpretation has been that § 702 does not create standing which would not exist apart from § 702 by virtue of general principles or other statutes.”); Gellhorn, *supra* note 109, at 365 (“[M]ost courts . . . concluded . . . that § 10 was merely declaratory of prior law and granted no new rights of judicial review.”).

For the statute enacting Title 5 of the United States Code, see Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378. For the provision repealing the APA, see *id.* § 8(a), 80 Stat. at 632, 653. Apart from minor stylistic differences, 5 U.S.C. § 702 was identical to § 10(a). See *id.* § 1, 80 Stat. at 392 (“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.”).

<sup>115</sup> 377 U.S. 426 (1964).

<sup>116</sup> *Id.* at 431–33. In *Borak*, the Court did not specify the precise source of these remedial rights: Was the Court reading a right of action into the statute that the defendant allegedly had violated, or was the Court instead recognizing a right of action as a matter of “federal common law”? Cf. Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 735–42 (2013) (discussing this issue).

<sup>117</sup> 387 U.S. 136 (1967).

<sup>118</sup> See *id.* at 148–54.

<sup>119</sup> See *id.* at 139–41; see also Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285, 1290 (2014) (noting that the presumption of reviewability “took its modern shape” in *Abbott Laboratories*, though questioning its basis). Justice Harlan’s opinion in *Abbott Laboratories* arguably cast the presumption of reviewability more broadly than the text accompanying this footnote. Rather than explicitly limiting his discussion to judicial review that the APA or general principles of equity jurisprudence would otherwise authorize,

Around the same time, the Court’s opinion in *Hardin v. Kentucky Utilities Co.*<sup>120</sup> suggested a generous view of the circumstances in which the intended beneficiaries of a federal statute can sue administrative officials who allegedly are violating the statute. In 1959, Congress had limited the territory within which the Tennessee Valley Authority (“TVA”) could supply electrical power.<sup>121</sup> Legislative history indicated that “the primary objective of the limitation” was to protect private utility companies in surrounding areas against competition from the TVA.<sup>122</sup> In *Hardin*, one such company alleged that the TVA was violating the geographic limitation and impinging upon the company’s sales. The lower courts upheld the company’s “standing” to sue for injunctive relief against this allegedly unlawful behavior,<sup>123</sup> and the Supreme Court agreed: “Since [the company] is . . . in the class which [the statutory limitation] is designed to protect, it has standing under familiar judicial principles to bring this suit, and no explicit statutory provision is necessary to confer standing.”<sup>124</sup>

Although the Court did not specify the source of the company’s right of action, the cases that the Court cited suggest that the “familiar judicial principles” were general principles of equity. As we have seen,<sup>125</sup> statutes enacted for the benefit of a particular group had sometimes been said to

---

Justice Harlan simply said that “judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.” *Abbott Labs.*, 387 U.S. at 140. Before one can speak of whether review has been “cut off,” though, review must have been authorized in the first place. In *Abbott Laboratories* itself, moreover, pre-existing principles unquestionably did authorize the plaintiffs to seek relief against enforcement of the regulation that they were challenging. See *id.* at 154 (“[T]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner’s rule they are quite clearly exposed to the imposition of strong sanctions.”); cf. *supra* notes 42–43 and accompanying text (discussing the traditional right of action enabling regulated parties to seek injunctions against enforcement of certain unlawful requirements).

<sup>120</sup> 390 U.S. 1 (1968).

<sup>121</sup> Act of Aug. 6, 1959, Pub. L. No. 86-137, 73 Stat. 280, 280–81 (codified as amended at 16 U.S.C. § 831n-4(a) (2012)).

<sup>122</sup> *Hardin*, 390 U.S. at 7.

<sup>123</sup> See *Ky. Utils. Co. v. TVA*, 237 F. Supp. 502, 505–06 (E.D. Tenn. 1964), *rev’d on other grounds*, 375 F.2d 403, 415–17 (6th Cir. 1966).

<sup>124</sup> *Hardin*, 390 U.S. at 7 (citations omitted). Like Professor Jaffe, the Court traced this conclusion to the *Chicago Junction Case*, 264 U.S. 258 (1924). See *Hardin*, 390 U.S. at 6; *supra* note 52 and accompanying text.

<sup>125</sup> See *supra* notes 48–53 and accompanying text.

confer personal “rights” (or “legally protected interest[s]”<sup>126</sup>) upon the members of that group. Before Congress enacted the APA, courts of equity had entertained suits for injunctive relief against administrative officials who were invading “rights” that belonged to the plaintiffs in particular, including rights created by statute.<sup>127</sup> After Congress enacted the APA, people facing the invasion of such “legal rights” were said to be suffering “legal wrong” within the meaning of Section 10(a).<sup>128</sup> *Hardin* arguably reflects a broad understanding of the circumstances in which statutes generate “legal rights” of this sort. Thus, the great circuit judge Henry Friendly associated *Hardin* with the “legal wrong” clause in Section 10(a) of the APA.<sup>129</sup>

On the other hand, some lower federal courts instead associated *Hardin* with the “adversely affected or aggrieved” clause.<sup>130</sup> These courts may have thought that the “adversely affected or aggrieved” clause creates rights of action that would not otherwise have existed—in particular, that the clause confers a right of action upon all would-be plaintiffs who are “aggrieved” by an agency’s violation of a statutory provision that Congress enacted to protect the interests of people like the plaintiffs. Alternatively, these courts may simply have been applying *Borak*

---

<sup>126</sup> Jaffe, *supra* note 50, at 264.

<sup>127</sup> See *supra* note 49 and accompanying text (quoting *Stark v. Wickard*, 321 U.S. 288, 309 (1944)); see also *Hardin*, 390 U.S. at 7 (relying upon *Stark*).

<sup>128</sup> See *Pa. R.R. Co. v. Dillon*, 335 F.2d 292, 294–95 (D.C. Cir. 1964) (“For purposes of standing in this case, the sufficiency of appellants’ allegations of ‘legal wrong’ . . . depend upon congressional intent to bestow upon them a legal right to protection from such competition.”); cf. *Braude v. Wirtz*, 350 F.2d 702, 707 (9th Cir. 1965) (“The phrase ‘legal wrong’ under the [APA] means the invasion of a legally protected right.”); *Kan. City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955) (“Section 10(a) is for the benefit of ‘any person suffering legal wrong’, that is, one whose legal rights have been violated.”); *supra* notes 98–100 and accompanying text.

<sup>129</sup> See *Safir v. Gibson*, 417 F.2d 972, 978 (2d Cir. 1969); see also *Stewart*, *supra* note 48, at 1727 n.285 (“The ‘legal wrong’ test contained in § 702 should be read as referring to both interests protected at common law and those protected by statute. ‘Adversely affected’ under § 702 refers to statutory review proceedings . . .”).

<sup>130</sup> See *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 933 n.26 (2d Cir. 1968) (citing *Hardin* for the proposition that “any person attempting to assert an interest, personal to him, which the ‘relevant statute’ was specifically designed to protect, and which he claims is not being protected, [is] ‘adversely affected or aggrieved’ within the meaning of that statute”); *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20, 27 (S.D. W. Va. 1969) (asserting that in *Hardin*, “the Supreme Court . . . held that a person is ‘aggrieved’ if he asserts a personal interest which the ‘relevant statute’ was designed to protect”), *aff’d*, 429 F.2d 423 (4th Cir. 1970); see also *Road Review League v. Boyd*, 270 F. Supp. 650, 660–61 (S.D.N.Y. 1967) (suggesting something similar before *Hardin*).

aggressively and assuming that each relevant statute implied a right of action in favor of its intended beneficiaries—so that even if the “adversely affected or aggrieved” clause simply accommodates what was once called “statutory” review,<sup>131</sup> the intended beneficiaries of each relevant statute were entitled to such review.

Whatever the rationale, though, *Hardin* clearly supported recognizing rights of action in favor of people who were suffering harm because an administrative agency was violating a statutory provision that Congress had enacted for their benefit.

## II. DATA PROCESSING

In modern times, Justice Douglas’s majority opinion in *Data Processing* is often taken to recognize an even broader right of action—one that makes relief available to anyone who is being harmed by unlawful agency behavior and whose interests are even “arguably” within the general “zone” to be protected by the statutory or constitutional provision that the agency is violating. That interpretation of *Data Processing* assumes that the majority opinion used the word “standing” to refer to whether the plaintiff would have remedial rights if the agency was indeed violating the law and the plaintiff’s factual allegations were true. But that assumption is wrong; for the most part, the opinion used the word “standing” to refer to a more preliminary inquiry. Once modern lawyers understand what *Data Processing* meant by “standing,” they will consider its usage idiosyncratic—but they will also see that subsequent courts and commentators have misunderstood *Data Processing*’s holding.

### A. “Standing” as a Preliminary Screen that Is Relatively Easy to Satisfy

#### 1. Justice Douglas’s Opinion in *Data Processing*

The *Data Processing* case involved national banks, which are chartered pursuant to federal law and regulated by the Comptroller of the Currency. These entities do not have broad authority to conduct nonbanking business, but Congress has allowed them to “exercise . . . all such incidental powers as shall be necessary to carry on the business of banking.”<sup>132</sup> In the 1960s, Comptroller James Saxon interpreted this

---

<sup>131</sup> See *supra* text accompanying note 87.

<sup>132</sup> Rev. Stat. § 5136 (1874) (codified as amended at 12 U.S.C. § 24 (2012)); National Bank Act, ch. 106, § 8, 13 Stat. 99, 101 (1864).

provision of the National Bank Act expansively.<sup>133</sup> In one of many such rulings, the Comptroller announced that “[i]ncidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers.”<sup>134</sup>

This ruling potentially put national banks into competition with other companies that sold data-processing services. Indeed, the complaint in *Data Processing* identified a specific instance of such competition: a data-processing company called Data Systems, Inc., allegedly had lost two clients or prospective clients to the American National Bank and Trust Company of St. Paul, Minnesota.<sup>135</sup> Arguing that the National Bank Act did not really authorize national banks to enter the data-processing business, Data Systems and the Association of Data Processing Service Organizations (a national trade group) sued both the Comptroller and the American National Bank and Trust Company in federal district court. The complaint asked the court to set aside the Comptroller’s ruling, to enjoin the Comptroller from promulgating any rule or policy to the same effect, to enjoin the American National Bank and Trust Company from performing data-processing services for others, and to hold the American National Bank and Trust Company liable for damages to Data Systems, Inc.<sup>136</sup>

Shortly after serving their answers, both defendants moved to dismiss the complaint “upon the grounds that plaintiffs lack standing to maintain this action and that the Court lacks jurisdiction over the subject matter.”<sup>137</sup> The district court granted these motions,<sup>138</sup> and the Eighth Circuit agreed that the plaintiffs lacked “jurisdictional standing.”<sup>139</sup> Ultimately, though,

---

<sup>133</sup> See Jeffrey D. Dunn, Comment, Expansion of National Bank Powers: Regulatory and Judicial Precedent Under the National Bank Act, Glass-Steagall Act, and Bank Holding Company Act, 36 Sw. L.J. 765, 770–71 (1982); see also *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 436 n.12 (1st Cir. 1972) (discussing Comptroller Saxon’s “bold and radical changes” and noting that they did not fare well in court).

<sup>134</sup> Office of Comptroller of the Currency, Comptroller’s Manual for National Banks: Laws, Regulations, Rulings ¶ 3500 (photo. reprinted 1983) (1966).

<sup>135</sup> Complaint ¶¶ 13–16, in Appendix 4, 7–8, *Data Processing*, 397 U.S. 150 (No. 69-85).

<sup>136</sup> *Id.* at 5, 8–9.

<sup>137</sup> Motion of the Defendant, William B. Camp, Comptroller of the Currency, to Dismiss the Action, in Appendix 15, 15, *Data Processing*, 397 U.S. 150 (No. 69-85); accord Motion to Dismiss, in Appendix 17, 17, *Data Processing*, 397 U.S. 150 (No. 69-85).

<sup>138</sup> *Ass’n of Data Processing Serv. Orgs. v. Camp*, 279 F. Supp. 675 (D. Minn. 1968).

<sup>139</sup> *Ass’n of Data Processing Serv. Orgs. v. Camp*, 406 F.2d 837, 838 (8th Cir. 1969).

the Supreme Court reversed and “remanded for a hearing on the merits.”<sup>140</sup>

Justice Douglas’s opinion for the Court started with the following thought: “[T]he question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to ‘cases’ and ‘controversies.’”<sup>141</sup> Consistent with views that he had expressed in the 1940s,<sup>142</sup> Justice Douglas associated this constitutional issue with “whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”<sup>143</sup> But the plaintiffs in *Data Processing* unquestionably met this test: they had obvious practical interests in avoiding competition from national banks.<sup>144</sup>

Justice Douglas proceeded to articulate a second requirement, which he conceded was not mandated by Article III. At least when a plaintiff wants to challenge agency action for allegedly violating the Constitution or a federal statute, Justice Douglas asserted that “[t]he question of standing . . . concerns, apart from the ‘case’ or ‘controversy’ test, . . . whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>145</sup> To judge from Westlaw, the phrase “zone of interests” had never previously appeared in a reported opinion by any state or federal court, and Justice Douglas did not explain its provenance.<sup>146</sup> In support of its relevance, though, Justice Douglas referred to the APA, which he described as “grant[ing] standing to a person ‘aggrieved by agency action within the meaning of a relevant statute.’”<sup>147</sup> He also observed that “[w]here statutes are concerned, the trend [of recent decisions] is toward enlargement of the class of people who may protest administrative action” (and, specifically, toward “enlarging the category of aggrieved ‘persons’”).<sup>148</sup> As an example, Justice Douglas cited *Hardin v. Kentucky Utilities Co.*, where “[w]e held

<sup>140</sup> *Data Processing*, 397 U.S. at 158.

<sup>141</sup> *Id.* at 151.

<sup>142</sup> See *supra* text accompanying note 85.

<sup>143</sup> *Data Processing*, 397 U.S. at 152. At a minimum, Justice Douglas thought that this question was important in “a competitor’s suit” (such as *Data Processing*). His opinion can be read to suggest that “a taxpayer’s suit” might be different. See *id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 153.

<sup>146</sup> Cf. Jonathan R. Siegel, *Zone of Interests*, 92 *Geo. L.J.* 317, 317 (2004) (“The legal source of the zone of interests requirement is obscure.”).

<sup>147</sup> *Data Processing*, 397 U.S. at 153 (quoting 5 U.S.C. § 702 (Supp. IV 1969)).

<sup>148</sup> *Id.* at 154.

that no explicit statutory provision was necessary to confer standing” upon a plaintiff who is “within the class of persons that the [relevant] statutory provision was designed to protect.”<sup>149</sup>

In *Data Processing*, the parties had debated *Hardin*’s relevance. In his brief on behalf of the Comptroller, the Solicitor General had argued that the plaintiffs were not among the intended beneficiaries of the provision in the National Bank Act that lists the powers of national banks and that implicitly prevents national banks from doing other things; the “sole purpose” of that provision was to “creat[e] a strong national banking system,” not “to protect . . . potential competitors of national banks.”<sup>150</sup> On the other hand, the plaintiffs pointed to the legislative history of a more recent statute, the Bank Service Corporation Act of 1962.<sup>151</sup> Although that Act made it easier for multiple banks to cooperate in forming entities called “bank service corporations,” Section 4 specified that “[n]o bank service corporation may engage in any activity other than the performance of bank services for banks,”<sup>152</sup> and legislative history suggested that data-processing companies were among the intended beneficiaries of this restriction.<sup>153</sup> According to the plaintiffs, moreover, the legislative history suggested that some members of Congress had expected Section 4 of the Bank Service Corporation Act to protect data processors against competition not only from “bank service corporations” but also from banks themselves.<sup>154</sup> Justice Douglas declined to delve into the details of these arguments, but he concluded that “§ 4 arguably brings a competitor within the zone of interests protected by it.”<sup>155</sup>

Finally, Justice Douglas asked whether Congress had done anything to preclude judicial review of the agency action that the plaintiffs were

---

<sup>149</sup> *Id.* at 155.

<sup>150</sup> Brief for the Comptroller of the Currency at 19–20, *Data Processing*, 397 U.S. 150 (No. 69-85).

<sup>151</sup> Pub. L. No. 87-856, 76 Stat. 1132 (1962) (codified as amended at 12 U.S.C. §§ 1861–1867 (2012)).

<sup>152</sup> *Id.* § 4, 76 Stat. at 1132.

<sup>153</sup> See Brief for the Petitioners at 30–36, *Data Processing*, 397 U.S. 150 (No. 69-85).

<sup>154</sup> See *id.* In the alternative, the plaintiffs also argued that they should not have to establish a legally protected interest of their own. See *id.* at 10 (invoking Professor Davis’s view that anyone who is hurt by unlawful governmental action should normally have a remedy); *id.* at 12–19 (arguing, like Professor Jaffe, that at least where a “vital public interest” is at stake, courts should be able to entertain suits by private plaintiffs who would help protect the public interest); *id.* at 20–29 (criticizing the “legal right” requirement).

<sup>155</sup> *Data Processing*, 397 U.S. at 156 (emphasis added).

trying to challenge. Citing *Abbott Laboratories v. Gardner*,<sup>156</sup> he began by observing that “[t]here is no presumption against judicial review and in favor of administrative absolutism, unless that purpose is fairly discernible in the statutory scheme.”<sup>157</sup> Here, he concluded, no such purpose was apparent: “We find no evidence that Congress in either the Bank Service Corporation Act or the National Bank Act sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under those statutes.”<sup>158</sup> Indeed, Justice Douglas took 5 U.S.C. § 702 to suggest the opposite: in his view, both the National Bank Act and the Bank Service Corporation Act “are clearly ‘relevant’ statutes within the meaning of § 702,” and the plaintiffs “are within that class of ‘aggrieved’ persons who, under § 702, are entitled to judicial review of ‘agency action.’”<sup>159</sup>

But while Justice Douglas concluded that the plaintiffs “have standing to sue,” he did *not* say that the law definitely recognized the claim that they were asserting. To the contrary, he indicated that at the outset of a suit, when the defendants file a motion to dismiss for want of “standing,” courts should not yet resolve that issue. Justice Douglas’s opinion in *Data Processing* repeatedly used the word “standing” to refer to a threshold question distinct from “the merits” of the plaintiffs’ claims.<sup>160</sup> According to Justice Douglas, moreover, the Eighth Circuit had been wrong to analyze “standing” by asking whether the plaintiffs had a “legal interest” in being free from competition.<sup>161</sup> In his words, “The ‘legal interest’ test goes to the merits. The question of standing is different.”<sup>162</sup>

Toward the end of his opinion, Justice Douglas reiterated that “the merits” of the case included not only whether the agency’s action was

<sup>156</sup> 387 U.S. 136 (1967); see *supra* note 119 and accompanying text.

<sup>157</sup> *Data Processing*, 397 U.S. at 157 (citation omitted). This rhetoric harked back to debates from the New Deal. In the late 1930s, “administrative absolutism” had been a catchphrase for people who wanted to expand judicial review of agency action. See Shepherd, *supra* note 89, at 159–91 (noting the phrase’s prominence in a report issued in 1938 by the American Bar Association’s Special Committee on Administrative Law, then chaired by Roscoe Pound); see also Report of the Special Committee on Administrative Law, 63 A.B.A. Ann. Rep. 331, 343 (1938) (defining “administrative absolutism,” in its pure form, as “a highly centralized administration set up under complete control of the executive for the time being, relieved of judicial review and making its own rules”).

<sup>158</sup> *Data Processing*, 397 U.S. at 157 (footnote omitted).

<sup>159</sup> *Id.* (quoting 5 U.S.C. § 702 (Supp. IV 1969)).

<sup>160</sup> See *id.* at 153, 156, 158.

<sup>161</sup> See *id.* at 152–53 (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 406 F.2d 837, 842–43 (8th Cir. 1969)).

<sup>162</sup> *Id.* at 153.

unlawful but also whether the applicable law really gave these particular plaintiffs the sort of interest that supported remedial rights. As the case proceeded, then, the lower courts would eventually need to consider the question that they had prematurely analyzed under the rubric of “standing.” The second-to-last paragraph of the majority opinion in *Data Processing* read as follows:

Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a “legal interest” that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.<sup>163</sup>

Some leading administrative-law casebooks have edited out this paragraph,<sup>164</sup> so today’s students are not necessarily aware of it. But Justice Douglas’s view of “standing” as a preliminary issue, distinct from whether the plaintiffs actually have the kind of interest that would support a claim for relief, was crucial to the logic of his opinion. According to Justice Douglas, 5 U.S.C. § 702 confers “standing” on everyone who is suffering real-world harm because of agency action and who is even “arguably” within the zone of interests protected by a federal statute that the agency allegedly is disregarding. If Justice Douglas had equated “standing” with a valid claim for relief, that conclusion would make little sense: to decide whether the law gives remedial rights to a particular plaintiff, Justice Douglas presumably would have wanted to know whether the plaintiff is *actually* within the zone of interests protected by a relevant statute. The closing paragraphs of Justice Douglas’s opinion acknowledged as much: in order to win relief on the merits, the plaintiffs would need to establish *not only* that the defendants were violating the relevant statutes *but also* that those statutes gave the plaintiffs a “legal interest” that protected them against such violations.

In sum, the thrust of the majority opinion in *Data Processing* was not that the question of “legal interest” is irrelevant, but simply that it goes to “the merits” of the plaintiffs’ claims rather than to the preliminary question of “standing.” Contrary to modern misperceptions, Justice Douglas did not read 5 U.S.C. § 702 as itself conferring remedial rights

---

<sup>163</sup> *Id.* at 158.

<sup>164</sup> See, e.g., Kristin E. Hickman & Richard J. Pierce, Jr., *Federal Administrative Law: Cases and Materials* 921 (2d ed. 2014); Mashaw et al., *supra* note 16, at 1290; Peter L. Strauss et al., *Gellhorn and Byse’s Administrative Law: Cases and Comments* 1223 (11th ed. 2011).

on everyone who is “arguably” within the zone of interests protected by a relevant statute.

## 2. Justice Brennan’s Position

In a separate opinion that was printed in the companion case of *Barlow v. Collins* but that also applied to *Data Processing*, Justice Brennan advocated an even narrower usage of the word “standing.”<sup>165</sup> Both his published opinion and internal correspondence confirm that at the time, Justice Brennan saw “standing” as a preliminary screen that was even more sharply distinct from remedial rights than Justice Douglas suggested.

The plaintiffs in *Barlow* were African Americans who had long been tenant farmers on a plantation in Alabama. Both on their own behalf and as putative representatives of a class, they were seeking to challenge the validity of a new regulation about the assignability of federal farm subsidies.<sup>166</sup>

Normally, federal law prevented the assignment of claims against the United States.<sup>167</sup> Ever since 1938, however, Section 8(g) of the Soil Conservation and Domestic Allotment Act had allowed farmers to assign their rights to receive certain payments from the federal government, provided that the assignment was made “without discount” and “as security for cash or advances to finance making a crop.”<sup>168</sup> From the start, some people had worried that “unfair landlords” would exploit this provision to try to obtain the benefit of subsidies intended for tenant farmers.<sup>169</sup> Early on, regulations issued by the Secretary of Agriculture had addressed this concern; in the course of defining the phrase “to finance making a crop,” the regulations specified that “[a]ssignments may not be taken to secure the payment of the whole or any part of a cash or fixed commodity rent for a farm.”<sup>170</sup> This exclusion remained in force for

---

<sup>165</sup> *Barlow v. Collins*, 397 U.S. 159, 167–73 (1970) (Brennan, J., concurring in the result and dissenting).

<sup>166</sup> Complaint ¶ 3, in Appendix 3, 4, *Barlow*, 397 U.S. 159 (No. 69-249).

<sup>167</sup> Rev. Stat. § 3477 (1874) (codified as amended at 31 U.S.C. § 203 (1964)). The current version of this prohibition is 31 U.S.C. § 3727 (2012).

<sup>168</sup> Agricultural Adjustment Act of 1938, ch. 30, § 103, 52 Stat. 31, 35 (adding § 8(g)).

<sup>169</sup> Albon L. Holsey, *Negro Farmers Look Ahead*, 16 *Opportunity: J. Negro Life* 110, 111 (1938) (reporting that § 8(g) “is said to have been inserted over the protests of officials of the Agriculture Department”).

<sup>170</sup> 8 Fed. Reg. 7413, 7426 (1943).

years.<sup>171</sup> But in 1966, the Secretary revised the regulations to say that assignments *could* be made “to secure the payment of cash rent for land used to make a crop.”<sup>172</sup>

That same year, the plaintiffs’ landlord allegedly demanded an assignment of subsidies that the plaintiffs expected to receive under the Food and Agriculture Act of 1965 (which had incorporated Section 8(g) of the Soil Conservation and Domestic Allotment Act by reference).<sup>173</sup> Some of the plaintiffs executed the assignments, while others refused and allegedly lost their leases.<sup>174</sup> Both sets of plaintiffs asserted that they were suffering economic harm because of the Secretary’s new regulation.<sup>175</sup> According to the plaintiffs, moreover, the new regulation was “invalid and unauthorized by law”; as the plaintiffs interpreted Section 8(g) and the provision of the 1965 Act incorporating it, the Secretary lacked the power to authorize assignments as security for the payment of cash rent.<sup>176</sup> Proceeding on that theory, the plaintiffs filed suit in federal district court against their landlord, the Secretary, and officials of the Agricultural Stabilization and Conservation Service (which administered the relevant subsidy programs and was responsible for evaluating whether to pay a purported assignee or the original beneficiary<sup>177</sup>). With respect to the official defendants, the plaintiffs sought a declaration that the new regulation was invalid and an injunction forbidding the defendants to enforce it or to make any payments pursuant to the assignments that it purported to authorize.<sup>178</sup>

As in *Data Processing*, the official defendants promptly asserted that “[t]he court lacks jurisdiction of the subject matter with respect to said

---

<sup>171</sup> See, e.g., 20 Fed. Reg. 6511, 6512 (1955) (promulgating 7 C.F.R. § 1110.2 (1955)); see also 26 Fed. Reg. 5788 (1961) (re-designating this provision as 7 C.F.R. § 709.2).

<sup>172</sup> 31 Fed. Reg. 2815 (1966).

<sup>173</sup> Food and Agriculture Act of 1965, Pub. L. No. 89-321, § 402(a), 79 Stat. 1187, 1194–96; see Complaint, *supra* note 166, ¶ 10, *in* Appendix at 8. For an account of the plaintiffs’ interactions with their landlord, see Susan Youngblood Ashmore, *Carry It On: The War on Poverty and the Civil Rights Movement in Alabama, 1964–1972*, at 202–04 (2008).

<sup>174</sup> Complaint, *supra* note 166, ¶ 10, *in* Appendix at 8.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* ¶¶ 1, 8, *in* Appendix at 3, 7.

<sup>177</sup> See, e.g., 7 C.F.R. § 709.7 (1967) (calling for benefits to be “paid directly to the assignee” if the indebtedness secured by the assignment had not been discharged and if other conditions were satisfied); *id.* §§ 709.11–22 (regulating the circumstances in which the federal government would recognize assignments).

<sup>178</sup> Complaint, *supra* note 166, *in* Appendix at 12–13.

defendants in that plaintiffs lack standing to sue.”<sup>179</sup> The district judge agreed and dismissed the claims against the official defendants,<sup>180</sup> and the Fifth Circuit affirmed.<sup>181</sup> On the same day that the Supreme Court decided *Data Processing*, however, the Supreme Court reversed.

The published version of the Court’s opinion in *Barlow* appeared under Justice Douglas’s name, and it followed the template of *Data Processing*. First, Justice Douglas noted that the plaintiffs had adequately alleged “injury in fact,” and “there is no doubt that . . . [they] have the personal stake and interest that impart the concrete adverseness required by Article III.”<sup>182</sup> Second, Justice Douglas asserted that the plaintiffs were not only arguably but “clearly” within “the zone of interests protected by the Act” that the plaintiffs accused the Secretary of misapplying—with the result that the plaintiffs “are persons ‘aggrieved by agency action within the meaning of a relevant statute’ as those words are used in 5 U.S.C. § 702.”<sup>183</sup> (Justice Douglas explained that the 1965 Act required the Secretary to “provide adequate safeguards to protect the interests of tenants and sharecroppers,”<sup>184</sup> and Section 8 of the Soil Conservation and Domestic Allotment Act included a similar provision.<sup>185</sup> In his view, moreover, the legislative history of Section 8(g) also revealed “a congressional intent to benefit the tenants.”<sup>186</sup>) Third, Justice Douglas observed that Congress had done nothing to “preclude[] judicial review or commit[] the challenged action entirely to administrative discretion.”<sup>187</sup> To the contrary, given Congress’s intent to protect tenant farmers, Justice Douglas held that “the statutory scheme at issue here is to be read as evincing a congressional intent that [the plaintiffs] may have

<sup>179</sup> Motion to Dismiss the Complaint as to Defendants Collins, Godfrey and Freeman, in Appendix 17, 17, *Barlow*, 397 U.S. 159 (No. 69-249).

<sup>180</sup> See Order (Feb. 21, 1967), in Appendix 51, 52–53, *Barlow*, 397 U.S. 159 (No. 69-249) (allowing the plaintiffs to pursue their claims against their landlord, but dismissing the claims against the official defendants); see also Order, Determination and Direction (Apr. 14, 1967), in Appendix 60, 60, *Barlow*, 397 U.S. 159 (No. 69-249) (directing the entry of final judgment with respect to the official defendants so that the plaintiffs could take an immediate appeal).

<sup>181</sup> *Barlow v. Collins*, 398 F.2d 398 (5th Cir. 1968).

<sup>182</sup> *Barlow*, 397 U.S. at 163–64.

<sup>183</sup> *Id.* at 164–65.

<sup>184</sup> Food and Agriculture Act of 1965, Pub. L. No. 89-321, § 402(a), 79 Stat. 1187, 1196.

<sup>185</sup> Agricultural Adjustment Act of 1938, ch. 30, § 101, 52 Stat. 31, 32 (specifying that in carrying out the provisions of § 8, “the Secretary . . . shall, as far as practicable, protect the interests of tenants and sharecroppers”); see also Act of Feb. 29, 1936, ch. 104, 49 Stat. 1148, 1150 (containing an earlier version of the same language).

<sup>186</sup> *Barlow*, 397 U.S. at 164–65.

<sup>187</sup> *Id.* at 165.

judicial review of the Secretary's action."<sup>188</sup> The Court therefore remanded the case to the district court "for a hearing on the merits."<sup>189</sup>

Justice Brennan submitted a separate opinion "concurring in the result" in both *Data Processing* and *Barlow* but "dissent[ing] from the Court's treatment of the question of standing to challenge agency action."<sup>190</sup> According to Justice Brennan, the test for "standing" should not refer to the "zone of interests" protected by relevant statutes, but instead should be entirely about the minimum requirements of Article III.<sup>191</sup> On this way of talking, plaintiffs who alleged that they were suffering "injury in fact" because of agency action would always enjoy "standing."<sup>192</sup>

Justice Brennan conceded that before reaching "the merits" of a case challenging agency action, courts did need to make a preliminary "canvass of relevant statutory materials."<sup>193</sup> Under Justice Brennan's proposed terminology, however, "the canvass is made, not to determine *standing*, but to determine an aspect of *reviewability*, that is, whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff."<sup>194</sup> Sometimes, "[p]ertinent statutory language, legislative history, and public policy considerations" would persuade courts that Congress had "precluded all judicial review" of the challenged action, or at least had "foreclosed review to the class to which the plaintiff belongs."<sup>195</sup> Conversely, federal statutes sometimes explicitly allowed review at the behest of particular plaintiffs, or contained "statutory indicia from which a right to review may be inferred."<sup>196</sup> As an example of the latter possibility, Justice Brennan asserted that "reviewability has ordinarily been inferred from evidence that Congress intended the plaintiff's class to be a beneficiary of the statute under which the plaintiff raises his claim."<sup>197</sup>

---

<sup>188</sup> *Id.* at 167.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* (Brennan, J., concurring in the result and dissenting).

<sup>191</sup> See *id.* at 168 (arguing that standing should depend entirely on the "injury in fact" inquiry; that the Court had "discarded the notion of any additional requirement when we discussed standing solely in terms of its constitutional content in *Flast v. Cohen*, 392 U.S. 83 (1968)"; and that the majority opinion was wrong to "requir[e] a second, nonconstitutional step").

<sup>192</sup> *Id.* at 172-73 & n.6.

<sup>193</sup> *Id.* at 169.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 173.

<sup>196</sup> *Id.* at 174.

<sup>197</sup> *Id.*

Justice Brennan apparently saw this point as a gloss on 5 U.S.C. § 702, which identified people who are “entitled to judicial review” of agency action<sup>198</sup> and which Justice Brennan therefore associated with the issue of “reviewability.”<sup>199</sup> Again, though, Justice Brennan portrayed “reviewability” as a preliminary inquiry distinct from “the merits.” Admittedly, “in cases where the plaintiff’s right to review must be inferred from evidence that his class is a statutory beneficiary,” the court’s analysis of “reviewability” would overlap to some extent with the court’s subsequent analysis, on “the merits,” of whether the plaintiff “is entitled to relief if he can show that the challenged agency action violated the statute.”<sup>200</sup> But in Justice Brennan’s schema, “Evidence that the plaintiff’s class is a statutory beneficiary . . . need not be as strong for the purpose of obtaining review as for the purpose of establishing the plaintiff’s claim on the merits.”<sup>201</sup> Because reviewability was merely a preliminary screen, and because courts should not lightly assume that Congress intended to preclude judicial review of final agency action,<sup>202</sup> even “slight . . . indicia” of beneficiary status “will suffice to establish [the plaintiff’s] right to have review and thus to reach the merits.”<sup>203</sup>

Under the analytical structure proposed by Justice Brennan, “[i]f it is determined that a plaintiff who alleged injury in fact [‘standing’] is entitled to judicial review [‘reviewability’], inquiry proceeds to the merits.”<sup>204</sup> For Justice Brennan as for Justice Douglas, though, “the merits” would not be limited to whether the defendant had behaved unlawfully. They would also encompass whether this particular plaintiff enjoyed remedial rights (which, for Justice Brennan, would require a fuller analysis of whether the plaintiff was indeed a “statutory beneficiary”).<sup>205</sup> Thus, Justice Brennan summarized “the merits” as involving “whether the specific legal interest claimed by the plaintiff is

<sup>198</sup> Id. (quoting 5 U.S.C. § 702 (Supp. IV 1969)) (internal quotation marks omitted).

<sup>199</sup> See id.

<sup>200</sup> Id. at 175.

<sup>201</sup> Id. at 175–76.

<sup>202</sup> See id. at 174 (citing *Abbott Labs.*, 387 U.S. at 140); see also *supra* text accompanying notes 119 and 156–157.

<sup>203</sup> *Barlow*, 397 U.S. at 176 (Brennan, J., concurring in the result and dissenting).

<sup>204</sup> Id. at 175.

<sup>205</sup> See id. (indicating that for a plaintiff to win on “the merits,” the court would need to be persuaded “that the statute protects his class, and thus that he is entitled to relief if he can show that the challenged agency action violated the statute”).

protected by the statute and . . . whether the protested agency action invaded that interest.”<sup>206</sup>

Later in his opinion, Justice Brennan did criticize “the erroneous notion that a plaintiff has no standing unless he can establish the existence of a legally protected interest.”<sup>207</sup> But this passage was specifically about “standing,” not “the merits.” Justice Brennan never denied that plaintiffs need a “legally protected interest” in order to win relief on the merits. His point was simply that plaintiffs should not have to demonstrate such an interest at the very outset of their suits, as part of the test for “standing.” For Justice Brennan, the sole function of the test for “standing” was to screen out matters that were not “Cases” or “Controversies” within the meaning of Article III and that federal courts therefore could not adjudicate. Thus, Justice Brennan insisted that plaintiffs had “standing” if they adequately alleged that the defendant was causing them “injury in fact,” even if the applicable law did not recognize any rights of action that might allow them to obtain relief.<sup>208</sup> As Justice Brennan appeared to acknowledge, however, the fact that plaintiffs lacked a “legally protected interest” would doom their claims on “the merits.”<sup>209</sup>

Internal correspondence sheds further light both on Justice Brennan’s position and on the development of Justice Douglas’s opinion in *Data Processing*. After oral argument in *Data Processing* and *Barlow*, Chief Justice Burger initially divided the task of writing the Court’s opinions: he assigned *Data Processing* to Justice Douglas and *Barlow* to Justice Brennan.<sup>210</sup> Justice Douglas quickly batted out a draft of *Data Processing*, which he sent to Justice Brennan (but not the other Justices).<sup>211</sup> About a

---

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 177; see also *id.* at 168 (“By requiring a second, nonconstitutional step [as part of its test for ‘standing’], the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests.”).

<sup>208</sup> See, e.g., *id.* at 172 & n.5 (“[F]or purposes of standing, it is sufficient that a plaintiff allege *damnum absque injuria*, that is, he has only to allege that he has suffered harm as a result of the defendant’s action.”); *id.* at 173 n.6 (taking the Court’s precedents to establish that “injury in fact renders a party adverse under the Constitution”).

<sup>209</sup> See, e.g., *id.* at 174 n.8.

<sup>210</sup> See Bernard Schwartz, *The Unpublished Opinions of the Burger Court* 31–32 (1988).

<sup>211</sup> The Justices took their initial vote on *Data Processing* on November 24, 1969. See Justice Douglas’s Conference Notes (Nov. 24, 1969), in *Papers of William O. Douglas*, Library of Congress Manuscript Division, MSS 18853, Box 1475, folder labeled “No. 85 – Asso. of Data Processing v. Camp: Misc. Memos, Cert Memos, Vote of Ct.” Despite the intervening Thanksgiving holiday, Justice Douglas had prepared an initial draft of his opinion by December 3. The copy of the opinion in the files of Justice Douglas’s law clerk bears the

month later, Justice Brennan reciprocated with a preliminary draft of the opinion that Justice Brennan was preparing in *Barlow*,<sup>212</sup> soon followed by a slightly revised version.<sup>213</sup> Justice Douglas’s draft of *Data Processing* purported to stay within the framework established by earlier cases, and it did not contain the phrases “injury in fact” or “zone of interests.”<sup>214</sup> Still, its analysis of the plaintiffs’ standing referred to both Article III of the Constitution and Section 4 of the Bank Service Corporation Act.<sup>215</sup> By contrast, Justice Brennan’s draft of *Barlow* cast the question of “standing” entirely in constitutional terms. According to Justice Brennan, a plaintiff who “alleges . . . that the challenged [agency] action has caused him substantial injury in fact” necessarily possesses “the personal stake and interest that imparts the concrete adverseness required by Article III” and therefore enjoys “standing” (as Justice Brennan proposed to use that term).<sup>216</sup> To be sure, Justice Brennan appeared to concede that in order to win on “the merits,” the plaintiffs would eventually need to show that the defendants had “invaded one of their legally protected interests”; otherwise, “no claim will be established upon which relief can be granted.”<sup>217</sup> But Justice Brennan insisted that “whether the plaintiff has stated a claim upon which relief can be granted” is “not relevant” to the plaintiff’s “standing.”<sup>218</sup>

After reading this draft, Justice Douglas’s law clerk Thomas C. Armitage sent his boss a memo commending Justice Brennan’s framework. Mr. Armitage explained that in cases seeking judicial review

---

notation “only to Brennan.” See Draft Opinion in *Data Processing* (Dec. 3, 1969), at 1, in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1475, folder labeled “No. 85 – Asso. of Data Processing v. Camp: Law Clerk.”

<sup>212</sup> See Schwartz, *supra* note 210, at 32 (quoting transmittal letter dated January 5, 1970); *id.* at 33–44 (reprinting Justice Brennan’s draft).

<sup>213</sup> See Draft Opinion in *Barlow* (undated, but probably Jan. 5–8, 1970), in Papers of William J. Brennan, Library of Congress Manuscript Division, MSS 52266, Box I:215, Folder 4.

<sup>214</sup> In an article published while this one was in the publication process, Scott Stern likewise notes the absence of those phrases from the first draft of Justice Douglas’s opinion in *Data Processing*. See Scott W. Stern, Standing for Everyone: *Sierra Club v. Morton*, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing, 30 *Fordham Envtl. L. Rev.* 21, 46–47 (2018), <https://ir.lawnet.fordham.edu/elr/vol30/iss2/2>.

<sup>215</sup> See Draft Opinion in *Data Processing* (Dec. 3, 1969), *supra* note 211, at 1–2 (discussing Article III); *id.* at 3–5 (analyzing the relevance of § 4).

<sup>216</sup> Draft Opinion in *Barlow*, *supra* note 213, at 6–7.

<sup>217</sup> *Id.* at 7.

<sup>218</sup> *Id.* In his words, “To insist that a plaintiff show invasion of a legally protected interest confuses the merits of the controversy with the standing of the party to litigate them.” *Id.*

of administrative action, the framework separated three questions that previous cases often had lumped together. First, courts would determine the plaintiff's "standing to sue" by asking a single question: "Did the plaintiff allege that the defendant's action caused him 'substantial injury in fact'?"<sup>219</sup> (Under Justice Brennan's approach, Mr. Armitage noted, "whether . . . the injury invades a legally protected interest" would "go to the merits of the plaintiff's case, not to the question of standing."<sup>220</sup>) Second, courts would ask whether the challenged action "was 'committed to agency discretion,'" which in turn depended on "whether Congress has expressly or impliedly precluded judicial review."<sup>221</sup> Third, "[i]f judicial review of the administrative action is not precluded, the final inquir[y] is whether the plaintiff has a valid claim on the merits, *i.e.*, whether the alleged injury invades a legally protected interest and whether the allegation of injury is true."<sup>222</sup> Mr. Armitage observed that this framework "will not change the results which have been generally reached in the 'competitor's' standing area, but it will more clearly separate the different elements of analysis."<sup>223</sup>

"If you agree to the present structure of Justice Brennan's opinion," Mr. Armitage added, "it will require some recasting of your opinion" in *Data Processing*.<sup>224</sup> Mr. Armitage's memo suggested the following structure:

(1) In a preliminary section, the framework for analysis as set out above should be briefly explained. Each of the three factors should then be discussed separately.

(2) Resolution of the issue of standing should be limited to answering the question, "Did the [petitioner] allege a substantial injury in fact?" Discussions as to whether [petitioner] was within the class or persons which the statute was designed to protect, etc., should be entirely excluded from this section, as that goes to the merits (*i.e.*, whether there is a legally protected interest.)

---

<sup>219</sup> Memo from TCA to Justice Douglas (undated), at 1, *in* Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1478, folder labeled "No. 249 – Barlow v. Collins: Law Clerk."

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* For additional discussion of this memo, see Stern, *supra* note 214, at 47–48.

(3) The “committed to agency discretion” issue should be decided in the next section. This would seem to require doing a bit more legislative research to substantiate the conclusion that Congress had no intent to limit judicial review in this area.

(4) The remaining question is whether [petitioner] has a valid claim on the merits, and this issue should be remanded to the [district court] for decision.

(5) In a final section, it would seem desirable to rationalize some of the old competitor’s standing cases with the approach taken in your opinion. Basically, the language in previous cases, which has talked of “statutory aids” to standing, or whether the plaintiff was an “implied beneficiary” of the statutory purpose to protect plaintiff’s class, was addressing itself either to the “committed to agency discretion” issue or to the merits. Either one of these factors may deny the plaintiff relief in a court of law, but it does not deny him standing.<sup>225</sup>

Justice Douglas apparently was not fully convinced. Either shortly before or shortly after receiving this memo, he sent Justice Brennan a brief note proposing a single change to Justice Brennan’s draft in *Barlow*. Justice Brennan’s draft said that the test for standing “is satisfied when the plaintiff alleges, as petitioners’ complaint alleged here, that the challenged action has caused him substantial injury in fact.”<sup>226</sup> Justice Douglas proposed the following substitute: “This test is satisfied when the plaintiff alleges that the challenged action either touches a zone to which the law has already applied sanctions or causes harm, economic or otherwise, within the purview of the federal statute whose application is in question.”<sup>227</sup> This proposed change was obviously inconsistent with Justice Brennan’s effort to eliminate statutory analysis from the discussion of “standing,” and Justice Brennan declined to make it.<sup>228</sup>

---

<sup>225</sup> Id. at 2.

<sup>226</sup> Draft Opinion in *Barlow*, supra note 213, at 6.

<sup>227</sup> Letter from Justice Douglas to Justice Brennan (Jan. 8, 1970), in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1478, folder labeled “No. 249 – Barlow v. Collins: Misc. Memos, Cert Memos, Vote of Ct.”

<sup>228</sup> Letter from Justice Brennan to Justice Douglas (Jan. 8, 1970), in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1478, folder labeled “No. 249 – Barlow v. Collins: Misc. Memos, Cert Memos, Vote of Ct” (accepting the “economic or otherwise” language but rejecting the rest). This exchange is described in Schwartz, supra note 210, at 45–46.

Still, Justice Douglas apparently authorized his clerk to suggest changes that would harmonize Justice Douglas's draft opinion in *Data Processing* with Justice Brennan's draft in *Barlow*.<sup>229</sup> Mr. Armitage quickly prepared a set of suggested revisions and transmitted them to Justice Douglas.<sup>230</sup> In a cover memo, Mr. Armitage noted again that "[t]he only question relevant to standing per *Barlow* is whether there is an alleged injury in fact," and Mr. Armitage revised the draft of *Data Processing* accordingly.<sup>231</sup>

As the base for the next draft of his opinion in *Data Processing*, Justice Douglas started with the version that was consistent with Justice Brennan's approach, but he made extensive changes.<sup>232</sup> He agreed that "standing" was a threshold inquiry distinct from "the merits," and he specifically cited Justice Brennan's proposed opinion in *Barlow* for the proposition that "the 'legal interest' test goes to the merits" and "[t]he question of standing is different."<sup>233</sup> Even at the "standing" stage, though, Justice Douglas apparently thought that courts should ask whether the

---

<sup>229</sup> Cf. Memo from TCA to Justice Douglas, *supra* note 219, at 2 ("If you would like me to do any work on your opinion in No. 85 [*Data Processing*] in accordance with the above suggestions, let me know and I will start to work on it.").

<sup>230</sup> See Memo from TCA to Justice Douglas (Jan. 10, 1970), in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1475, folder labeled "No. 85 - Asso. of Data Processing v. Camp: Law Clerk" ("My suggested changes turned out to be somewhat more extensive than I initially contemplated, and I wanted to briefly explain them here."); see also File Copy of Draft Opinion in *Data Processing* (Jan. 10, 1970), at 2, in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1474, folder labeled "No. 85 - Asso. of Data Processing v. Camp: Galley Proofs - Final Galley" ("As in *Barlow v. Collins*, *ante*, p. \_\_\_, the test is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.").

<sup>231</sup> Memo from TCA to Justice Douglas (Jan. 10, 1970), *supra* note 230. Mr. Armitage also reported that "Justice Brennan's opinion as I read it, and as his law clerks interpret it, implicitly overrules this Court's opinions in *Tennessee Power Co. v. TVA* and *Hardin v. Kentucky Utilities*." *Id.*; cf. Draft Opinion in *Data Processing* (Dec. 3, 1969), *supra* note 211, at 2-5 (making prominent references to both of those opinions). Given Mr. Armitage's contemporaneous summary of Justice Brennan's framework, though, he presumably meant only that Justice Brennan was moving the "legal interest" test out of the analysis of "standing" and into "the merits." See *supra* text accompanying note 220; see also File Copy of Draft Opinion in *Data Processing* (Jan. 10, 1970), *supra* note 230, at 6 ("Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a 'legal interest' which protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.").

<sup>232</sup> See WOD Desk Copy (Jan. 10, 1970), in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1474, folder labeled "No. 85 - Asso. of Data Processing v. Camp: Galley Proofs - Final Galley."

<sup>233</sup> *Id.* at 3 (Rider 3).

plaintiff was in the right ballpark. Thus, he added a second component to Justice Brennan’s proposed test: courts assessing a plaintiff’s “standing” to challenge agency action should ask not only “whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise,”<sup>234</sup> but also “whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>235</sup>

In a letter dated January 13, 1970, Justice Brennan told Justice Douglas that “our differences seem narrowed to this: I deal with whether there is evidence of a statutory concern for the interests of the plaintiff’s class as an aspect of reviewability . . . and you treat it as a second aspect of standing.”<sup>236</sup> Justice Brennan made a pitch for his classification, but he added:

Whatever label is placed on the inquiry into whether Congress intended the plaintiff’s interests to be protected by the statute, the inquiry must be made under both of our approaches. A plaintiff who gets into court by alleging injury in fact can be given short shrift for challenging an act that isn’t reviewable as to him, or, one step farther down the line, for failure to state a claim upon which relief can be granted.<sup>237</sup>

Justice Douglas did not recede from his proposed test for “standing,” so the two Justices brought their colleagues into the loop by circulating their respective opinions to the Conference (that is, all the Justices).<sup>238</sup> A week later, Justice Brennan sent the other Justices a long memo trying to win support for his framework.<sup>239</sup> The memo argued that Justice Brennan’s tripartite distinction between “standing,” “reviewability,” and “the merits” would promote analytical clarity without changing the substance of existing law. In Justice Brennan’s words, “No inquiry

<sup>234</sup> *Id.* at 2.

<sup>235</sup> *Id.* at 3 (Rider 3).

<sup>236</sup> Letter from Justice Brennan to Justice Douglas (Jan. 13, 1970), in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1475, folder labeled “No. 85 – Asso. of Data Processing v. Camp: Misc. Memos, Cert Memos, Vote of Ct.”

<sup>237</sup> *Id.*

<sup>238</sup> See *id.* (proposing this solution); see also Draft Opinion by Justice Douglas in *Data Processing* (circulated Jan. 13, 1970), in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 239, Folder 2744; Draft Opinion by Justice Brennan in *Barlow* (circulated Jan. 14, 1970), in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 238, Folder 2724.

<sup>239</sup> Memo from Justice Brennan to the Conference (Jan. 20, 1970), in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 239, Folder 2744.

previously made by courts has been eliminated, and no new inquiry added. The investigations have simply been separated from one another and organized so as to facilitate focused and error-free decisions.<sup>240</sup> To explain the need for separation, the memo noted that “[e]ach of the three inquiries—into injury in fact, reviewability at the plaintiff’s request, and existence of the specific legal interest which he claims—is governed by its own criteria.”<sup>241</sup> According to the memo, when courts lumped portions of these inquiries together, they risked “obscuring what actually is at issue in a given case”<sup>242</sup> and erroneously dismissing viable claims.<sup>243</sup>

Justice Douglas circulated a brief reply, denying “that the matter of standing can rest solely on the Article III inquiry” and asserting that “the courts must . . . look at the statute to see if the claimant is at least arguably within the zone of interests protected by the statute.”<sup>244</sup> Ultimately, the Conference preferred Justice Douglas’s approach to Justice Brennan’s. At Justice Brennan’s suggestion, the Chief Justice therefore asked Justice Douglas to prepare the Court’s opinion in *Barlow*.<sup>245</sup> Justice Douglas quickly circulated a proposed opinion that was based on Justice Brennan’s draft, but that made revisions to bring it into line with *Data Processing*.<sup>246</sup> Meanwhile, Justice Brennan worked up the statement of his own views that he published as a concurring opinion (joined by Justice White).

---

<sup>240</sup> Id. at 6.

<sup>241</sup> Id. at 3.

<sup>242</sup> Id.; see also id. (“The books are full of vague and ambiguous opinions which dismiss a plaintiff under the rubric of ‘standing’ when actually dismissal, if proper at all, rested either on the plaintiff’s failure to prove that the challenged action was reviewable at his request or on his failure to prove the existence of the specific legal interest which he claimed.”).

<sup>243</sup> See id. at 4 (referring to “[t]he serious risk of injustice inherent in merging the inquiry into standing with the in[qui]ries into reviewability and the merits”).

<sup>244</sup> Memo from Justice Douglas to the Conference (Jan. 21, 1970), at 1, in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 239, Folder 2744. Justice Douglas’s memo went on to say that “Justice Brennan’s test . . . seems to relegate the question of statutory protection of the claimant not to the merits, but to the question of reviewability.” Id. at 2. As I understand Justice Brennan’s approach, that criticism was inaccurate. See supra notes 217–218 and accompanying text (describing comments in Justice Brennan’s draft about “the merits”); see also supra text accompanying notes 200–206 (summarizing Justice Brennan’s published opinion).

<sup>245</sup> See Letter from Justice Brennan to Chief Justice Burger (Jan. 26, 1970), in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 238, Folder 2724; Letter from Chief Justice Burger to Justice Douglas (Feb. 4, 1970), in The Burger Court Opinion Writing Database, *Barlow*, [http://www.supremecourttopinions.wustl.edu/files/opinion\\_pdfs/1969/69-249.pdf](http://www.supremecourttopinions.wustl.edu/files/opinion_pdfs/1969/69-249.pdf) [<https://perma.cc/M25J-DY45>].

<sup>246</sup> Draft Opinion by Justice Douglas in *Barlow* (circulated Feb. 4, 1970), in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 239, Folder 2744.

This outcome must have been a bit frustrating for Justice Brennan, who was thinking about the topic more carefully and systematically than Justice Douglas. At least by the time they took their competing approaches to the Conference, though, the basic disagreement between Justice Douglas and Justice Brennan boiled down to whether the concept of “standing” should include a preliminary peek at the substance of the plaintiff’s claim—specifically, whether the plaintiff was at least “arguably” within the “zone of interests” protected by a relevant statute. Both Justices seemed to agree that any such peek would be preliminary; even if a plaintiff met the threshold requirement of “standing,” the court would later need to conduct a full analysis of “the merits,” and the court might ultimately conclude that the plaintiff lacked a legal interest of the sort that would entitle the plaintiff to relief from the harm that an agency’s unlawful behavior was causing.<sup>247</sup> In other words, both Justices thought that a plaintiff might have “standing” without having a full-fledged right of action (even if the agency really was behaving unlawfully and the plaintiff really was being harmed). Neither the Court’s published opinion in *Data Processing* nor the Justices’ internal correspondence asserted that the APA confers remedial rights on everyone who is even “arguably” within the zone of interests to be protected by a relevant statute and who suffers “injury in fact” because of an agency’s violation of that statute.

### B. Early Commentary on Data Processing

Early commentators understood that the Supreme Court’s opinion in *Data Processing* had done something novel. According to one student commentator, indeed, *Data Processing* “is the first case in the history of federal administrative law to clearly distinguish standing from the merits.”<sup>248</sup> But scholars expressed different views about the scope and effect of what the Court had said.

Within months of the Court’s decision, Kenneth Culp Davis published an article appearing to assume that *Data Processing* used the word “standing” in the same way as earlier cases.<sup>249</sup> Recall that before Congress

---

<sup>247</sup> See *supra* text accompanying note 163 (quoting Justice Douglas’s opinion in *Data Processing*); *supra* text accompanying notes 191–206 (quoting Justice Brennan’s concurring opinion in *Barlow*).

<sup>248</sup> Arthur Clifton Black, Comment, Standing for Review of Actions by Federal Administrative Agencies: A New Test, 23 U. Fla. L. Rev. 206, 209 (1970).

<sup>249</sup> See Kenneth Culp Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970).

enacted the APA, the Supreme Court had indicated that in the absence of special statutory review provisions, equity normally permitted a plaintiff to obtain relief against unlawful agency action only if the challenged action violated a “legal right” belonging to the plaintiff<sup>250</sup>—that is, only if the plaintiff was facing what the Court occasionally called “legal wrong” or “legal injury.”<sup>251</sup> Recall, too, that although this doctrine defined the elements of a claim for relief, courts spoke of it as a matter of “standing.”<sup>252</sup> Finally, recall that many courts had understood the APA to preserve this doctrine, and courts had continued to cast the doctrine as a limitation on “standing.”<sup>253</sup> Naturally, critics of the doctrine (including Professor Davis) had used the same vocabulary. In his 1955 article “Standing to Challenge Governmental Action,”<sup>254</sup> which became the chapter on “Standing” in the first edition of his treatise on administrative law,<sup>255</sup> Professor Davis had argued that as a general rule, “one who is in fact adversely affected should have standing to challenge the legality of administrative action.”<sup>256</sup> Like the decisions that he was criticizing, moreover, Professor Davis had associated “standing” with remedial rights. His basic point had been that instead of limiting relief to plaintiffs who were suffering “legal” injury, courts should allow anyone suffering injury “in fact” to challenge allegedly unauthorized administrative action and to win relief if the action was indeed unlawful.<sup>257</sup>

When the Supreme Court issued its opinions in *Data Processing and Barlow*, Professor Davis claimed partial victory. He celebrated the Court’s repudiation of the “doctrine . . . that something in the nature of a ‘legal right’ or ‘legal interest’ was necessary for standing,”<sup>258</sup> and he also

---

<sup>250</sup> See supra notes 54–58 and accompanying text.

<sup>251</sup> See, e.g., *Ala. Power Co. v. Ickes*, 302 U.S. 464, 478, 480 (1938); supra note 100.

<sup>252</sup> See supra notes 59–63 and accompanying text.

<sup>253</sup> See, e.g., *Duba v. Schuetzle*, 303 F.2d 570, 574 (8th Cir. 1962) (“It has . . . been judicially determined that the Administrative Procedure Act was not designed to and in fact has not changed the basic principle that one must have suffered a *legal wrong* in order to have standing to challenge programs administered by governmental agencies.”); *Kan. City Power & Light Co. v. McKay*, 225 F.2d 924, 932–33 (D.C. Cir. 1955) (reading the phrase “legal wrong” in § 10(a) of the APA to refer to the violation of “legal rights,” and concluding that “the review provisions of the Administrative Procedure Act do not provide the [plaintiffs] here with standing to sue”); see also supra notes 98, 114, and 128.

<sup>254</sup> Davis, supra note 102.

<sup>255</sup> 3 Kenneth Culp Davis, *Administrative Law Treatise* 208–94 (1958).

<sup>256</sup> Davis, supra note 102, at 365.

<sup>257</sup> See, e.g., *id.* at 355 (invoking “the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy”).

<sup>258</sup> Davis, supra note 249, at 457.

praised the “injury in fact” part of the Court’s new test.<sup>259</sup> To be sure, Professor Davis criticized the majority’s decision to make standing depend *not only* on whether the plaintiff was suffering “injury in fact” *but also* on whether the plaintiff’s interests were “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>260</sup> Still, Professor Davis asserted that the Court had “mov[ed] at least three-quarters of the distance from the pre-1968 law to the position that ‘injury in fact’ should be the sole test” for standing,<sup>261</sup> and “Justices Brennan and White have firmly reached that destination.”<sup>262</sup>

In recounting this shift, Professor Davis did not suggest that there had been any change in what the Court meant by “standing.” In particular, he did not mention the possibility that the Court was now treating “standing” as a more preliminary concept and that questions about the plaintiff’s “legal rights” had been relocated to “the merits.” Instead, Professor Davis continued to speak as if tests for “standing” identified plaintiffs who are entitled to relief from unlawful agency action.<sup>263</sup> He appeared to understand *Data Processing*’s test accordingly.

Louis Jaffe was more circumspect. He summarized *Data Processing*’s holding as follows: “[A] suit should not be dismissed on a motion directed against standing of the plaintiff if he can show injury in fact and ‘is arguably within the zone of interests to be protected.’”<sup>264</sup> In a footnote, though, Professor Jaffe observed that “[t]he sense of the holding is ambiguous because it is not clear what is to be considered on ‘the merits.’”<sup>265</sup> Would the court simply evaluate the lawfulness of the challenged agency action (so that any plaintiff who is suffering injury in fact and who is arguably within the relevant zone of interests would “automatically win” if the court agrees that the agency is violating the

---

<sup>259</sup> See *id.* at 472 (“The main test should be ‘injury in fact’ . . .”).

<sup>260</sup> *Data Processing*, 397 U.S. at 153; see Davis, *supra* note 249, at 457–68 (condemning the “zone of interests” test).

<sup>261</sup> Davis, *supra* note 249, at 471; see also *id.* at 450–56 (basing this conclusion not only on *Data Processing* and *Barlow*, but also on *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968), and *Flast v. Cohen*, 392 U.S. 83 (1968)).

<sup>262</sup> *Id.* at 451. Professor Davis was referring to Justice Brennan’s concurring opinion in *Barlow*, which Justice White had joined. See *id.* at 457.

<sup>263</sup> See, e.g., *id.* at 459 (“A major function of federal courts is to protect private parties from being ‘injured in fact’ by unlawful action of government officers, despite the failure of Congress to say directly or indirectly in the statute or in the legislative history that the interest asserted by the private party is ‘to be protected’ or ‘to be regulated.’”).

<sup>264</sup> Jaffe, *supra* note 30, at 634.

<sup>265</sup> *Id.* at 634 n.9.

law), or would “the merits” of the plaintiff’s case include “a further inquiry into whether the statute means to protect plaintiff?”<sup>266</sup>

Writing in the *Yale Law Journal* in 1974, Professor Albert took *Data Processing* to support the latter view. In his telling, *Data Processing* “has authorized a new preliminary proceeding in which a court surveys the relevant legal materials for a zone of interest before focusing upon the claims for relief.”<sup>267</sup> For purposes of this “threshold inquiry,”<sup>268</sup> the court did not have to decide whether the plaintiff had a legally protected interest; at the “standing” stage, *Data Processing* instead told courts to ask “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>269</sup> As Professor Albert understood *Data Processing*, though, “The protected legal interest standard was apparently left unmodified for application after the standing issue is decided.”<sup>270</sup> Thus, plaintiffs who were not *actually* within the relevant zone of interests could still lose, even if they showed that the defendant was behaving illegally and that they were suffering harm as a result.

Admittedly, Professor Albert agreed with Professor Jaffe that the zone-of-interests test had “created confusion over what is required for prevailing on the merits.”<sup>271</sup> On one view, once the court determined that a plaintiff had “standing” to challenge some administrative action, “the only issue on the merits” would be the legality of that action—so that if an agency was behaving unlawfully, anyone who was suffering real-world harm to interests that were even arguably within the protected zone would enjoy remedial rights against the responsible officials.<sup>272</sup> As Professor Albert observed, however, “[t]his . . . principle of liability for administrative agencies” would be “unique” in American law; the idea that remedial rights would hinge on “arguable” protection “does not have a counterpart in any area of private or public claims for relief.”<sup>273</sup> Professor Albert therefore resisted this reading of the Court’s cases. In his words, “Without a more explicit mandate for this result than the Court has

---

<sup>266</sup> *Id.*

<sup>267</sup> Albert, *supra* note 3, at 495.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 494 (quoting *Data Processing*, 397 U.S. at 153) (internal quotation marks omitted).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 496.

<sup>272</sup> See *id.*

<sup>273</sup> *Id.*

afforded, zone standing should not relieve a litigant from proving legal protection in addition to the arguable variety.”<sup>274</sup>

As late as the 1980s, several other leading commentators took it for granted that *Data Processing*’s zone-of-interests test was merely a preliminary look at an issue that the court would revisit more carefully on the merits. According to Professor (later Dean) John Garvey, “arguably having a protected interest is a very different thing from actually having one, so winning against a standing objection is no guarantee against losing on the merits.”<sup>275</sup> Professor (later Judge) William Fletcher read *Data Processing* the same way: as he understood the Court’s opinion, the consequence of holding that a plaintiff had “standing” was that “she can then try to show that she is actually protected and can therefore proceed to that part of the merits dealing with plaintiff’s right to enforce an asserted duty.”<sup>276</sup> Judge (later Justice) Stephen Breyer and Professor Richard Stewart agreed. Through the mid-1980s, their casebook on administrative law observed that *Data Processing* “encourages courts to grant standing liberally and to postpone the question whether plaintiff has a legal right to the relief sought.”<sup>277</sup>

### C. Why Bother?

On that view, of course, *Data Processing* was originally a less significant case than the modern conventional wisdom has made it. Suppose that a federal administrative agency took some final action that violated a statutory limitation on the agency’s powers and that was inflicting “injury in fact” on a would-be plaintiff. Under *Data Processing*, if the plaintiff was “arguably within the zone of interests” to be protected by the relevant statute, the plaintiff would have “standing” to get a lawsuit

---

<sup>274</sup> *Id.* at 496–97.

<sup>275</sup> Garvey, *supra* note 29, at 568.

<sup>276</sup> Fletcher, *supra* note 21, at 234.

<sup>277</sup> Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Texts, and Cases* 1094 (2d ed. 1985); see also *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983) (Breyer, J.) (“At the outset of the case, when standing questions are most often presented, [the plaintiff] may have to show only that he is ‘arguably’ within the zone of interests.”). The first edition of the casebook, published in 1979, suggests a similar view. See Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy* 935 (1979) (“Note Justice Douglas’ suggestion that the ‘arguably within the zone’ test enables the court to dispose of the threshold question of standing while postponing a ruling on the merits. But why shouldn’t the court, if it conveniently can, dispose at the outset of the question whether plaintiff’s interest is or is not protected by statute?”).

off the ground (unless Congress had affirmatively precluded judicial review of the particular action in question). But if the plaintiff did not actually have a legal interest at stake, the plaintiff would lose on “the merits,” even though the agency’s action really was unlawful and really was harming the plaintiff. For that reason, Professor Garvey observed that *Data Processing*’s zone-of-interests test “is rather pointless in the vast majority of cases.”<sup>278</sup> As Professor Garvey explained, “it merely postpones the more rigorous inquiry which must follow: whether the plaintiff actually has a cause of action against the defendant.”<sup>279</sup>

This analysis invites a natural question: What was *Data Processing* supposed to accomplish? Why would the Supreme Court have bothered to announce a new framework for “standing” if the old requirement of a legal interest would still operate on “the merits”?

### *1. Caution About Ruling on the Merits at the Outset of a Case*

At least for Justice Brennan, the answer appears to have been partly about analytical clarity and partly about procedural sequencing. Dismissals for want of “standing” normally occurred early in a case, and Justice Brennan may have thought that courts should be cautious about evaluating “the merits” at that stage. In his preferred system, plaintiffs would be able to establish standing simply by alleging that the agency action in question was causing them “injury in fact.”<sup>280</sup> Justice Brennan definitely did not think that plaintiffs should be required, at this stage, to “show[] . . . that the challenged governmental action invaded one of [their] legally protected interests.”<sup>281</sup> As both he and the majority noted, that issue was part of “the merits,” and Justice Brennan suggested that courts would not think about it carefully enough if they treated it as a threshold requirement for standing. For Justice Brennan, the lower courts’ opinions in *Barlow* illustrated this danger: “By confusing the merits with the plaintiffs’ standing to challenge the Secretary’s action, both the District Court and the Court of Appeals denied the farmers the focused and careful decision on the merits to which they are clearly entitled.”<sup>282</sup> But Justice Brennan feared that the majority’s more relaxed zone-of-

---

<sup>278</sup> Garvey, *supra* note 29, at 569; see also Albert, *supra* note 3, at 496 (“[Z]one of interest standing appears to serve no intelligible function.”).

<sup>279</sup> Garvey, *supra* note 29, at 569.

<sup>280</sup> *Barlow*, 397 U.S. at 170–73 (Brennan, J., concurring in the result and dissenting).

<sup>281</sup> *Id.* at 168.

<sup>282</sup> *Id.*

interests test would suffer from the same problem. In his words, “The Court’s approach does too little to guard against the possibility that judges will use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.”<sup>283</sup>

Justice Brennan did not insist that every plaintiff who alleged “injury in fact” caused by agency action should automatically be entitled to proceed all the way to trial. For one thing, the plaintiff might lose on grounds of “reviewability” (as opposed to “standing”); while Justice Brennan argued that a plaintiff “need not show the existence of a legally protected interest to establish *either* his standing *or* his right to review,”<sup>284</sup> Justice Brennan suggested that cases could fail on reviewability grounds where there were absolutely no indicia “that Congress intended the plaintiff’s class to be a beneficiary of the statute under which the plaintiff raises his claim.”<sup>285</sup> Even if a case cleared this hurdle, moreover, Justice Brennan acknowledged that courts could decide “the merits” of some cases without holding a trial. To win on the merits, the plaintiff needed to persuade the court that “the specific legal interest claimed by the plaintiff is protected by the statute” and had been invaded by the agency—and “[i]f the alleged legal interest is clearly frivolous, . . . the plaintiff can be hastened from court by summary judgment.”<sup>286</sup>

Justice Brennan elaborated on this point in the internal memo that he sent his colleagues. There, he assured the other Justices that “the approach to standing which I urge need not change the result in individual cases, nor the rapidity with which courts can decide them.”<sup>287</sup> He explained that under his approach, “some suits which were previously dismissed for lack of standing may still be dismissed on the ground that the agency’s action is nonreviewable as to the plaintiff, or, if reviewability poses no problem, because the plaintiff fails to state a specific legal interest which the challenged action has invaded.”<sup>288</sup> Again, moreover, Justice Brennan observed that “[i]f the specific statutory interest which the plaintiff claims is frivolous, summary judgment can be quickly granted the defendant.”<sup>289</sup>

---

<sup>283</sup> Id. at 178.

<sup>284</sup> Id. at 174 n.8 (emphasis added).

<sup>285</sup> See id. at 174–75.

<sup>286</sup> Id. at 175 & n.10.

<sup>287</sup> Memo from Justice Brennan to the Conference (Jan. 20, 1970), *supra* note 239, at 6.

<sup>288</sup> Id.

<sup>289</sup> Id. at 5–6.

At the time, however, summary judgment probably was harder to win than it now is. (The available empirical evidence “suggests that summary judgment started to assume a greater role in the 1970s.”<sup>290</sup> That shift was cemented by a trilogy of cases that the Supreme Court decided in 1986, from all of which Justice Brennan dissented.<sup>291</sup>) Then-existing doctrine also impeded motions to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief can be granted.<sup>292</sup> As a result, modern readers should not assume that Justice Brennan simply wanted to relabel the grounds on which complaints were dismissed. As compared to the days in which courts used the doctrine of “standing” to make early determinations of whether the plaintiff had a legally protected interest, Justice Brennan’s proposed framework might well have allowed more cases to proceed further in the litigation process. Thus, Justice Brennan may have been motivated by the idea that courts should hesitate to rule on “the merits” of a case when the case is just getting started.

---

<sup>290</sup> Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 620 (2004); see also Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. Empirical Legal Stud. 861, 904 (2007) (finding an “increased likelihood of summary judgment motions between 1975 and 1986 across diverse case types”).

<sup>291</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see also Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 Wash. & Lee L. Rev. 81, 143 (2006) (reporting that among federal courts and tribunals, *Anderson* is the most-cited opinion and *Celotex* is the second-most-cited opinion ever issued by the Supreme Court). Despite popular assumptions that the *Celotex* trilogy caused a boom in summary judgment, empirical studies indicate that any boom actually predated the trilogy. See sources cited *supra* note 290; see also Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, in *Empirical Studies of Judicial Systems 2008*, at 1, 33 (Kuo-Chang Huang ed., 2009) (“Subject to the limited years and districts studied, we find no evidence of a broad-based increase in summary judgment rates after the Supreme Court’s 1986 trilogy.”); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141, 163 (2000) (“The achievement of [the trilogy] . . . may have been less to change the law of summary judgment than to consolidate a movement already underway.”).

<sup>292</sup> Compare *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (invoking “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”), with *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–63 (2007) (rejecting a “literal reading” of this statement and concluding that “the minimum standard of adequate pleading” is higher than *Conley* might suggest).

In his internal memo, Justice Brennan himself suggested as much. Although he pitched his framework mostly as a way of promoting clear analysis, the advantage of clear analysis was that it “makes for . . . less error and thus for greater justice.”<sup>293</sup> In the context of motions to dismiss for lack of standing, moreover, the error that loomed largest for Justice Brennan probably was the risk that cases would be dismissed at the outset even though more careful analysis would have suggested that the plaintiffs had viable claims. In his words, the courts’ failure to keep “standing” separate from issues of “reviewability” and “the merits” had “created real risk of denials of justice.”<sup>294</sup>

The majority opinion in *Data Processing* did not go as far as Justice Brennan wanted in separating “standing” from “the merits.” Even under the majority opinion, though, a plaintiff’s “standing” to challenge agency action would no longer depend on whether the plaintiff actually possessed a legally protected interest; if the plaintiff had suffered injury in fact and was even “arguably” within a relevant “zone of interests,” then the plaintiff would survive a motion to dismiss for lack of standing. The point of this relaxed test may well have been to continue screening out cases in which the plaintiffs *obviously* had no claim, but to afford more process to plaintiffs who might or might not have a claim. As a student commentator observed in the early 1970s, “it would appear that the Court was concerned that dismissals for lack of standing were being granted too summarily,” and the Court wanted to identify a broad category of plaintiffs who should “receive consideration beyond a mere motion to dismiss.”<sup>295</sup>

## 2. Jurisdictional Issues

A second possible explanation of *Data Processing*’s test for “standing” relates to limitations on the federal district courts’ subject-matter jurisdiction. Ultimately, I doubt that this second explanation captures what most of the Justices were thinking, but it fits the facts well enough to be worth mentioning.

*Data Processing* reached the Supreme Court in jurisdictional garb. In the opinion below, the Eighth Circuit described the case’s procedural

---

<sup>293</sup> Memo from Justice Brennan to the Conference (Jan. 20, 1970), *supra* note 239, at 6.

<sup>294</sup> *Id.* at 2.

<sup>295</sup> Project, *The New Law of Threshold Standing: The Effect of Sierra Club on Jus Tertii and on Government Contracts*, 1973 *Duke L.J.* 218, 224 n.46.

posture as follows: “The trial court dismissed plaintiffs’ complaint for lack of jurisdictional standing. We affirm.”<sup>296</sup> At the start of its analysis, moreover, the Eighth Circuit observed that “[t]he question of standing serves as a test of federal jurisdiction.”<sup>297</sup>

To explain this statement, the Eighth Circuit asserted that “[s]tanding is the constitutional prerequisite related to whether a justiciable ‘case or controversy’ exists”—a question that the Eighth Circuit associated with “whether the legal relationships of parties are such that they are aligned with adverse legal interests.”<sup>298</sup> The Supreme Court disagreed with the implication that standing doctrine is based *entirely* on the Constitution, and the Supreme Court also disagreed that the constitutional part of the analysis entails any inquiry into “legal interests”; the Court held that when a plaintiff is challenging agency action that benefits the plaintiff’s competitors, the plaintiff can satisfy “the ‘case’ or ‘controversy’ test” simply by “alleg[ing] that the challenged action has caused him injury in fact.”<sup>299</sup> But the Supreme Court agreed with the Eighth Circuit that this constitutional part of the test for standing is “jurisdictional.”<sup>300</sup>

It is at least conceivable that the Supreme Court was still thinking in jurisdictional terms when the Court articulated the second part of its test for standing to challenge agency action—the requirement that the plaintiff be at least “arguably” within a relevant “zone of interests.”<sup>301</sup> Of course, the Court made clear that this second part of the test is not of constitutional dimension; if Congress so desired, Congress could authorize the federal courts to entertain challenges to the legality of agency action at the behest of any and all plaintiffs who are suffering “injury in fact” because of that action.<sup>302</sup> But while the zone-of-interests test is not baked into Article III, it could conceivably reflect an interpretation of the jurisdiction that Congress has given the federal courts by statute.

The plaintiffs’ complaint in *Data Processing* invoked federal jurisdiction under 28 U.S.C. § 1331, which covers civil actions “aris[ing] under” federal law.<sup>303</sup> In *Bell v. Hood*, the Supreme Court had indicated

---

<sup>296</sup> Ass’n of Data Processing Serv. Orgs. v. Camp, 406 F.2d 837, 838 (8th Cir. 1969).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Data Processing*, 397 U.S. at 151–53.

<sup>300</sup> See *id.* at 154 (referring to “Article III jurisdictional questions”).

<sup>301</sup> *Id.* at 153.

<sup>302</sup> See *id.* at 154.

<sup>303</sup> See 28 U.S.C. § 1331(a) (1964); Complaint, *supra* note 135, ¶ 6, *in* Appendix at 5. The relevant sentence of the complaint also invoked 28 U.S.C. § 1391 and 12 U.S.C. § 94, but

that this statutory grant of jurisdiction normally is triggered whenever a complaint asserts a right of action allegedly supplied by federal law, even if the judge ultimately decides “on the merits” that federal law does not really confer such a right of action.<sup>304</sup> In deference to precedent, however, the Court had articulated a “possible exception[.]” where the alleged federal claim “is wholly insubstantial and frivolous.”<sup>305</sup> Applying these ideas in the context of administrative law, one might think that when a plaintiff is being harmed by agency action that allegedly violates a statutory or constitutional limitation on the agency’s authority, and when the plaintiff is at least “arguably” within the “zone of interests” to be protected by that limitation, the plaintiff’s request for relief under federal law is substantial enough to trigger federal jurisdiction even if the court later concludes that the plaintiff does not really qualify for a remedy. By contrast, if the plaintiff is not even in the ballpark of having a protected interest, one might say that the plaintiff’s claim is “wholly insubstantial and frivolous” in a jurisdictional sense, so that any further inquiry into the merits would be unwarranted.

In the late 1970s and early 1980s, two federal circuit courts explicitly linked *Data Processing*’s zone-of-interests test to *Bell v. Hood*.<sup>306</sup> A few years later, so did then-Professor Fletcher (albeit as part of an argument that the zone-of-interests test is “unnecessary” because the doctrine of *Bell v. Hood* already performed the same function).<sup>307</sup>

If one were trying to rationalize *Data Processing*’s focus on whether plaintiffs are “arguably” within some relevant “zone of interests,” one

those are venue provisions rather than jurisdictional grants. See, e.g., *S. Elec. Steel Co. v. First Nat’l Bank of Birmingham*, 515 F.2d 1216, 1217 (5th Cir. 1975); *Kirk v. Kirk*, 295 F. Supp. 1001, 1003 (D. Or. 1968).

<sup>304</sup> 327 U.S. 678, 682 (1946). Technically, *Bell* involved the statutory predecessor of 28 U.S.C. § 1331.

<sup>305</sup> *Bell*, 327 U.S. at 681–83; see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (noting that under *Bell v. Hood*, “the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction,” but indicating that jurisdiction *would* be implicated if the plaintiff lacked even an “arguable” cause of action).

<sup>306</sup> See *Rogers v. Brockett*, 588 F.2d 1057, 1062 n.9 (5th Cir. 1979) (emphasizing the word “arguably” in *Data Processing*’s version of the zone-of-interests test, and observing that “[t]his test seems to align the inquiry into standing with the test for federal question jurisdiction” under *Bell v. Hood*); *Mallick v. Int’l Bhd. of Elec. Workers*, 749 F.2d 771, 773 n.1 (D.C. Cir. 1984) (citing *Data Processing* as having “distinguish[ed] lack of standing, which occurs when a plaintiff is entirely outside the ‘zone,’ from failure to state a claim, which is a decision on the merits made after the court has assumed jurisdiction,” and citing *Bell v. Hood* as a related case).

<sup>307</sup> Fletcher, *supra* note 21, at 234–35.

could portray this test as an application of *Bell v. Hood* in the specific context of suits challenging agency action. Indeed, there is evidence that at least Justice Douglas's law clerk, if not Justice Douglas himself, was thinking about subject-matter jurisdiction around the time that Justice Douglas came up with the "zone of interests" language.<sup>308</sup> Ultimately, though, I am not sure that Justice Douglas's position reflected *Bell v. Hood*, and I doubt that his colleagues were thinking along those lines. The Court's opinion in *Data Processing* did not cite *Bell v. Hood* and did not indicate that the non-constitutional part of the new test for standing should be considered jurisdictional.<sup>309</sup> Nor did the opinion say that judges should

---

<sup>308</sup> Recall that on January 8, 1970, Justice Douglas suggested that Justice Brennan insert the following sentence into the preliminary draft of *Barlow*: "This test [for standing] is satisfied when the plaintiff alleges that the challenged action either touches a zone to which the law has already applied sanctions or causes harm . . . within the purview of the federal statute whose application is in question." See *supra* note 227 and accompanying text. Given the thrust of the rest of the draft, this was a strange suggestion, and Justice Brennan declined to go along. See *supra* note 228 and accompanying text. In a memo apparently prepared the next day, Justice Douglas's clerk reported:

I had a long talk with Justice Brennan's law clerks about Justice Brennan's opinion in *Barlow v. Collins*. . . . [T]hey conceded, as they had to, that the [suit] had to allege facts that would bring it within the purview of a federal statute. . . . The requirement that there be either an alleged violation of the Constitution or a federal statute is a prerequisite to federal subject matter jurisdiction.

Memo from TCA to Justice Douglas (undated), at 1, in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1475, folder labeled "No. 85 – Asso. of Data Processing v. Camp: Law Clerk." The clerk drafted a letter that Justice Douglas could send Justice Brennan and that explained Justice Douglas's earlier suggestion in these terms. See *id.* at 3. Specifically, the proposed letter said:

My reference to the necessity of a plaintiff alleging that the challenged action falls within the purview of a federal statute related to the limitations on subject matter jurisdiction in the federal courts. I would suggest that you mention in your opinion that in addition to alleging an injury in fact, a plaintiff must satisfy the requirements of federal subject matter jurisdiction, for example, by alleging the violation of a federal statute or the Constitution.

Draft Letter from Justice Douglas to Justice Brennan (Jan. 9, 1970), in Papers of William O. Douglas, Library of Congress Manuscript Division, MSS 18853, Box 1475, folder labeled "No. 85 – Asso. of Data Processing v. Camp: Law Clerk"; cf. Memo from TCA to Justice Douglas, *supra*, at 1 ("It would seem best to keep the requirement of subject matter jurisdiction separate from the requirement of standing. I would think the proper way for Justice Brennan to handle the matter would be to add something in his opinion . . . which would state that in addition to the requirement of standing, a party must satisfy the requirements of subject matter jurisdiction (*e.g.*, 'federal-question' jurisdiction, admiralty jurisdiction, diversity jurisdiction, etc.) . . .").

<sup>309</sup> Until recently, however, there was a circuit split on this question. See Micah J. Revell, Comment, Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction, 63 *Emory L.J.* 221, 224 & n.16 (2013); cf. *Pit River Tribe v. BLM*, 793 F.3d

apply the non-constitutional part of the test only when jurisdiction depends on 28 U.S.C. § 1331 (or other statutes that make jurisdiction hinge on the nature of the plaintiff’s claims) and not in cases where jurisdiction can be based on the parties’ citizenship. Soon after *Data Processing*, moreover, a different majority opinion referred to “the view that an insubstantial federal question does not confer jurisdiction” as “a maxim more ancient than analytically sound.”<sup>310</sup>

Still, even if *Bell v. Hood* does not explain *Data Processing*, the fact that some judges and commentators drew an analogy between the two cases shows how those people understood *Data Processing*. The analogy rests on the following premise: just as the conclusion that a suit “aris[es] under” federal law for purposes of triggering jurisdiction under *Bell v. Hood* did not establish that the plaintiff definitely had a right of action, neither did the conclusion that the plaintiff has “standing” under *Data Processing*. In then-Professor Fletcher’s words, “[b]oth the standing issue [as described in *Data Processing*] and the federal question jurisdiction issue [as described in *Bell v. Hood*] are preliminary looks at the merits” of whether the plaintiff has a right of action, and district courts were expected to revisit that issue (and to consider it more thoroughly) in cases that survived these screens.<sup>311</sup>

#### *D. Summary*

Contrary to the conventional modern wisdom, *Data Processing* did not hold that when an agency behaves illegally, the APA confers remedial rights upon everyone who meets *Data Processing*’s test for “standing.” Instead, *Data Processing*’s test for “standing” was meant to be a loose preliminary screen.

*Data Processing* contrasted a plaintiff’s “standing” to get a lawsuit off the ground with “the merits” of the plaintiff’s claim for relief. As described in *Data Processing*, moreover, “the merits” included not only whether the challenged agency action was illegal, but also whether the particular plaintiff who was challenging it was entitled to a remedy. The Supreme Court explicitly contemplated that on remand, even if the district court agreed that the defendants were behaving unlawfully, the plaintiffs

---

1147, 1156 (9th Cir. 2015) (reading *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), to make clear that the zone-of-interests test is not jurisdictional).

<sup>310</sup> *Rosado v. Wyman*, 397 U.S. 397, 404 (1970). *Rosado* was argued on the same day as *Barlow* and involved some of the same lawyers. See *infra* note 425.

<sup>311</sup> See Fletcher, *supra* note 21, at 234.

would lose unless “[some]thing in the Bank Service Corporation Act or the National Bank Act gives [them] a ‘legal interest’ that protects them against violations of those Acts.”<sup>312</sup> Far from either abandoning the legal-interest requirement or concluding that it had been satisfied, the Court simply held that it “goes to the merits” rather than to the preliminary question of “standing.”<sup>313</sup>

To be sure, the content of *Data Processing*'s test for “standing” did have some relationship to the then-existing version of the legal-interest requirement. Recall that by the 1960s, when a federal administrative agency allegedly was violating a statutory or constitutional limitation on its power, members of “the class which [the limitation] is designed to protect” were often thought to have the type of interest that would support a right of action in equity.<sup>314</sup> This aspect of then-existing doctrine informed *Data Processing*'s test for “standing,” which asked “whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>315</sup> Still, *Data Processing*'s test for “standing” was designed to be looser than then-existing doctrine about rights of action for the intended beneficiaries of statutory or constitutional protections. Instead of focusing crisply on each interest that a statute or constitutional provision was designed to protect, *Data Processing* referred to a fuzzier “zone.” In addition, *Data Processing* simply asked whether the plaintiff's asserted interest was “arguably” within the relevant zone.

Both these features of *Data Processing*'s test for “standing” are easy to understand if the test was supposed to be a preliminary screen for access to the courts. Under then-existing doctrine, plaintiffs who failed *Data Processing*'s test for “standing” were not even in the ballpark of having a claim for relief (in the absence of a special statutory right of action). In *Data Processing*, a majority of the Justices might well have thought that courts could summarily dismiss suits brought by such

---

<sup>312</sup> *Data Processing*, 397 U.S. at 158.

<sup>313</sup> *Id.* at 153.

<sup>314</sup> *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 7 (1968); see also Jaffe, *supra* note 50, at 266 (“Although the question whether the statutory or constitutional provision violated was directed to the protection of the plaintiff's interest is not always an easy question to answer, it is nevertheless the relevant one.”); cf. *supra* notes 125–131 and accompanying text (discussing different ways of relating *Hardin* to the APA).

<sup>315</sup> *Data Processing*, 397 U.S. at 153.

plaintiffs, but that courts needed to take a closer look at suits brought by plaintiffs whose interests were at least arguably in a relevant zone.

By contrast, these features of *Data Processing*'s test for “standing” are much more puzzling if one accepts the modern reading of *Data Processing*—that is, if the majority opinion was trying to identify plaintiffs whom the APA definitely entitles to remedies for unlawful agency action. In the words of Justice Breyer’s casebook, “Suppose that a particular plaintiff is ‘arguably’ within the ‘zone of interests’ the [relevant] statute protects, but, after closer analysis, it is clear that he really is *not* within that ‘zone of interest.’”<sup>316</sup> Why would the APA nonetheless give him remedial rights?<sup>317</sup>

The solution to this puzzle is that *Data Processing*'s test for “standing” was not meant to be the last word about which plaintiffs are entitled to relief for unlawful agency action. As the word “arguably” suggests, the test was simply meant to be a preliminary screen.

### III. WHEN AND WHY DID *DATA PROCESSING*'S TEST FOR “STANDING” BECOME A DEFINITIVE TEST FOR REMEDIAL RIGHTS UNDER THE APA?

Part II developed the central thesis of this Article: modern doctrine about remedial rights under the APA is based on a misreading of *Data Processing*. For the sake of completeness, though, this Part discusses when and why that misreading arose. Section III.A traces the transformation of *Data Processing*'s concept of “standing” from a preliminary screen into a definitive test for remedial rights. Section III.B speculates about some of the factors that may have contributed to this transformation. Section III.C notes an ironic consequence of the modern reading.

---

<sup>316</sup> Breyer et al., *supra* note 17, at 828.

<sup>317</sup> One possible answer, suggested by Kenneth Culp Davis’s work, is that Congress wanted to enlist private plaintiffs to help enforce limitations on agencies’ powers, and Congress was more concerned about those plaintiffs’ *practical* interests than their *legal* interests. See Davis, *supra* note 102, at 354–56, 364–69. On that account, though, the content of *Data Processing*'s test would be puzzling for a different reason. If Congress was simply trying to empower private attorneys general, why limit remedial rights to plaintiffs whose interests are “arguably” (though not actually) within the zone that the applicable limitation on agency power was designed to protect? Why not confer a right of action upon everyone suffering “injury in fact” (as Professor Davis himself advocated, see *supra* text accompanying notes 102–108)?

*A. The Transformation of Data Processing**1. The Initial Distinction Between "Standing" and Remedial Rights*

Soon after *Data Processing* and *Barlow v. Collins*, some lower courts read the Supreme Court's opinions as I do. Writing early in 1971, for instance, federal district judge Constance Baker Motley expressed sympathy with what she perceived as the Court's project. "[F]or years," she asserted, "the failure to view issues of standing as separable from the existence of legally cognizable interests has . . . occasioned much confusion in legal opinions."<sup>318</sup> In her telling, the Supreme Court's recent decisions had sought "to clarify the content of each concept" without discarding either.<sup>319</sup> Judge Motley elaborated upon the new regime as follows:

Standing relates only to the issue of the appropriateness of conferring the power to sue upon a person in the interest of preserving adverseness in the judicial process and in insuring a general logical nexus between the type of claim asserted and the party raising it. . . . Once it is determined that those goals have been respected, the court goes on to examine whether the particular plaintiff has a specific legal right, an interest more closely related to the Act or action being challenged which he or she reasonably should be permitted to vindicate.<sup>320</sup>

Consistent with the Supreme Court's then-existing approach to implied rights of action, Judge Motley saw the latter inquiry as flexible: to decide whether the plaintiff has a cognizable claim for relief, "the court considers the implications of allowing suits of the type raised, the amenability of such claims to judicial disposition, and, most importantly, what rights Congress determined to vest in the party suing."<sup>321</sup> But a plaintiff could fail this test despite meeting *Data Processing*'s test for "standing." Indeed, that is how Judge Motley cast her conclusion in the case at hand: "[W]hile plaintiff has standing to sue, she has not demonstrated a legal interest which is protected against violations of the sort alleged here," and so she "has failed to state a claim upon which relief may be granted."<sup>322</sup>

---

<sup>318</sup> Talbot v. Romney, 334 F. Supp. 1074, 1078 (S.D.N.Y. 1971).

<sup>319</sup> Id. (citing Flast v. Cohen, 392 U.S. 83 (1968), as well as *Data Processing and Barlow*).

<sup>320</sup> Id. at 1079.

<sup>321</sup> Id.

<sup>322</sup> Id. at 1079–80.

In the early 1970s, several other lower courts agreed that *Data Processing* had not eliminated the legal-interest requirement, but simply had moved it from “standing” to the merits. As federal district judge John H. Wood put it in dismissing a suit for injunctive relief brought by a company that was trying to win a government contract, “[*Data Processing*] makes it plain that for plaintiff to obtain the relief here sought, [plaintiff] must show that it has the requisite legal interest.”<sup>323</sup> The Third Circuit similarly recognized the preliminary nature of *Data Processing*’s “arguably within the zone of interests” test. In the words of Judge Arlin Adams, this test “demands a more limited version of the type of inquiry utilized to determine whether a party has a cause of action” under a statute that does not explicitly create one.<sup>324</sup> As a result, “It is technically possible for a litigant to meet [the arguably-within-the-zone-of-interests test], yet have no cause of action.”<sup>325</sup>

One year after *Data Processing*, the brief that the Solicitor General’s office submitted to the Supreme Court in *Investment Co. Institute v. Camp*<sup>326</sup> took a similar position. As in *Data Processing* itself, the plaintiffs in that case were challenging a ruling by the Comptroller of the Currency that exposed them to competition by national banks. Specifically, one of the Comptroller’s regulations purported to let national banks offer investment vehicles that resembled mutual funds,<sup>327</sup> and plaintiffs from the mutual-fund industry were seeking injunctive and

---

<sup>323</sup> Gary Aircraft Corp. v. United States, 342 F. Supp. 473, 477 (W.D. Tex. 1972). But see *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 861–73 (D.C. Cir. 1970) (liberalizing doctrines about judicial review of government-contracting decisions even before *Data Processing*, and relying heavily on Professor Davis’s views); see also *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204, 1207 (D.C. Cir. 1970) (treating *Scanwell* and *Data Processing* as consistent); *Lombard Corp. v. Resor*, 321 F. Supp. 687, 692 (D.D.C. 1970) (concluding that disappointed bidders “have a litigable interest in attempting to protect the public interest in the integrity of the competitive bidding process”).

<sup>324</sup> *Schiaffo v. Helstoski*, 492 F.2d 413, 425 (3d Cir. 1974).

<sup>325</sup> *Id.* Admittedly, *Schiaffo* did not directly involve the scope of any right of action created by the Administrative Procedure Act; *Schiaffo* was not an APA suit, and Judge Adams ultimately inferred a right of action under a different statute. See *id.* at 425–27. Still, Judge Adams explicitly held that “*Schiaffo*’s standing to bring this suit must be measured against the same criteria that are set forth in *Data Processing*.” *Id.* at 422. What is more, when Judge Adams noted that a plaintiff could meet *Data Processing*’s test for “standing” without having a “cause of action,” the sole authority that he cited was *Data Processing* itself. *Id.* at 425 & n.56. Thus, Judge Adams presumably would have drawn the same distinction in suits brought under the APA.

<sup>326</sup> 401 U.S. 617 (1971).

<sup>327</sup> See 28 Fed. Reg. 3309, 3311–13 (1963) (codified at 12 C.F.R. § 9.18 (1966)).

declaratory relief on the ground that the regulation conflicted with the Glass-Steagall Act (which amended the National Bank Act's provision about the powers of national banks so as to prevent national banks from underwriting any issue of securities or buying stock in any corporation for their own accounts).<sup>328</sup>

The district court held that the plaintiffs were entitled to relief. Because the district court decided the case in 1967 (well before *Data Processing*), the district court addressed the plaintiffs' legal "interest" as part of its analysis of "standing." Still, the court held that "[t]he plaintiffs were the recipients by implication of Congressional protection" and hence did have the requisite interest.<sup>329</sup> The court explained that the Glass-Steagall Act had been designed "to separate national commercial banking from the securities business" and "to allow separate entities to engage in these business areas"—and the court thought that "[t]his strong general policy against the invasion of either field of endeavor by either entity is sufficient to postulate an interest upon which standing to challenge the regulation may be premised."<sup>330</sup> On the substance of that challenge, moreover, the district court agreed with the plaintiffs that the relevant portions of the regulation were "illegal" and should be set aside.<sup>331</sup>

The government appealed. A panel of the D.C. Circuit could not come to a firm conclusion about whether the plaintiffs had standing.<sup>332</sup> But all three members of the panel thought that the regulation was consistent with the Glass-Steagall Act, so the panel reversed the district court's judgment on that basis.<sup>333</sup>

---

<sup>328</sup> See Banking Act of 1933, ch. 89, § 16, 48 Stat. 162, 184–85 (codified as amended at 12 U.S.C. § 24 (2012)); see also *id.* § 21, 48 Stat. at 189 (codified as amended at 12 U.S.C. § 378 (2012)) (prohibiting commercial banks more generally from "engag[ing] in the business of issuing, underwriting, selling, or distributing . . . securities"); Act of Aug. 23, 1935, ch. 614, § 303, 49 Stat. 684, 707 (amending § 21 so as not to limit the powers of national banks more than § 16 already did).

<sup>329</sup> *Inv. Co. Inst. v. Camp*, 274 F. Supp. 624, 636 (D.D.C. 1967).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 648.

<sup>332</sup> Compare *Nat'l Ass'n of Sec. Dealers v. SEC*, 420 F.2d 83, 95–100 (D.C. Cir. 1969) (Bazelon, C.J., concurring) (making various arguments in support of standing, but emphasizing that competitors were "the only parties likely to challenge the authorization of prohibited bank activity"—so holding that they lacked standing would effectively "immunize rulings of the Comptroller from judicial review"), with *id.* at 107–08 (Burger, J., concurring) (stating that "[m]y position . . . is one of reservation amounting to virtual disbelief in any standing in Appellees," but reaching the merits anyway).

<sup>333</sup> See *id.* at 84 (per curiam).

By the time the Supreme Court granted the plaintiffs’ petition for certiorari, the Court had decided *Data Processing*. In briefing the case for the Court, the Solicitor General reformulated the government’s position accordingly. The opening part of the government’s brief argued both that the plaintiffs lacked “standing” in *Data Processing*’s sense (because “the interest [they] assert is not even ‘arguably within the zone of interest to be protected or regulated’ by the Glass-Steagall Act or any other relevant statute”) and that “[i]n any event . . . [they] have no ‘legal interest’ which protects them from the statutory violations which they allege.”<sup>334</sup> To explain the relevance of the “legal interest” inquiry, the brief summarized *Data Processing* as follows:

[W]hile rejecting “legal interest” as a test of *standing*, the Court ruled that, in order to *obtain relief* on the basis of an alleged violation of a statute, the plaintiff must establish that it has a “legal interest” which merits protection from such a violation . . . . In short, far from rendering irrelevant the issue of the plaintiff’s legal interest in the enforcement of the statute involved, the Court simply determined that legal interest is an inquiry addressed “to the merits” rather than to standing.<sup>335</sup>

Still, other parts of the brief argued that there had been no statutory violation anyway. According to the government, the D.C. Circuit had been correct to find no conflict between the regulation and the Glass-Steagall Act.<sup>336</sup>

In an opinion by Justice Potter Stewart, the Supreme Court emphatically rejected the latter argument. According to Justice Stewart, “The literal terms of [the Glass-Steagall Act] clearly prevent what the Comptroller has sought to authorize here.”<sup>337</sup> Justice Stewart spent much less time on the government’s threshold arguments. In a brief paragraph, however, he asserted that *Data Processing* “foreclosed” the government’s contention that the plaintiffs lacked “standing.”<sup>338</sup> He did not separately address the government’s argument that the plaintiffs lacked a “legal interest” that entitled them to relief. That omission played a role in

---

<sup>334</sup> Brief for the Comptroller of the Currency at 23–24, *Inv. Co. Inst.*, 401 U.S. 617 (No. 70-61) (quoting *Data Processing*, 397 U.S. at 153).

<sup>335</sup> *Id.* at 21 (citations omitted).

<sup>336</sup> See *id.* at 32–47.

<sup>337</sup> *Inv. Co. Inst.*, 401 U.S. at 639.

<sup>338</sup> *Id.* at 620.

subsequent interpretations of *Data Processing*, so it is worth considering Justice Stewart's position in more detail.

## 2. Justice Stewart's Opinion in *Investment Co. Institute v. Camp*

In his discussion of "standing," Justice Stewart noted that the plaintiffs in *Investment Co. Institute* were challenging exactly the same sort of administrative ruling as the plaintiffs in *Data Processing*—a determination by the Comptroller of the Currency about "the legitimate scope of activities available to national banks under [the National Bank Act]."<sup>339</sup> *Data Processing* had already held that Congress had not precluded judicial review of such rulings. Likewise, the plaintiffs in *Investment Co. Institute* were complaining about exactly the same sort of injury as the plaintiffs in *Data Processing*—the competition from national banks to which the Comptroller's ruling exposed them. Again, *Data Processing* had already held that this injury was sufficient "to create a case or controversy" between the plaintiffs and the Comptroller.<sup>340</sup>

As for the other part of *Data Processing*'s test for "standing," Justice Stewart conspicuously failed to recite the "zone of interests" language. Instead, he described that aspect of the majority opinion in *Data Processing* as follows: "[W]e concluded that Congress had arguably legislated against the competition that the [data-processing companies] sought to challenge," and "[w]e noted that whether Congress had indeed prohibited such competition was a question for the merits."<sup>341</sup> Applying this formulation to the plaintiffs in *Investment Co. Institute*, Justice Stewart observed that the rest of his opinion "deal[s] with the merits of the petitioners' contentions and conclude[s] that Congress did legislate against the competition that the petitioners challenge."<sup>342</sup> Given that Congress had *actually* "legislated against the competition" to which the plaintiffs were being subjected, Congress surely had *arguably* legislated against that competition. In Justice Stewart's words, "There can be no real question, therefore, of the petitioners' standing in the light of the *Data Processing* case."<sup>343</sup>

---

<sup>339</sup> *Id.* (alteration in original) (quoting *Data Processing*, 397 U.S. at 157) (internal quotation marks omitted).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 621.

<sup>343</sup> *Id.*

Having upheld the plaintiffs’ “standing,” moreover, Justice Stewart spent the rest of his opinion discussing whether the agency’s regulation conflicted with the Glass-Steagall Act. This structure might suggest that as a general rule, Justice Stewart saw no need for plaintiffs to have a “legal interest” in suits challenging agency action; perhaps he thought that if a plaintiff met the test for “standing,” the only question on the merits would be whether the agency was indeed behaving unlawfully. If so, though, Justice Stewart’s views had changed dramatically in a short time; the previous year, when the Justices held their initial conference after oral argument in *Data Processing*, he had been the one Justice who voted to affirm the judgment below (dismissing the plaintiffs’ suit at the very outset because the plaintiffs lacked a legal interest).<sup>344</sup> In light of internal correspondence between Justice Stewart and Justice Harlan, my guess is that Justice Stewart believed that the plaintiffs in *Investment Co. Institute* had the requisite legal interest to obtain relief, not that they did not need any such interest.

Justice Stewart’s files show that some weeks after he sent his colleagues a draft of his opinion in *Investment Co. Institute*, Justice Harlan responded that “I am having difficulty with the discussion of standing in your proposed opinion for the Court.”<sup>345</sup> Even if the Glass-Steagall Act prohibited commercial banks from entering the mutual-fund industry, Justice Harlan did not think that Congress had enacted this prohibition for the purpose of “protect[ing] any class to which the plaintiffs . . . belong”; the text and legislative history of the Act suggested that the prohibition was meant to safeguard the stability of commercial banks, not to protect the “monopolistic interests” of incumbent investment companies.<sup>346</sup> As a

---

<sup>344</sup> See Justice Douglas’s Conference Notes (Nov. 24, 1969), *supra* note 211 (listing Justice Stewart as the only vote to affirm); cf. Letter from Justice Stewart to Justice Douglas (Feb. 9, 1970), in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 239, Folder 2744 (“I have decided to acquiesce in your opinion, unless somebody else writes in dissent.”).

<sup>345</sup> Memo from Justice Harlan to Justice Stewart (Mar. 10, 1971), at 1, in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 68, Folder 597. In keeping with the normal custom, Justice Harlan sent copies of this memo to the other Justices. See *id.* at 4. By this point, however, most of them had already joined Justice Stewart’s opinion. See Letter from Justice Douglas to Justice Stewart (Feb. 16, 1971), Letter from Justice Black to Justice Stewart (Feb. 17, 1971), Letter from Justice Brennan to Justice Stewart (Feb. 19, 1971), and Letter from Justice White to Justice Stewart (Mar. 4, 1971), in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 68, Folder 597.

<sup>346</sup> Memo from Justice Harlan to Justice Stewart (Mar. 10, 1971), *supra* note 345, at 1, 3; see also *id.* at 1 (“It appears reasonably plain that the Act was adopted despite its anticompetitive effects, not because of them.”). But see Jonathan R. Macey, Special Interest

result, the plaintiffs failed the test for standing suggested by *Hardin v. Kentucky Utilities Co.*<sup>347</sup> To be sure, the Court's subsequent opinion in *Data Processing* indicated that for purposes of "standing," the key question was simply whether the plaintiffs' interests were "arguably" within the zone to be protected by the Glass-Steagall Act. But in Justice Harlan's view, this test still focused on whether the plaintiffs were among the intended beneficiaries of the Act, and Justice Harlan doubted that the plaintiffs' interests were even "arguably protected" in this sense.<sup>348</sup> In any event, even if the plaintiffs met the test for "standing," Justice Harlan took *Data Processing* to indicate that they still needed to demonstrate a "legal interest" on the merits—and the mere fact that the Comptroller's regulation was unlawful did not automatically mean that it invaded any legal interest belonging to these particular plaintiffs.<sup>349</sup>

Justice Stewart began his response as follows: "I agree that the conclusion that a competitor has standing does not necessarily mean that he is entitled to relief after showing that agency action is ultra vires or otherwise invalid."<sup>350</sup> Tellingly, then, Justice Stewart did not see *Data Processing*'s test for "standing" as identifying plaintiffs who definitely have remedial rights against unlawful agency action. Still, when a company sought relief against agency action that subjected the company to competition, Justice Stewart thought that the company had both "standing and entitlement to relief" if "Congress intended to prohibit the competition of which the plaintiff complains."<sup>351</sup> In Justice Stewart's view, the *motivation* behind "a Congressional prohibition on competition"—for instance, whether Congress had enacted the prohibition "for the purpose of protecting competitors" or for the benefit

---

Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall, 33 Emory L.J. 1, 2, 15–21 (1984) (arguing that despite the public-policy rhetoric in its text and legislative history, the Glass-Steagall Act was indeed "special interest group legislation," enacted at the behest of investment bankers "to prohibit commercial banks from competing with [them]").

<sup>347</sup> 390 U.S. 1, 5–6 (1968); Memo from Justice Harlan to Justice Stewart (Mar. 10, 1971), supra note 345, at 1–2.

<sup>348</sup> Memo from Justice Harlan to Justice Stewart (Mar. 10, 1971), supra note 345, at 2–3.

<sup>349</sup> See id. at 3 (observing that the second-to-last paragraph of the majority opinion in *Data Processing* "seems to indicate that the existence *vel non* of a 'legal interest' is distinct from the issues of standing and reviewability on the one hand and from the legality of the administrative conduct on the other," and concluding that "[t]he only relevant issue which appears to satisfy these conditions is whether the plaintiff's interest is 'actually' as well as 'arguably' within the zone of interests intended to be protected").

<sup>350</sup> Memo from Justice Stewart to Justice Harlan (Mar. 11, 1971), at 1, in Potter Stewart Papers, Yale University Library Manuscripts and Archives, MS 1367, Box 68, Folder 598.

<sup>351</sup> Id.

of the public more generally—did not affect that conclusion; whatever the reasons behind Congress’s decision to prohibit competition, the direct beneficiaries of that prohibition were entitled to relief against agency action that disregarded their protection.<sup>352</sup> That point can readily be cast in terms of the legal interests that a statutory prohibition on competition should be presumed to create. Like the district court, Justice Stewart may have thought that when the Glass-Steagall Act forbade investment companies and national banks to enter each other’s fields, the Act was giving each group legal protection against competition by the other, and members of each group were entitled to relief against agency action that purported to let members of the other group invade their turf.

### 3. Open Questions in the 1970s

Justice Stewart’s opinion in *Investment Co. Institute* left many open questions. For instance, although Justice Stewart had upheld both the plaintiffs’ standing and their entitlement to relief on the ground that Congress had “legislated against the competition” in question,<sup>353</sup> his opinion did not define that phrase. Could every limitation on the powers of national banks be described as a prohibition on competition, because all such limitations affect how national banks can interact with other market participants? Or should courts say that Congress had “legislated against . . . competition” only when Congress had acted with the intention of preventing competition between national banks and companies in other fields?<sup>354</sup> Although the tone set by the Supreme Court was obviously good for companies that wanted to challenge the Comptroller’s aggressive positions about the powers of national banks, it was not clear exactly how far lower courts should take either “standing” or remedial rights in this area.<sup>355</sup>

---

<sup>352</sup> See *id.*

<sup>353</sup> *Inv. Co. Inst.*, 401 U.S. at 620–21.

<sup>354</sup> Cf. *id.* at 639–40 (Harlan, J., dissenting) (“I understand the Court to mean by ‘legislated against the competition’ not only that Congress prohibited banks from entering this field of endeavor, but that it did so in part for reasons stemming from the fact of the resulting competition.”); *id.* at 640 (citing passages in the majority opinion about the purposes behind the Glass-Steagall Act and Congress’s concern that commercial banks would behave imprudently if they were trying to compete for investment business).

<sup>355</sup> The relevant Supreme Court precedents included not only *Data Processing* and *Investment Co. Institute* but also *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (*per curiam*). In 1963, the Comptroller announced that as part of their incidental powers, national banks could “provide travel services for their customers and receive compensation therefor,” and

could also "advertise, develop, and extend such travel services for the purpose of attracting customers to the bank." Comptroller's Manual for National Banks ¶ 7475 (1963) (codified at 12 C.F.R. § 7.7475 (1972)), as quoted in *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 429 (1st Cir. 1972). Travel agencies subsequently filed a suit for declaratory and injunctive relief against both the Comptroller and the South Shore National Bank, which had started offering travel services in the area that the plaintiffs served. The complaint asserted that the National Bank Act did not really allow national banks "to engage in the travel agency business" and that the Comptroller's ruling therefore "subjected the plaintiffs to unlawful competition." *Arnold Tours, Inc. v. Camp*, 286 F. Supp. 770, 771 (D. Mass. 1968) (quoting complaint).

In 1968, the district court held that "plaintiffs lack standing to maintain this action." *Id.* at 773. On appeal, the First Circuit considered the case in tandem with one presenting the issue that the Supreme Court would later decide in *Data Processing*—whether data-processing companies had standing to challenge the Comptroller's ruling that national banks could offer data-processing services. Based on legislative history indicating that Congress had enacted § 4 of the Bank Service Corporation Act partly to protect data-processing companies against competition, the First Circuit held that the data-processing companies did have standing to bring their suit, but the First Circuit affirmed the dismissal of the travel agencies' suit. *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147, 1149–53 (1st Cir. 1969).

While the travel agencies' petition for certiorari was pending, the Supreme Court issued its opinions in *Data Processing* and *Barlow*, so the Supreme Court vacated the First Circuit's judgment and remanded for further consideration in light of the new decisions. *Arnold Tours, Inc. v. Camp*, 397 U.S. 315 (1970) (mem.). On remand, however, the First Circuit again affirmed the dismissal of the travel agencies' suit for want of "standing." *Arnold Tours, Inc. v. Camp*, 428 F.2d 359, 361 (1st Cir. 1970). According to the First Circuit, the Supreme Court's decision in *Data Processing* was based on evidence that "Congress . . . had protection of data processing competitors specifically in mind" when Congress enacted § 4 of the Bank Service Corporation Act. *Id.* By contrast, the plaintiffs in *Arnold Tours* "have produced no scintilla of evidence tending to show that Congress was specifically concerned with the competitive interests of travel agencies," nor "enough evidence of concern for general business competitors to create a 'zone' within which they are arguably included." *Id.*

The travel agencies again sought certiorari, and the Supreme Court summarily reversed. In a short per curiam opinion prepared by Justice Douglas, the Court offered the following correction of the First Circuit's views:

In *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors alone from competition. Moreover, we noted a growing trend "toward enlargement of the class of people who may protest administrative action." We held that § 4 [of the Bank Service Corporation Act] "arguably brings a competitor within the zone of interests protected by it." Nothing in the opinion limited § 4 to protecting only competitors in the data-processing field.

*Arnold Tours*, 400 U.S. at 46 (footnote and citations omitted). Having thus indicated that the travel agencies met *Data Processing*'s test for "standing," the Supreme Court remanded the case for further proceedings. *Id.* at 47.

On remand, the district court concluded that national banks did not have statutory authority to operate travel departments. Without any further inquiry into the travel agencies' remedial rights, the court entered judgment declaring that "the Comptroller's regulation . . . is invalid" and ordering the South Shore National Bank to "divest itself of its Travel Department within six months." *Arnold Tours, Inc. v. Camp*, 338 F. Supp. 721, 724–25 (D. Mass. 1972). On appeal, the bank argued that the plaintiffs were not entitled to relief on the merits unless they had a "legal interest"; as the bank understood *Data Processing*, "th[e] legal interest test is a

With respect to “standing” in particular, *Investment Co. Institute* also raised broader questions about the status of the “zone of interests” test: Why had Justice Stewart avoided that phrase, and should lower courts continue to ask whether would-be plaintiffs were “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee” that the plaintiffs accused an agency of violating?<sup>356</sup> Writing in 1977, Professor Davis asserted that the zone-of-interests test “has become extinct,” because the Supreme Court “has not mentioned that test in its latest eighteen majority opinions about standing.”<sup>357</sup> That claim was exaggerated; after *Investment Co. Institute*, the Court went back to using the zone-of-interests formulation when describing the requirements for “standing.”<sup>358</sup> Still, the Court did not flesh out the meaning of that formulation. In Professor Jonathan Siegel’s words, the Supreme Court “provid[ed] . . . little guidance regarding the zone of interests test for nearly two decades following its creation,” and lower courts were “uncertain” about exactly what the test required.<sup>359</sup>

Importantly, the Supreme Court also sent uncertain signals about the relationship between “standing” and remedial rights. A year after *Investment Co. Institute*, Justice Stewart’s majority opinion in *Sierra Club v. Morton* held that the Sierra Club lacked “standing” to challenge certain actions by the United States Forest Service because the Sierra Club had not adequately alleged that those actions would harm the Sierra Club or

---

requirement in addition to standing which must be met before plaintiffs may prevail in this action.” *Arnold Tours*, 472 F.2d at 437 (summarizing the bank’s argument). But the First Circuit affirmed the district court’s judgment. In the First Circuit’s words, “The subsequent decision of the Supreme Court in *Investment Co. Institute v. Camp* indicates to us that the sole question for the merits is whether Congress has permitted the travel agency business as presented here.” *Id.* at 437–38 (citation omitted).

With respect to the Comptroller, that conclusion may have been a correct application of *Investment Co. Institute* (though that depends on whether the National Bank Act or the Bank Service Corporation Act “legislated against . . . competition” between national banks and other businesses in the same sense that the Glass-Steagall Act “legislated against . . . competition” between national banks and investment companies, see *Inv. Co. Inst.*, 401 U.S. at 620). Still, the idea that the plaintiffs enjoyed remedial rights against the South Shore National Bank went well beyond anything that the Supreme Court had said. Where did the plaintiffs get their right of action against the bank?

<sup>356</sup> See *Data Processing*, 397 U.S. at 153; cf. *Cotovsky-Kaplan Physical Therapy Assocs. Ltd. v. United States*, 507 F.2d 1363, 1365 & n.7 (7th Cir. 1975) (noting doubts about the status of the zone-of-interests test after *Investment Co. Institute*).

<sup>357</sup> Kenneth Culp Davis, *Standing*, 1976, 72 Nw. U. L. Rev. 69, 81 (1977).

<sup>358</sup> See Siegel, *supra* note 146, at 323 & n.48 (citing cases).

<sup>359</sup> *Id.* at 321–24.

its members.<sup>360</sup> In a footnote, however, Justice Stewart indicated that if a plaintiff satisfies the test for “standing,” the plaintiff “may assert the interests of the general public in support of his claims for equitable relief.”<sup>361</sup> A cross-reference to the portion of the opinion discussing *FCC v. Sanders Bros. Radio Station* and statutes that enabled aggrieved parties to act as “private attorney[s] general” suggests that Justice Stewart may have regarded the APA as such a statute.<sup>362</sup> If so, the footnote can be read to imply that once a plaintiff establishes “standing,” the only question on the merits is whether the agency action is unlawful. As contemporaneous commentators observed, however, that is not the *only* possible interpretation of the footnote<sup>363</sup>—and this interpretation would be in tension with the position that Justice Stewart himself took at the time of *Investment Co. Institute*.<sup>364</sup>

A few years after *Sierra Club*, moreover, a footnote in Justice Brennan’s majority opinion in *Davis v. Passman*<sup>365</sup> continued to draw a distinction between “standing” and rights of action. Again, Justice Brennan portrayed “standing” as a preliminary question about “whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction.”<sup>366</sup> In Justice Brennan’s telling, whether a plaintiff met the requirements for “standing” was distinct from whether the applicable law gave the plaintiff a “cause of action,” which in turn was distinct from “the question of what relief, if any, a litigant may be entitled to receive.”<sup>367</sup> Although *Davis* was not an APA case, it shows the need for

---

<sup>360</sup> 405 U.S. 727, 731–41 (1972).

<sup>361</sup> *Id.* at 740 n.15.

<sup>362</sup> See *id.* (“See n. 12 and accompanying text, *supra*.”); *id.* at 737–38 & n.12 (discussing the “private attorney general” theory); cf. *supra* note 108 and accompanying text (discussing Professor Davis’s effort to portray § 10(a) of the APA as having generalized the special statutory review provision at issue in *Sanders Bros.*).

<sup>363</sup> See Project, *supra* note 295, at 227–34 (discussing various possible interpretations); see also *id.* at 228 (“Possibly *Data Processing*’s implication that a legal interest must be shown on the merits is still the law.”).

<sup>364</sup> See *supra* note 350 and accompanying text.

<sup>365</sup> 442 U.S. 228 (1979).

<sup>366</sup> *Id.* at 239–40 n.18.

<sup>367</sup> *Id.* at 239 & n.18. As this trichotomy suggests, Justice Brennan did not equate *either* “standing” or “causes of action” with remedial rights. As I understand his locution, he would have said that a plaintiff had a “cause of action” if the plaintiff was among the class of litigants who met the substantive requirements for seeking judicial relief, even if the plaintiff failed to satisfy additional requirements imposed by the law of remedies. See *id.* at 240 n.18 (“A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for

caution in interpreting statements from the 1970s about a plaintiff's "standing": to say that a plaintiff had "standing" was not necessarily to say anything about the plaintiff's remedial rights.

#### 4. Data Processing as a Test for Remedial Rights

At least where *Data Processing* was concerned, though, many lower courts did not exercise such caution. In suits challenging agency action as unlawful, courts knew that they were supposed to start by applying *Data Processing*'s test for "standing." Aside from the "injury in fact" requirement, that test required plaintiffs to assert an "interest" of some sort, and courts were supposed to ask whether that interest was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>368</sup> But this requirement was understood to be lenient.<sup>369</sup> When the analysis moved on to "the merits," moreover, many judges paid no further attention to the plaintiff's asserted interest. Instead, they simply asked whether the agency was behaving unlawfully.<sup>370</sup> Under this approach, *Data Processing*'s test for "standing" effectively became a test for remedial rights: any plaintiff who was suffering "injury in fact" because of agency action and whose interests were at least "arguably" within the relevant "zone" could get a court to set the agency action aside if the court agreed that the action was unauthorized.

Courts that took this approach did not necessarily cast it in terms of "rights of action." As Judge Leonard Garth of the Third Circuit observed in 1980, "Where a party seeks to challenge the legality of the acts of a federal administrative agency, the 'cause of action' element is more commonly referred to as a right to seek judicial review of the agency

---

example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the 'preconditions' for such equitable remedies." (citing *Trainor v. Hernandez*, 431 U.S. 434, 440–43 (1977)); see also *Trainor*, 431 U.S. at 442 (referring to irreparable injury as a "precondition for equitable relief").

<sup>368</sup> *Data Processing*, 397 U.S. at 153.

<sup>369</sup> Cf. Robert Allen Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 *Vand. L. Rev.* 479, 486 (1972) (observing, early on, that "there appears to have been no reported case in which a court finding injury in fact has not also found that the plaintiff's claim was arguably within the zone of interests to be protected or regulated").

<sup>370</sup> See, e.g., *Pesikoff v. Sec'y of Labor*, 501 F.2d 757 (D.C. Cir. 1974); *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974); *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689 (E.D. Va.), rev'd on other grounds, 489 F.2d 492 (4th Cir. 1973), vacated, 420 U.S. 136 (1975).

action.”<sup>371</sup> But to the extent that the APA’s provisions about judicial review were understood to let certain plaintiffs initiate suits against agency officials (or the United States itself<sup>372</sup>), and to give those plaintiffs remedial rights if the defendants were indeed behaving unlawfully, the APA’s provisions about judicial review could be described as creating a right of action.<sup>373</sup> By the early 1980s, some lower courts explicitly portrayed *Data Processing* as having interpreted the APA to confer this right of action upon everyone who meets *Data Processing*’s test for “standing.” In the words of Judge Frank Johnson of the Eleventh Circuit,

---

<sup>371</sup> *Soc’y Hill Civic Ass’n v. Harris*, 632 F.2d 1045, 1055 (3d Cir. 1980).

<sup>372</sup> Before 1976, there was a circuit split about whether the APA implicitly waived the federal government’s sovereign immunity, or whether plaintiffs normally could proceed only against individual officials. See Kathryn E. Kovacs, *Scalia’s Bargain*, 77 *Ohio St. L.J.* 1155, 1162–63 (2016) (citing cases). In 1976, Congress amended 5 U.S.C. § 702 to include the following explicit waiver of sovereign immunity:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721, 2721; see also Kovacs, *supra*, at 1168 (noting that Antonin Scalia, then the head of the Office of Legal Counsel, played a “key” role in the passage of this amendment).

<sup>373</sup> See, e.g., *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (“The APA confers a general cause of action upon persons ‘adversely affected or aggrieved by agency action within the meaning of a relevant statute,’ 5 U.S.C. § 702 . . . .”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317–18 (1979) (appearing to read the APA as creating a cause of action). For an early statement along these lines, see Robert L. Bergstrom, *Suing the Appropriate Parties in Litigation Against Federal Defendants*, 6 *Clearinghouse Rev.* 734, 736 (1973) (“It is clear the APA creates a right of action against federal agencies and officials.”); see also, e.g., John M. Rogers, *A Way Out of the Social Security Jurisdiction Tangle*, 21 *Ariz. L. Rev.* 689, 689–90 n.2 (1979) (“In addition to specific statutes providing for judicial review of particular kinds of agency action, the APA generally provides for a cause of action in the nature of judicial review to persons ‘suffering legal wrong’ . . . because of ‘final agency action for which there is no other adequate remedy in a court.’” (quoting 5 U.S.C. §§ 702, 704 (1976))); Paul Wartelle & Jeffrey Hadley Loudon, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy*, 9 *Hastings Const. L.Q.* 487, 503 n.112 (1982) (“The APA, 5 U.S.C. § 702 (1976), is a general remedial statute that functions very much like [42 U.S.C.] § 1983. It does not itself provide jurisdiction for statutory claims against federal agencies; instead, it provides the cause of action upon which jurisdiction under 28 U.S.C. § 1331 (1976) may be based.”).

“The *Data Processing* Court . . . found that Congress . . . intended to provide a right of action under the APA to all those who assert an interest that is arguably within the ‘zone of interests’ of a relevant statute.”<sup>374</sup>

The lower-court judges who interpreted *Data Processing* this way included one Antonin Scalia, a former law professor who recently had been appointed to the D.C. Circuit. From the 1950s on, Kenneth Culp Davis had been urging courts to read Section 10(a) of the APA (later 5 U.S.C. § 702) as a general version of the special statutory review provision that Congress had included in the Communications Act and that the Supreme Court had interpreted in *Sanders Bros.*<sup>375</sup> Then-Judge Scalia assumed that *Data Processing* had done so,<sup>376</sup> with one additional limitation: to enjoy remedial rights under the APA (as allegedly interpreted in *Data Processing*), plaintiffs not only needed to be suffering injury in fact because of unlawful agency behavior but also needed to be at least “arguably” within the zone of interests to be protected or regulated by the statute or constitutional provision that the agency was violating.<sup>377</sup> As Judge Scalia understood *Data Processing*, the zone-of-interests test “is meant to determine whether Congress intended the plaintiff to serve as a ‘private attorney general’”—someone with authority to bring suit over (and to obtain relief for) unlawful conduct by the executive branch.<sup>378</sup> Judge Scalia did not think that the Supreme Court *should* have interpreted the APA to confer such broad remedial rights.<sup>379</sup> But he saw

---

<sup>374</sup> R.T. Vanderbilt Co. v. Occupational Safety & Health Review Comm’n, 708 F.2d 570, 576 (11th Cir. 1983); see also, e.g., James v. Home Constr. Co. of Mobile, 689 F.2d 1357, 1358 n.1 (11th Cir. 1982) (“The ‘zone of interest’ test is used to determine what parties are ‘adversely affected or aggrieved’ and thus entitled to a right of action under the APA.” (quoting 5 U.S.C. § 702)); *Soc’y Hill Civic Ass’n*, 632 F.2d at 1054–55 (appearing to assume that in the absence of other statutory limitations, the APA “broadly conferred” a right to obtain relief against unlawful agency action upon everyone who “demonstrate[s] an ‘injury in fact’ to an interest ‘arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question’” (quoting *Data Processing*, 397 U.S. at 152–53)).

<sup>375</sup> See *supra* text accompanying notes 71–76 (discussing *Sanders Bros.*) and notes 102–108 (discussing Professor Davis’s views).

<sup>376</sup> See *Air N.Z. Ltd. v. Civil Aeronautics Bd.*, 726 F.2d 832, 836 n.3 (D.C. Cir. 1984) (Scalia, J.).

<sup>377</sup> See *Cnty. Nutrition Inst. v. Block*, 698 F.2d 1239, 1256 (D.C. Cir. 1983) (Scalia, J., concurring in part and dissenting in part) (discussing this requirement), *rev’d*, 467 U.S. 340 (1984).

<sup>378</sup> *Id.*

<sup>379</sup> See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881, 887–90 (1983) (decrying *Data Processing*’s alleged interpretation of the APA for having “transmogrified” the statute, contrary to both the “evident

*Data Processing* as a decision “of enormous consequence.”<sup>380</sup> In his words, “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.”<sup>381</sup>

A few years later, the Supreme Court itself embraced this understanding of *Data Processing* in a pair of opinions written by Justice Byron White. The first was *Japan Whaling Ass’n v. American Cetacean Society*,<sup>382</sup> which the Court decided in 1986. Under federal law, if the Secretary of Commerce certified that the nationals of any particular foreign country were “conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling,” that country would lose at least half its allocation in fisheries controlled by the United States (and might also face other sanctions).<sup>383</sup> In the early 1980s, the United States considered invoking this provision against Japan, but the Secretary ultimately decided not to issue the certification.<sup>384</sup> Asserting that the Secretary was violating his legal obligations, various wildlife-conservation groups brought suit in federal district court, seeking a writ of mandamus and other relief against the Secretary. The district court ordered the Secretary to issue the certification, and the circuit court affirmed.<sup>385</sup> When the case reached the Supreme Court, the government’s main argument was that the relevant federal statutes did not give the Secretary the duty that the lower courts had found. But the government also suggested that in any event, the Secretary did not owe any duty to the plaintiffs in particular, so the plaintiffs lacked a right of action for mandamus.<sup>386</sup>

---

meaning” of the text and what Judge Scalia then saw as “authoritative portions of the legislative history”).

<sup>380</sup> *Id.* at 887.

<sup>381</sup> *Id.* at 889.

<sup>382</sup> 478 U.S. 221, 231 n.4 (1986).

<sup>383</sup> See 16 U.S.C. § 1821(e)(2) (1982).

<sup>384</sup> See *Japan Whaling Ass’n*, 478 U.S. at 227–28.

<sup>385</sup> See *Am. Cetacean Soc’y v. Baldrige*, 604 F. Supp. 1398 (D.D.C.), *aff’d*, 768 F.2d 426 (D.C. Cir. 1985).

<sup>386</sup> See Brief for the Federal Petitioners at 46–47, *Japan Whaling Ass’n*, 478 U.S. 221 (Nos. 85-954 & 85-955) (arguing that “even if the Secretary did have a nondiscretionary duty to certify Japan, mandamus would be inappropriate in this case,” partly because “it is highly doubtful that the [relevant statutes] create any ‘duty owed to’ respondents” (quoting 28 U.S.C. § 1361)); Reply Brief for the Federal Petitioners at 17 n.20, *Japan Whaling Ass’n*, 478 U.S. 221 (Nos. 85-954 & 85-955) (casting this point in terms of whether the plaintiffs had a “cause of action” for mandamus).

Justice White’s majority opinion agreed with the government’s main argument and reversed the lower courts on that basis. In a footnote, though, Justice White rejected the government’s other argument.<sup>387</sup> As Justice White explained, the conservation groups were suing “to ‘compel agency action unlawfully withheld,’ or alternatively, to ‘hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”<sup>388</sup> According to Justice White:

The “right of action” in such cases is expressly created by the Administrative Procedure Act (APA), which states that “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review” at the behest of “[a] person . . . adversely affected or aggrieved by agency action.”<sup>389</sup>

Justice White thought it “clear” that the plaintiffs’ claim satisfied each of these requirements: (1) the Secretary’s decision qualified as “final agency action,” (2) there did not appear to be any other adequate remedy in a court, and (3) “it appears that [the conservation groups] are sufficiently ‘aggrieved’ by the agency’s action” to qualify as proper plaintiffs.<sup>390</sup> To explain the third point, Justice White simply observed that the conservation groups met *Data Processing*’s test for standing: “[T]hey undoubtedly have alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected by continued whale harvesting, and this type of injury is within the ‘zone of interests’ protected by the [relevant statutes].”<sup>391</sup> On this basis, Justice White concluded that the plaintiffs were “entitled to pursue their claims under the right of action created by the APA” (and would have been entitled to appropriate relief if they had been correct that the Secretary was acting unlawfully).<sup>392</sup>

The following year, Justice White’s majority opinion in *Clarke v. Securities Industry Ass’n*<sup>393</sup> included a more elaborate statement of the same idea. As in *Data Processing*, the plaintiffs in *Clarke* were trying to challenge decisions by the Comptroller of the Currency that exposed the

---

<sup>387</sup> *Japan Whaling Ass’n*, 478 U.S. at 230 n.4.

<sup>388</sup> *Id.* at 231 n.4 (citation omitted) (quoting 5 U.S.C. § 706(1), (2)(A)).

<sup>389</sup> *Id.* (alterations in original) (citation omitted) (quoting 5 U.S.C. §§ 702, 704).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> 479 U.S. 388 (1987).

plaintiffs to competition from national banks. Justice White therefore began his opinion by summarizing *Data Processing*, but he gave it a particular spin: while acknowledging that the Court had “described [the question] as one of standing,”<sup>394</sup> he strongly suggested that *Data Processing* was really about the scope of the right of action created by 5 U.S.C. § 702. In his words, “The matter was basically one of interpreting congressional intent.”<sup>395</sup> The lower court in *Data Processing* “had interpreted § 702 as requiring either the showing of a ‘legal interest,’ as that term had been narrowly construed in our earlier cases, or . . . an explicit provision in the relevant statute permitting suit by any party ‘adversely affected or aggrieved.’”<sup>396</sup> The Supreme Court had been “unwilling to take so narrow a view of the APA’s “generous review provisions.””<sup>397</sup> Still, the Court “thought . . . that Congress, in enacting § 702, had not intended to allow suit by every person suffering injury in fact.”<sup>398</sup> As Justice White told the story, “[w]hat was needed was a gloss on the meaning of § 702”—which the Court’s opinion in *Data Processing* “supplied . . . by adding to the requirement that the complainant be ‘adversely affected or aggrieved,’ *i.e.*, injured in fact, the additional requirement that ‘the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.””<sup>399</sup>

Justice White went on to observe that the Court had not recognized such broad rights of action elsewhere in federal law: “The principal cases in which the ‘zone of interest’ test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of § 702.”<sup>400</sup> To demonstrate “[t]he difference made by the APA,” he contrasted *Data Processing* and its progeny with “cases in which a private right of action under a statute is asserted in conditions that make the APA inapplicable.”<sup>401</sup> Specifically, he pointed to *Cort v. Ash*,<sup>402</sup>

---

<sup>394</sup> *Id.* at 394.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* (citation omitted).

<sup>397</sup> *Id.* at 395 (quoting *Data Processing*, 397 U.S. at 156, in turn quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 395–96 (alteration in original) (first quoting 5 U.S.C. § 702; then quoting *Data Processing*, 397 U.S. at 153).

<sup>400</sup> *Id.* at 400 n.16.

<sup>401</sup> *Id.*

<sup>402</sup> 422 U.S. 66 (1975).

where the plaintiffs had been harmed by an alleged violation of a federal statute but the Supreme Court had refused to infer a right of action. “Clearly,” Justice White observed, “the Court was requiring more from the would-be plaintiffs in *Cort* than a showing that their interests were arguably within the zone protected or regulated by [the relevant statute].”<sup>403</sup> The point of this comparison was that *Data Processing*’s relatively loose test for “standing” should not automatically be extended beyond the APA. But the *premise* of the comparison was that *Data Processing* (like *Cort*) was about rights of action.

As noted above, this premise fits uneasily with the content of *Data Processing*’s test for “standing,” which is easier to understand as a loose preliminary screen than as defining a claim for relief. After all, if one were trying to decide whether a plaintiff *actually* has remedial rights, one probably would not simply ask whether the plaintiff’s interests are “arguably” within a relevant zone. In the early 1990s, the Rehnquist Court sometimes responded to this problem by dropping the word “arguably” from the zone-of-interests test.<sup>404</sup> A few years later, though, the Court went back to including and even emphasizing the word, at least in APA cases.<sup>405</sup> The Court has offered only half-hearted rationalizations for this aspect of current doctrine,<sup>406</sup> but the oddity of the word “arguably” has not caused the Court to re-examine its interpretation of *Data Processing*.

---

<sup>403</sup> *Clarke*, 479 U.S. at 401 n.16.

<sup>404</sup> See *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523–30 (1991) (asserting that “[t]o establish standing to sue under the APA,” the plaintiffs “must show that they are within the zone of interests sought to be protected” by the statutes at issue, and concluding that the plaintiffs failed this test); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990) (“[W]e have said that to be ‘adversely affected or aggrieved . . . within the meaning’ of a statute [for purposes of 5 U.S.C. § 702], the plaintiff must establish that the injury he complains of (*his* grievement, or the adverse effect *upon him*) falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.”); see also *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305 (O’Connor, Circuit Justice 1993) (again omitting the word “arguably” and concluding that “the respondents are outside the zone of interests IRCA seeks to protect”); Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court’s “Hypothetical” Barriers*, 68 N.D. L. Rev. 1, 50 (1992) (“The recent linguistic change is significant: by removing ‘arguable,’ the zone test merges with the private right of action cases.”).

<sup>405</sup> See, e.g., *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998); *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Dir., Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995).

<sup>406</sup> See, e.g., *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (“[W]e have always conspicuously included the word ‘arguably’ in the test to indicate that the benefit of any doubt goes to the plaintiff.”); see also *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (“That lenient approach is

*B. Some Factors that Contributed to the Transformation of Data Processing*

If current doctrine does indeed rest on a misreading of *Data Processing*, it is natural to wonder why courts embraced that misreading. After acknowledging the influence of Kenneth Culp Davis and the changing politics of judicial review, this Section lays some of the blame on confusion generated by the imprecision of the word “standing.”

*1. The Influence of Kenneth Culp Davis*

Individual scholars occasionally affect judicial doctrine, and Professor Davis was at least partly responsible for the transformation of *Data Processing*. Although Professor Davis’s scholarship has been criticized for trying to promote his agenda,<sup>407</sup> there is no denying its influence.<sup>408</sup> Almost as soon as the Supreme Court issued its opinion in *Data Processing*, Professor Davis portrayed the case as being about remedial rights and as moving in the direction of the position that he had advocated since the 1950s. Both in his law-review articles and in his widely used treatise, Professor Davis helped spread the notion that under *Data Processing*, everyone who met Justice Douglas’s test for “standing” was entitled to relief against unlawful agency action (unless Congress had specifically foreclosed judicial review).<sup>409</sup>

---

an appropriate means of preserving the flexibility of the APA’s omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review.”)

<sup>407</sup> See, e.g., William H. Allen, Book Review, 80 Colum. L. Rev. 1149, 1153 (1980) (“Professor Davis . . . is a professed law reformer. . . . Sometimes, as an advocate, he uses his authorities as a practitioner is accustomed to use them rather than as the naïve among us think that scholars always use them. . . . So it is wise to approach him carefully and critically.”); cf. Thomas W. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1062 (1997) (observing that Davis’s book *Discretionary Justice* (1969) “reads like a stump speech delivered at a campus rally”).

<sup>408</sup> See Ronald M. Levin, The Administrative Law Legacy of Kenneth Culp Davis, 42 San Diego L. Rev. 315, 317–18 (2005) (noting that the Supreme Court often cited Davis’s work, and adding that “his influence has been even more pronounced” in the lower courts); *id.* at 338–41 (highlighting Professor Davis’s influence on “the law of standing—i.e., the principles that determine which persons are entitled to go to court to challenge a given administrative action”).

<sup>409</sup> See *supra* notes 249–263 and accompanying text (discussing the article that Professor Davis published soon after *Data Processing*); see also 4 Kenneth Culp Davis, Administrative Law Treatise 218 (2d ed. 1983) (taking *Data Processing* to support Professor Davis’s interpretation of the APA, except insofar as *Data Processing* also articulated the zone-of-interests test); cf. *id.* at 212 (continuing to advocate the principle that “[o]ne who is adversely

## 2. *Changing Perceptions of Administrative Agencies*

Changing perceptions of administrative agencies also made people more receptive to this notion (and may have contributed to Professor Davis’s views as well). In the late 1930s, many conservatives wanted to broaden judicial review of agency action, but many liberals did not; supporters of the New Deal had faith in agencies and did not want courts to get in the way.<sup>410</sup> A version of this divide persisted for years, albeit in diluted form.<sup>411</sup> In the 1960s, though, “a different paradigm of the administrative state” emerged.<sup>412</sup> In Professor Thomas Merrill’s words, even people who had begun their careers as “committed New Dealers” became concerned about “bureaucrac[y]” and the risk that agencies might “become ‘captured’ by the business organizations that they are charged with regulating.”<sup>413</sup> Judicial review of agency action therefore came to seem more attractive to liberals.<sup>414</sup>

A student note published in 1969 both reflected this transition and highlighted its relevance to the doctrine of standing. “Until recently,” the note observed, standing doctrine (and particularly the “legal interest” requirement) had “served in large part to insulate the New Deal administrative machinery from judicial review.”<sup>415</sup> But “[t]oday, . . . even many ‘New Deal liberals’ do not view the growing power of the bureaucratic establishment with perfect equanimity.”<sup>416</sup>

Justice Douglas was an extreme example. When he was appointed to the Supreme Court in 1939 (fresh off a stint as chairman of the Securities and Exchange Commission), he arrived “with the faith of a New Dealer and a respect and enthusiasm for the institution of the administrative

---

affected in fact by governmental action has standing to challenge its legality,” because “[e]lementary justice requires that one who is hurt by illegal action should have a remedy” (emphasis omitted)).

<sup>410</sup> See, e.g., Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 *Mich. L. Rev.* 399, 413–29 (2007); Shepherd, *supra* note 89, at 1644.

<sup>411</sup> See Merrill, *supra* note 407, at 1048–49.

<sup>412</sup> *Id.* at 1050.

<sup>413</sup> *Id.* at 1050–51.

<sup>414</sup> See *id.* at 1059–67.

<sup>415</sup> Note, *The Federal Courts and Urban Renewal*, 69 *Colum. L. Rev.* 472, 502–03 (1969).

<sup>416</sup> *Id.* at 503.

agency.”<sup>417</sup> By the end of his tenure, however, he was expressing grave concerns about “the spreading bureaucracy that promises to engulf us.”<sup>418</sup>

Justice Douglas’s opinion for the Court in *Data Processing* reflected those concerns.<sup>419</sup> By relocating the “legal interest” requirement from “standing” to “the merits,” *Data Processing* substantially relaxed the threshold test for obtaining judicial review of agency action. Indeed,

---

<sup>417</sup> Bernard Wolfman et al., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. Pa. L. Rev. 235, 317 (1973).

<sup>418</sup> *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 399 (1973) (Douglas, J., dissenting); see also, e.g., *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 407 U.S. 926, 932 (1971) (Douglas, J., dissenting from the denial of certiorari) (criticizing “bureaucratic ‘industry-mindedness’”); *Richardson v. Perales*, 402 U.S. 389, 413 (1971) (Douglas, J., dissenting) (“[W]hen a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone, for these days the average man can say: ‘There but for the grace of God go I.’”); *Wyman v. James*, 400 U.S. 309, 335 (1971) (Douglas, J., dissenting) (“The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent.”); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 778 (1969) (Douglas, J., dissenting) (“The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers.”); *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring) (“The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches.”); James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 *Stan. L. Rev.* 1041, 1067 n.131 (1975) (“Justice Douglas . . . is something of a paradigmatic figure in his growing disillusionment with the powerful role that the federal bureaucracy plays in American life.”).

In one of his autobiographies, Justice Douglas suggested that he had always had concerns about administrative agencies. Even during the New Deal, he claimed, “I told FDR over and over again that every agency he created should be abolished in ten years,” because “[a]fter that it is likely to become a prisoner of bureaucracy and of the inertia demanded by the Establishment.” William O. Douglas, *Go East, Young Man* 297 (1974). Of course, the fact that this recollection appears in Justice Douglas’s autobiography does not automatically make it true. Cf. Melvin I. Urofsky, *A Portrait of Douglas—One Half Missing*, H-Net (June 2003), <https://www.h-net.org/reviews/showrev.php?id=7726> [<https://perma.cc/5NCC-RV2V>] (book review) (“[S]cholars have known for a long time that [Justice Douglas’s autobiographies] are full of inaccuracies, or—if one wants to be harsh—down-right lies.”). At a minimum, I do not believe Justice Douglas’s account of the reasoning behind the advice that he purportedly gave FDR in the 1930s. Compare Douglas, *supra*, at 297 (“After experience with administrative agencies at the federal level, it seemed to me that most agencies become so closely identified with the interests they are supposed to regulate, eventually they are transformed into spokesmen for the interest groups.”), with Merrill, *supra* note 407, at 1060 (“The idea of agency capture can be traced to a book published by Marver Bernstein in 1955.”). Still, Justice Douglas began referring unfavorably to the power of bureaucrats as early as 1951. See *United States v. Wunderlich*, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting); see also Freedman, *supra*, at 1067 n.131 (citing more cases); Wolfman et al., *supra* note 417, at 317–20 (tracing Justice Douglas’s “evolving skepticism and distrust” of administrative agencies).

<sup>419</sup> See Merrill, *supra* note 407, at 1076; see also *supra* note 157 and accompanying text.

Justice Douglas himself might have been willing to go farther. At least with respect to suits about alleged violations of the Constitution, his concurring and dissenting opinions from this era express sympathy for the concept of “private attorneys general” and suggest that the Court can recognize rights of action without waiting for Congress to do so.<sup>420</sup> In the early 1970s, he also famously advocated recognizing “standing” for mountains and other environmental objects that allegedly were protected by federal law but faced the threat of development.<sup>421</sup>

Some of the same concerns that led Justice Douglas to favor more judicial review of agency action may have predisposed courts and commentators to read *Data Processing* broadly. As early as 1958, Professor Jaffe had asserted that “[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”<sup>422</sup> Writing in 1973, Professor Henry Monaghan suggested that the truth behind this statement had generated “[i]rresistible pressure . . . to accord judicial review to anyone substantially affected by administrative action, whether or not he asserted interests comparable to those protected by the

---

<sup>420</sup> See *Flast*, 392 U.S. at 108–09 (Douglas, J., concurring) (“Congress can of course define broad categories of ‘aggrieved’ persons who have standing to litigate cases or controversies. But, contrary to what my Brother Harlan suggests, the failure of Congress to act has not barred this Court from allowing standing to sue and from providing remedies [for violations of the Constitution].”); see also, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 234 (1974) (Douglas, J., dissenting) (“The interest of citizens in guarantees written in the Constitution seems obvious. Who other than citizens has a better right to have the Incompatibility Clause enforced?”); *United States v. Richardson*, 418 U.S. 166, 200 (1974) (Douglas, J., dissenting) (discussing the constitutional requirement that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,” U.S. Const. art. I, § 9, cl. 7, and observing that “[n]o one has a greater ‘personal stake’ in policing this protective measure than a taxpayer”); *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319 (Douglas, Circuit Justice 1973) (“If applicants are correct on the merits [about the unconstitutionality of the bombing of Cambodia,] they have standing as taxpayers. The case in that posture is in the class of those where standing and the merits are inextricably intertwined.”).

<sup>421</sup> See *Sierra Club*, 405 U.S. at 741 (Douglas, J., dissenting) (“The critical question of ‘standing’ would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled . . . where injury is the subject of public outrage.” (footnote omitted)).

<sup>422</sup> Louis L. Jaffe, *The Right to Judicial Review* (pt. 1), 71 *Harv. L. Rev.* 401, 401 (1958); see Adrian Vermeule, *Bureaucracy and Distrust*: Landis, Jaffe, and Kagan on the Administrative State, 130 *Harv. L. Rev.* 2463, 2472 (2017) (observing that this statement is “Jaffe’s most famous sentence, and one of the best-known ideas in administrative law theory”).

common law judges.”<sup>423</sup> To the extent that lawyers and judges thought that someone who was being harmed by unlawful agency action normally *should* be able to obtain relief in court, they might have been inclined to read *Data Processing* as having held that such plaintiffs normally *could* obtain relief in court.

### 3. Confusion Generated by the Word “Standing”

In addition to Professor Davis’s influence, and in addition to the changing politics of judicial review, the sheer imprecision of the word “standing” also contributed to the transformation of *Data Processing*. In the 1970s and 1980s, a succession of scholars made the word more precise by emphasizing its connection to rights of action. That connection, in turn, may have affected later judges’ understanding of the “zone of interests” test.

#### a. Lee Albert’s Clarification of Earlier Cases About “Standing”

Everyone who writes about “standing” in administrative law owes a debt to Professor Lee Albert, whose 1974 article on the subject did a great deal to clarify the different senses in which judicial opinions used the word “standing.”<sup>424</sup> A former clerk to Justice White, Professor Albert had been one of the lawyers for the plaintiffs in *Barlow* at the Supreme Court level.<sup>425</sup> As we have seen,<sup>426</sup> he understood the Court’s opinions in *Barlow* and *Data Processing* to treat “standing” as an initial filter. On his reading of those opinions (with which I agree), even if a plaintiff had “standing” in *Data Processing*’s sense, and even if the defendants were indeed behaving illegally, the court might conclude upon further analysis that the plaintiff did not have a “protected legal interest” and therefore

---

<sup>423</sup> Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 *Yale L.J.* 1363, 1380 (1973).

<sup>424</sup> Albert, *supra* note 3. Professor Albert’s colleagues on the Yale faculty apparently were less impressed by his article than I am. In the same year that the article was published, he was denied tenure. See Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* 234, 255–57 (2005).

<sup>425</sup> See *Barlow*, 397 U.S. at 160 (listing counsel). At the time, Albert was Director of the Center on Social Welfare Policy and Law, then affiliated with Columbia Law School. Despite just being in his early thirties, he had a remarkable impact on the Supreme Court’s October Term 1969, which in turn had a remarkable impact on welfare law. In addition to briefing *Barlow*, he also argued (and won) both *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Rosado v. Wyman*, 397 U.S. 397 (1970).

<sup>426</sup> See *supra* text accompanying notes 25–27 and 267–274.

lacked any remedial rights.<sup>427</sup> In this respect, Professor Albert observed, *Data Processing* was part of “a tradition which regards standing as a preliminary question, distinct from the merits of a claim.”<sup>428</sup>

Justice Felix Frankfurter arguably was one of the architects of this tradition. In a series of famous opinions, Justice Frankfurter had cast “standing” as a “threshold inquiry” that reflected constitutional limitations on the judicial power of the United States.<sup>429</sup> But Professor Alexander Bickel had taken this point farther, and Professor Albert therefore focused on his work.<sup>430</sup> In Professor Bickel’s account, even when a suit met the requirements of Article III, courts sometimes invoked the concept of “standing” to refrain from “adjudication of the merits.”<sup>431</sup>

According to Professor Albert, though, this way of thinking about “standing” to seek judicial review of agency action was not really true to most of the relevant cases. His article advanced the following thesis: “A more illuminating way of looking at standing is to recognize that its determination is an adjudication of familiar components of a cause of action, resolved by asking whether a plaintiff has stated a claim for relief.”<sup>432</sup>

To develop this point, Professor Albert began by contrasting the terminology that courts used in “private law” cases (such as suits in which private plaintiffs sought damages against other private parties who allegedly had committed a tort or breached a contract) with the terminology that pre-*Data Processing* courts had used in “public law” cases (such as suits in which private plaintiffs sought injunctive relief against administrative agencies or officials who allegedly had acted without valid authority). Professor Albert observed that in both types of

<sup>427</sup> Albert, *supra* note 3, at 494.

<sup>428</sup> *Id.* at 425 & n.2.

<sup>429</sup> See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring); see also, e.g., *Coleman v. Miller*, 307 U.S. 433, 460, 464–66 (1939) (opinion of Frankfurter, J.) (indicating that the judicial power of the United States “could come into play . . . only if [matters] arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies,’” and discussing “standing” as a “jurisdictional requirement[]”).

<sup>430</sup> See, e.g., Albert, *supra* note 3, at 425 n.2, 436–37.

<sup>431</sup> See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 122–23 (1962) (“Often the word ‘standing’ has been made to do duty in a sense beyond the [constitutional] one. It has covered, for example, refusals to adjudicate at the instance of a plaintiff who had suffered an injury but who was thought not to be in a position to raise the ultimate issue in the clearest and most fully developed fashion.”); see also *id.* at 117–25 (discussing dismissals for lack of “standing” under the rubric of the “passive virtues,” as a “device[] of ‘not doing’”).

<sup>432</sup> Albert, *supra* note 3, at 426 (footnote omitted).

cases, “courts are asked to decide when and for whom concededly harmful and unlawful conduct is remediable.”<sup>433</sup> But the courts had cast their analysis in different ways.

In “private law” cases, courts would focus on the substantive law governing claims for relief. Even if the defendant had engaged in “unlawful conduct” and the plaintiff had suffered harm as a result, the applicable substantive law might not give the plaintiff any remedial rights.<sup>434</sup> For instance, in “the common class of tort suits in which a plaintiff alleges that the breach of a statutory norm has caused him injury,” the plaintiff might lose “either because he is not within the protected class or his harm is not one the statute was designed to prevent.”<sup>435</sup> Similarly, in suits accusing the defendant of breaching a contract, plaintiffs who were harmed by the breach but who were not themselves parties to the contract might lack remedial rights because they were only “incidental” beneficiaries of the contract (rather than intended beneficiaries).<sup>436</sup> In such cases, though, the plaintiff would be told that “[a] court has adjudicated the claim and has said that the plaintiff may not recover.”<sup>437</sup> What is more, the court’s opinion would identify “the kind of substantive reasons for which relief is denied: that the defendant owes no ‘duty’ to the plaintiff, that the defendant’s conduct is not the ‘legal’ cause of plaintiff’s injuries, or that the plaintiff’s interest is not one which the law protects.”<sup>438</sup>

By contrast, in “public law” cases challenging administrative action, courts might say that plaintiffs lacked “standing” to get into court in the first place. But according to Professor Albert, “the inquiry and subject matter of standing in public law cases” corresponded to “the question of claim for relief in private law cases.”<sup>439</sup> Professor Albert explained that for much of the twentieth century, “[t]wo issues have been involved in determining whether a litigant has standing to obtain review of administrative action”: (1) whether there was “injury to the litigant from the action he challenges” and (2) whether the litigant had “a legally protected interest.”<sup>440</sup> In Professor Albert’s view, the “injury”

---

<sup>433</sup> Id. at 428.

<sup>434</sup> Id. at 438–39.

<sup>435</sup> Id. at 439.

<sup>436</sup> Id. at 440.

<sup>437</sup> Id. at 441.

<sup>438</sup> Id. at 438–39.

<sup>439</sup> Id. at 428.

<sup>440</sup> Id. at 427–28.

requirement “obviously deals with an essential element of a claim,” and the “legal interest” requirement should be thought of in the same terms.<sup>441</sup> Overall, the variables that courts analyzed under the rubric of “standing” (such as “the amount, kind, and directness of injury, the type of interests infringed, and the legal provisions on which [the plaintiff] relies”) involved the same kinds of considerations that courts hearing private-law cases “routinely take into account in deciding whether a complaint states a cause of action.”<sup>442</sup>

Contrary to some traditional doctrine, Professor Albert did not think that the rights of action available in “public law” should be exactly the same as the rights of action available in “private law.” He denied that relationships among private people were identical to “relationships between an individual and the government,” and he argued that “the rules governing the claim and defining the contours of the protected interest” should vary accordingly.<sup>443</sup> But as an analytical matter, he observed, the issues that courts discussed under the rubric of “standing” in public-law cases were about “whether a litigant has stated a claim for relief.”<sup>444</sup> When courts dismissed such cases for want of “standing,” courts were deciding that the plaintiffs “had no claim”—that is, that the applicable substantive law did not give them remedial rights.<sup>445</sup>

---

<sup>441</sup> Id. at 428–29.

<sup>442</sup> Id. at 428.

<sup>443</sup> Id. at 444–45.

<sup>444</sup> Id. at 450.

<sup>445</sup> Id. at 442; accord *Merriam v. Kunzig*, 476 F.2d 1233, 1246 n.7 (3d Cir. 1973) (Adams, J., dissenting from the denial of rehearing en banc). Two decades earlier, Professors Hart and Wechsler had obliquely suggested a similar view of “standing” in the first edition of their casebook on Federal Courts. After a lengthy excerpt from *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150–60 (1951) (Frankfurter, J., concurring), which portrayed standing as a question of “justiciability,” they appended the following questions and comments:

Would clarity be gained by viewing standing as involving problems of the nature and sufficiency of the litigant’s concern with the subject matter of the litigation, as distinguished from problems of the justiciability—that is, the fitness for adjudication—of the legal questions which he tenders for decision? . . .

More precisely stated, the question of standing in this sense is the question whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons, to warrant giving him the relief, if he establishes the illegality alleged—and, by the same token, to warrant recognizing him as entitled to invoke the court’s decision on the issue of illegality. So viewed, the question is one of remedy, is it not, belonging to and dependent upon the applicable law of remedies?

*b. Justice Powell's Separate Concept of "Prudential" Standing*

Unfortunately, Professor Albert's article did not make an immediate impact on the Supreme Court. Instead, the Court's opinions from the mid-1970s were shaped more by Justice Lewis Powell, who had joined the Court in 1972 and soon started painting with a broad brush about the importance of what he called "prudential" limitations on "standing."<sup>446</sup>

Justice Powell's first extended salvo on the topic was a concurring opinion in *United States v. Richardson*.<sup>447</sup> In the course of arguing that federal courts should not routinely entertain so-called "public actions" brought by a plaintiff who wants to challenge the constitutionality of governmental behavior but who "has nothing at stake other than his interest as a taxpayer or citizen,"<sup>448</sup> Justice Powell asserted that "[t]he doctrine of standing has always reflected prudential as well as constitutional limitations."<sup>449</sup> As an example, Justice Powell pointed to "the second test created in [*Data Processing*]—'whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'<sup>450</sup> That test is not part of "the constitutional bare minima" for standing, so Justice Powell thought that it "undoubtedly" was a "prudential limit."<sup>451</sup>

Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 174 (1953); see also *id.* at 175 ("What are the appropriate sources of the law of remedies to be applied in federal litigation when standing, or any other question of a right of action, is in issue?").

<sup>446</sup> See S. Todd Brown, *The Story of Prudential Standing*, 42 *Hastings Const. L.Q.* 95, 105 (2014); Magill, *supra* note 74, at 1174; cf. John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 424–25 (1994) (discussing the strong but perhaps hazy sense of "judicial restraint" that Justice Powell felt at the start of his tenure).

<sup>447</sup> 418 U.S. 166 (1974).

<sup>448</sup> *Id.* at 190, 192 (Powell, J., concurring).

<sup>449</sup> *Id.* at 196 n.18. Without using the word "prudential," *Data Processing* had expressed a similar idea. See *Data Processing*, 397 U.S. at 154 ("Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court for its own governance, have involved a 'rule of self-restraint.'" (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953))); *Flast v. Cohen*, 392 U.S. 83, 97–98 (1968) (asserting that "the doctrine of justiciability," of which "standing" is an aspect, "has become a blend of constitutional requirements and policy considerations").

<sup>450</sup> *Richardson*, 418 U.S. at 196 n.18 (Powell, J., concurring) (quoting *Data Processing*, 397 U.S. at 153).

<sup>451</sup> *Id.*; see also *Singleton v. Wulff*, 428 U.S. 106, 123 & n.2 (1976) (Powell, J., concurring in part and dissenting in part) (noting that "[b]eyond [the constitutional] question . . . lies the further and less easily defined inquiry of whether it is prudent to proceed to decision on particular issues even at the instance of a party whose Art. III standing is clear," and describing

The following year, Justice Powell’s majority opinion in *Warth v. Seldin* reiterated that the question of standing “involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”<sup>452</sup> With respect to the “constitutional dimension” of standing doctrine, Justice Powell endorsed the injury-in-fact requirement.<sup>453</sup> But “[a]part from this minimum constitutional mandate,” Justice Powell observed that “this Court has recognized other limits on the class of persons who may invoke the courts’ decisional and remedial powers.”<sup>454</sup> Citing earlier cases, he identified two such limits. First, “when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”<sup>455</sup> Second, even when a plaintiff alleges a more targeted harm, “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”<sup>456</sup>

In the years after *Warth*, the Supreme Court recited this taxonomy repeatedly.<sup>457</sup> From the early 1980s on, moreover, the standard examples of “prudential” limitations on standing included not only the two that Justice Powell had offered in *Warth*, but also “the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”<sup>458</sup>

---

*Data Processing’s* “arguably within the zone of interests” test as one way of “fram[ing]” that inquiry).

<sup>452</sup> 422 U.S. 490, 498 (1975).

<sup>453</sup> See *id.* at 498–99 (“The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party . . . . A federal court’s jurisdiction therefore can be invoked only when the plaintiff himself has suffered ‘some threatened or actual injury resulting from the putatively illegal action . . . .’” (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973), but also citing *Data Processing*, 397 U.S. at 151–54)).

<sup>454</sup> *Id.* at 499.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 750–52 (1984); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471–76 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99–100 (1979).

<sup>458</sup> *Allen*, 468 U.S. at 751; accord *Valley Forge Christian Coll.*, 454 U.S. at 475; cf. *Gladstone*, 441 U.S. at 99–100 & n.6 (observing that in addition to the “prudential principles” mentioned in *Warth*, “[t]here are other nonconstitutional limitations on standing to be applied in appropriate circumstances,” and citing the zone-of-interests test as an example).

*c. "Prudential" Standing and Rights of Action*

Despite Justice Powell's support for "prudential rules of standing,"<sup>459</sup> he never fully specified their source or nature. Echoing language from the earlier case of *Barrows v. Jackson*,<sup>460</sup> his opinion in *Warth* described them as "essentially matters of judicial self-governance" and observed that the Court did not have to apply them in cases where there were "countervailing considerations."<sup>461</sup> But in the same passage, Justice Powell declared that "the standing question in such cases is whether the constitutional or statutory provision on which the [plaintiff's] claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."<sup>462</sup> Justice Powell added that in cases where the Court allowed a plaintiff to win relief for the plaintiff's own injuries on the basis of what the Court characterized as someone else's constitutional or statutory rights, "the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff."<sup>463</sup> During the rest of the 1970s, the Supreme Court did not play

---

<sup>459</sup> *Warth*, 422 U.S. at 500.

<sup>460</sup> 346 U.S. 249 (1953).

<sup>461</sup> *Warth*, 422 U.S. at 500–01; see also *Barrows*, 346 U.S. at 255 (observing that apart from the requirements of Article III, "this Court has developed a complementary rule of self-restraint for its own governance . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others"); id. at 257–59 (holding that "[u]nder the peculiar circumstances of this case," where damages were being sought against a white defendant who had conveyed her house in violation of a racially restrictive covenant, the defendant should be allowed to defend herself by raising what the Court characterized as "the constitutional rights of those [whom the covenant] discriminated against").

A decade after *Warth*, Professor Monaghan would powerfully question this account of limitations on so-called "third party standing." See Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 278–79 (1984) ("[R]educing third party standing to discretionary rules of judicial practice is very troubling. . . . What, precisely, is the source of the posited judicial authority to permit third party standing in some cases and to deny it in others?"); cf. id. at 300–01 (noting that "*Barrows* was argued in first party terms," and the defendant could readily have been seen as asserting her own privilege to make a contract "free from unjustified governmental discrimination").

<sup>462</sup> *Warth*, 422 U.S. at 500; see also David P. Currie, Misunderstanding Standing, 1981 Sup. Ct. Rev. 41, 41 (calling this statement "the soundest sentence the Supreme Court has uttered on this troublesome subject within human memory," but adding that "[u]nfortunately, the Court has generally ignored its own good counsel").

<sup>463</sup> *Warth*, 422 U.S. at 501; see also id. at 508–10 (concluding that taxpayers in the City of Rochester who complained that they were facing higher municipal taxes because of a nearby town's zoning practices did not have "standing" to seek relief on the basis of "the constitutional and statutory rights of third parties" who were being excluded from the town, and expressing this conclusion as follows: "we discern no justification for recognizing in the Rochester taxpayers a right of action on the asserted claim"). By the same token, when Justice

up this possible linkage between the “prudential” aspects of standing doctrine and the circumstances in which courts might infer rights of action in favor of plaintiffs who were harmed by the violation of a federal statute or constitutional provision.<sup>464</sup> Within a few years, however, distinguished commentators were arguing that these two topics were essentially one and the same. In the words of Professor David Currie, “Whether the answer is labeled ‘standing’ or ‘cause of action,’ the question is whether the statute or Constitution implicitly authorizes the plaintiff to sue.”<sup>465</sup>

To be sure, commentators did not necessarily agree with Justice Powell’s evolving views about when to find such authorization. The week before issuing his opinion in *Warth*, Justice Powell had joined Justice Brennan’s unanimous opinion in *Cort v. Ash*.<sup>466</sup> There, Justice Brennan had laid out four questions for judges to consider when deciding “whether a private remedy is implicit in a statute not expressly providing one,” and only one of those questions asked whether Congress had specifically intended to create a right of action.<sup>467</sup> By the end of the 1970s, however, Justice Powell was urging his colleagues to repudiate *Cort*’s analysis and to refrain from reading implied rights of action into federal statutes “absent the most compelling evidence that Congress in fact intended such an action to exist.”<sup>468</sup>

---

Powell noted that Congress could explicitly override “prudential” limitations on standing, he cast that point too in terms of rights of action. See *id.* at 501 (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”).

<sup>464</sup> See, e.g., Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 *Cornell L. Rev.* 663, 673 (1977) (“The Court has never clearly recognized the relationship between standing cases and ‘private right of action’ cases.”).

<sup>465</sup> Currie, *supra* note 462, at 43; see also Fletcher, *supra* note 21, at 236 (“For all the Court is usually willing to say, and perhaps to see, the implied cause of action cases are unrelated to the standing cases. In fact, they raise a comparable issue.”).

<sup>466</sup> 422 U.S. 66 (1975).

<sup>467</sup> *Id.* at 78.

<sup>468</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 749 (1979) (Powell, J., dissenting); see also *id.* at 743 (“*Cort* allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch.”); *id.* at 731 (“The ‘four factor’ analysis of that case is an open invitation to federal courts to legislate causes of action not authorized by Congress.”). Justice Powell contrasted cases like *Cort*, where the plaintiff was seeking relief against a private defendant for harms caused by the defendant’s alleged violation of a federal statute, with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), where the plaintiff was seeking relief against government officials for harms caused by behavior that the Constitution itself prevented Congress from authorizing. According to Justice Powell, “the federal courts have a far greater responsibility under the Constitution for the protection of those rights derived directly from it, than for the definition and enforcement of rights created solely by Congress.” *Davis*, 442 U.S. at 252 n.1 (Powell, J., dissenting). Even

A majority of the Court soon moved in this direction.<sup>469</sup> Many commentators criticized the Court's growing reluctance to recognize implied rights of action.<sup>470</sup>

Still, commentators tended to agree that “the existence of standing and the existence of a cause of action present the same basic question.”<sup>471</sup> The most prominent article in this vein was written by then-Professor William Fletcher, who had taken Administrative Law from Professor Albert and was explicitly building on his work.<sup>472</sup> Among other contributions, Professor Fletcher sought to explain “what the Court means, or should mean, when it refers to ‘prudential’ standing.”<sup>473</sup> In Professor Fletcher's words, “‘Prudential standing,’ in the current usage, . . . determines whether a plaintiff has a federal cause of action.”<sup>474</sup> Where Congress had not explicitly created a right of action by statute, courts needed to decide whether to recognize one as a matter of unwritten law or as an inference from existing written laws. For purposes of this inquiry, “[t]he ideas that the Court now invokes as controlling principles of standing law—for example, that a plaintiff must have suffered direct injury, or that a plaintiff must have suffered in some way different from the general population—are . . . useful as presumptions or aids for construction . . .”<sup>475</sup> But

---

in the constitutional context, though, Justice Powell did not think that courts should infer rights of action willy-nilly. See *id.* at 252 (“[T]he exercise of this responsibility involves discretion, and a weighing of relevant concerns.”); see also *Carlson v. Green*, 446 U.S. 14, 28 (1980) (Powell, J., concurring in the judgment) (“In this situation, as Mr. Justice Harlan once said, a court should ‘take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy.’” (alteration in original) (quoting *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment))).

<sup>469</sup> See, e.g., *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (“The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.”); see also *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–56 (2017) (summarizing the shift in the Court's doctrine on this point).

<sup>470</sup> See, e.g., Robert H.A. Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to Borak*, 79 Nw. U. L. Rev. 227 (1984); Tamar Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553 (1981).

<sup>471</sup> Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1475 (1988); see also Sunstein, *supra* note 113, at 166 n.15 (citing earlier articles expressing similar views).

<sup>472</sup> See William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 Ala. L. Rev. 277, 277 (2013); see also Fletcher, *supra* note 21, at 223 n.18 (crediting Professor Albert's “important” article).

<sup>473</sup> Fletcher, *supra* note 21, at 251.

<sup>474</sup> *Id.* at 252.

<sup>475</sup> *Id.* at 239.

“[w]hen the Court refuses to find prudential standing, it, in effect, refuses to infer a cause of action from existing legal materials.”<sup>476</sup> Likewise, “[w]hen the Court says that Congress may create standing when prudential factors lead the Court not to find standing, the Court says nothing more complicated than that it will not infer a cause of action absent a clear statutory directive.”<sup>477</sup>

When Professor Fletcher described what the Supreme Court meant by “standing,” he was not talking about Justice Douglas’s opinion in *Data Processing*. To the contrary, Professor Fletcher specifically indicated that Justice Douglas had used the word differently: “Under *Data Processing*, standing was a question of whether plaintiff was ‘arguably’ entitled to sue rather than whether plaintiff was actually entitled to do so.”<sup>478</sup> As Professors Albert and Fletcher both showed, however, *Data Processing*’s concept of “standing” was unusual.

When a judicial opinion puts a familiar word to an unusual use, subsequent courts may get confused. That may well be what happened to *Data Processing*: the distinctiveness of its concept of “standing” got lost over time. Consistent with what the word means in other cases, courts came to associate *Data Processing*’s test for “standing” with full-fledged rights of action.

### *C. The Zone-of-Interests Test as a Limitation on Express Rights of Action*

Indeed, the Supreme Court now associates the zone-of-interests test with rights of action even outside the context of the APA. That is one of the less-noted features of Justice Scalia’s opinion for the Court in *Lexmark International, Inc. v. Static Control Components, Inc.*: whenever Congress creates a private right of action to enforce any federal statute, interpreters normally are supposed to presume that the right of action “extends only to plaintiffs whose interests ‘fall within the zone of interests protected by the [statute].’”<sup>479</sup>

---

<sup>476</sup> *Id.* at 252.

<sup>477</sup> *Id.* (footnote omitted).

<sup>478</sup> *Id.* at 264; see also *supra* text accompanying note 28.

<sup>479</sup> 572 U.S. 118, 129 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Although this Section will criticize *Lexmark*’s statements about the zone-of-interests test, I agree with Justice Scalia’s broader point that the terminology of “prudential standing” is “misleading” and that issues discussed under that rubric often are really about whether the applicable law

This conclusion reflects Justice Scalia's long-held (mis)understanding of *Data Processing*. As noted above, Justice Scalia took *Data Processing* to have embraced a modified version of Professor Davis's interpretation of the APA.<sup>480</sup> According to Professor Davis, when 5 U.S.C. § 702 refers to people who are "adversely affected or aggrieved by agency action within the meaning of a relevant statute," it encompasses everyone who is suffering injury in fact. Justice Scalia thought that *Data Processing* had adopted Professor Davis's reading of the words in Section 702, but had tacked on the zone-of-interests test to cabin what would otherwise have been an astonishingly broad right of action. In *Lexmark*, Justice Scalia therefore asserted that "[t]he modern 'zone of interests' formulation originated in [*Data Processing*] as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act."<sup>481</sup>

*Lexmark* itself did not involve the APA; rather than seeking judicial review of agency action, one private company was suing another private company under a right of action created by the Lanham Act (which says that anyone who misrepresents goods in commercial advertising "shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act").<sup>482</sup> Starting in the 1980s, however, the Supreme Court had occasionally listed the zone-of-interests test as a general "prudential" limitation on standing, potentially applicable outside the APA context.<sup>483</sup> In the 1990s, Justice Scalia started treating this idea as an established canon of statutory interpretation: in a concurring opinion from 1992, and in dicta in a majority opinion from 1997, Justice Scalia suggested that statutory provisions creating rights of action should typically be interpreted to operate only in favor of plaintiffs whose interests are within the zone that the statute was designed to protect.<sup>484</sup>

---

gives the plaintiff a right of action. See *id.* at 125–28; see also Monaghan, *supra* note 5, at 1817 (observing that "*Lexmark*'s mode of analysis should foster clarity").

<sup>480</sup> See *supra* text accompanying notes 375–381.

<sup>481</sup> *Lexmark*, 572 U.S. at 129.

<sup>482</sup> 15 U.S.C. § 1125(a)(1) (2012).

<sup>483</sup> See *Allen*, 468 U.S. at 751; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 475 (1982).

<sup>484</sup> See *Bennett v. Spear*, 520 U.S. 154, 163–64 (1997) (asserting that "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated," and adding that the Court's cases "have specifically listed [the zone-of-interests test] among other prudential standing requirements of general application"—though concluding that the "citizen-suit provision" in the Endangered Species Act overcomes the normal presumption); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 287–88 (1992) (Scalia, J., concurring in the judgment) (asserting that "[j]udicial inference of a zone-of-interests

*Lexmark* confirmed that suggestion: under current doctrine, the zone-of-interests test operates as an implied limitation on “all statutorily created causes of action” that do not opt out of it.<sup>485</sup> By now, the Court has read this limitation not only into the Lanham Act but also into Title VII of the Civil Rights Act of 1964 (which allows “a person claiming to be aggrieved” by an unlawful employment practice first to file a charge with the EEOC and then to bring a civil action)<sup>486</sup> and the Fair Housing Act (which says that “[a]n aggrieved person may commence a civil action” and may win damages “if the court finds that a discriminatory housing practice has occurred”).<sup>487</sup>

Admittedly, this limitation is not very restrictive. Everyone whose interests are even “arguably” within a relevant zone can satisfy the version of the limitation that the Court reads into the APA. And while Justice Scalia suggested that the Court might read a more demanding version of the limitation into other federal statutes that create private rights of action,<sup>488</sup> the Court’s most recent opinion on this topic did not do so.<sup>489</sup>

Yet even if most plaintiffs will satisfy the zone-of-interests test, there is considerable irony in using the test to constrain the interpretation of statutory provisions that seem, on their face, to confer rights of action more broadly. Whatever Justice Scalia might have thought, *Data Processing* did not develop the zone-of-interests test as “a limitation on the cause of action . . . conferred by the Administrative Procedure

---

requirement . . . is a background practice against which Congress legislates,” and reading such a limitation into the private right of action created by RICO, 18 U.S.C. § 1964(c)).

<sup>485</sup> *Lexmark*, 572 U.S. at 129.

<sup>486</sup> 42 U.S.C. § 2000e-5(b), (f)(1) (2012); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177–78 (2011) (Scalia, J.).

<sup>487</sup> 42 U.S.C. § 3613(a)(1)(A), (c)(1) (2012); *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302–03 (2017).

<sup>488</sup> See *Lexmark*, 572 U.S. at 130; see also *Bennett*, 520 U.S. at 163 (“[W]hat comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the “generous review provisions” of the APA may not do so for other purposes . . . .” (quoting *Clarke*, 479 U.S. at 400 n.16, in turn quoting *Data Processing*, 397 U.S. at 156)); *Cnty. Nutrition Inst. v. Block*, 698 F.2d 1239, 1256 (D.C. Cir. 1983) (Scalia, J., concurring in part and dissenting in part) (observing that in *Valley Forge*, when the Supreme Court mentioned the zone-of-interests test as a general “prudential” limitation on standing in “non-APA” cases, the Court “omit[ted] the word ‘arguably’”), rev’d, 467 U.S. 340 (1984).

<sup>489</sup> See *Bank of Am.*, 137 S. Ct. at 1303 (emphasizing the word “arguably”). But cf. *In re Peebles*, 880 F.3d 1207, 1213 (10th Cir. 2018) (observing that “[t]here’s no single test to determine whether a cause of action falls within a statute’s zone of interests,” and continuing to invoke Justice Scalia’s view that the implicit zone-of-interests requirement may be stricter for some federal statutes than it is for the APA).

Act.”<sup>490</sup> To the contrary, the test reflected an especially lenient version of then-existing doctrine about who might conceivably be able to invoke that cause of action.

For more than a generation, though, the Supreme Court has erroneously treated *Data Processing*'s test for “standing” as the last word about rights of action under the APA. This reading of *Data Processing* has dramatically expanded the set of plaintiffs who are thought to enjoy remedial rights under the APA. At the same time, the zone-of-interests test has become an implied limitation on express rights of action created by other federal statutes. Properly understood, *Data Processing* does not support either of these aspects of current doctrine.

#### CONCLUSION

The test that *Data Processing* articulated under the rubric of “standing” was originally designed to screen out claims by people who obviously were not appropriate plaintiffs—people who either lacked any practical stake in the agency action that they wanted to challenge or were not even in the ballpark of having a right of action. Plaintiffs who failed this test could be thrown out of court immediately. But plaintiffs who passed the test were not necessarily entitled to relief. In *Data Processing*, not one of the Justices suggested that whenever an agency is violating a statutory or constitutional limitation on its power, everyone whose interests are even “arguably” within the “zone” to be protected by the limitation is entitled to a remedy for any resulting harm. To the contrary, the Justices explicitly distinguished between *Data Processing*'s test for “standing” and the tests for remedial rights that would operate as part of “the merits.”<sup>491</sup>

Considered as a preliminary screen, *Data Processing*'s test for “standing” took an interesting approach. We are familiar with the idea that in the early stages of a case, plaintiffs should get some leeway about the facts. Thus, when a court is asked to dismiss a complaint under Federal

---

<sup>490</sup> *Lexmark*, 572 U.S. at 129.

<sup>491</sup> See *Data Processing*, 397 U.S. at 153 (“The ‘legal interest’ test goes to the merits. The question of standing is different.”); *id.* at 158 (“Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a ‘legal interest’ that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.”); see also *supra* text accompanying note 240 (quoting Justice Brennan’s assurance that his proposed framework simply reorganized existing doctrine and that “[n]o inquiry previously made by courts has been eliminated”).

Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, “the court must assume the truth of all well-pleaded factual allegations in the complaint and draw all reasonable inferences from those allegations in the plaintiff’s favor.”<sup>492</sup> Likewise, when courts are evaluating evidence in connection with a motion for summary judgment, “courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.”<sup>493</sup> In both contexts, though, courts normally apply their own best understanding of the applicable law.<sup>494</sup> *Data Processing*’s test for “standing” can be seen as cutting plaintiffs some slack on the law as well as the facts. At the outset of a case, instead of asking whether the plaintiff would indeed have remedial rights under the circumstances alleged by the complaint, courts were simply supposed to ask whether the plaintiff’s asserted interest was “arguably” in the relevant “zone.”

I am inclined to agree with Professor Albert and others that this preliminary screen served no useful purpose; instead of “survey[ing] the relevant legal materials for a zone of interest before focusing upon the claims for relief,” courts should simply use their normal mechanisms “for testing claims . . . at an early and appropriate stage of a lawsuit.”<sup>495</sup> But even if there is no reason to revive *Data Processing*’s concept of “standing,” we should at least understand it, so that we do not misinterpret what *Data Processing* held. Contrary to the modern conventional wisdom, *Data Processing* did not hold that everyone who meets its test for “standing” enjoys a full-fledged right of action. Nor would such a holding make sense. Remedial rights normally hinge on *actual* protection rather than simply “arguabl[e]” presence in a “zone.”<sup>496</sup> The content of *Data Processing*’s test for “standing” is better suited for use as a preliminary screen at the outset of a case than as a definitive measure of remedial rights at the end.

In the years since *Data Processing*, however, courts and commentators alike have mistakenly come to believe that the decision was about rights

---

<sup>492</sup> *In re Harman Int’l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 99–100 (D.C. Cir. 2015).

<sup>493</sup> *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam).

<sup>494</sup> See, e.g., *In re Harman*, 791 F.3d at 99 (observing that “the court need not accept the plaintiff’s legal conclusions” when ruling upon a motion to dismiss a complaint for failure to state a claim); *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011) (“When the only question a court must decide is a question of law, summary judgment may be granted.”).

<sup>495</sup> Albert, *supra* note 3, at 495, 497.

<sup>496</sup> See *supra* text accompanying note 273; see also *supra* note 317.

of action, rather than “standing” in a more preliminary sense. This misunderstanding of *Data Processing* has had important consequences. In the words of Justice Scalia (who thought that he was speaking of *Data Processing* rather than his own misreading of *Data Processing*):

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, 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).<sup>497</sup>

Simply put, if the APA confers remedial rights upon everyone who satisfies *Data Processing*’s test for “standing,” then the APA confers remedial rights upon a lot of people.

Precisely because the modern misunderstanding of *Data Processing* is so important, reasonable people might think that *stare decisis* counsels against trying to correct the misunderstanding at this point.<sup>498</sup> But it is worth noting that courts are not currently adhering to what *Data Processing* held. Instead, they are adhering to what later cases have mistakenly assumed that *Data Processing* held.

Those later cases, moreover, lack some of the features that might add to their own weight as precedents. The first Supreme Court opinion that explicitly embraced the mistaken interpretation of *Data Processing* did so only in a footnote that was not necessary to the Court’s decision.<sup>499</sup> What is more, the Supreme Court has never made a considered decision about the underlying question that it takes *Data Processing* to settle—whether the APA confers the same remedial rights upon everyone whose interests are “arguably” within a relevant zone as upon people whose interests are *actually* within that zone. Instead of thinking about the merits of this interpretation of the APA, the Court has read *Data Processing* to put the issue beyond debate. If I am correct, though, that is wrong: the Supreme

---

<sup>497</sup> Scalia, *supra* note 379, at 889 (footnotes omitted).

<sup>498</sup> But see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1 (2001).

<sup>499</sup> See *Japan Whaling Ass’n*, 478 U.S. at 231 n.4.

Court has never deliberately decided the question that it takes its precedents to answer.

Under these circumstances, even Justices with fairly strong commitments to *stare decisis* might be willing to revisit their understanding of *Data Processing* and to rely on other precedents to decide which plaintiffs have valid claims for relief on “the merits.” Before misinterpretations of *Data Processing* distorted doctrine on that topic, case law from the 1960s suggested at least three categories of plaintiffs who enjoyed relevant remedial rights<sup>500</sup>: (1) regulated parties whom an agency was subjecting to an unlawful requirement and who faced the threat of enforcement proceedings if they disobeyed the requirement,<sup>501</sup> (2) other plaintiffs whose “legal rights” or “legally protected interests” were being invaded by administrative officials (including plaintiffs who were the intended beneficiaries of a statutory or constitutional limitation that administrative officials were violating),<sup>502</sup> and (3) plaintiffs who were entitled to sue under special statutory review provisions.<sup>503</sup>

Properly understood, *Data Processing* should not have been read to expand upon these categories (which, by the late 1960s, were already quite broad). In particular, *Data Processing* does not support extending remedial rights to plaintiffs who are “arguably” but not actually among the intended beneficiaries of a relevant statute. Nor, contrary to the doctrine embraced by the modern Supreme Court, does *Data Processing* support *narrowing* the scope of express rights of action created by statutes other than the APA.<sup>504</sup> *Data Processing* was not really about rights of action at all.

---

<sup>500</sup> See, e.g., *Berry v. Hous. & Home Fin. Agency*, 233 F. Supp. 457, 459 (N.D.N.Y. 1964), *aff'd*, 340 F.2d 939 (2d Cir. 1965).

<sup>501</sup> See *supra* notes 42–44 and accompanying text; see also *Abbott Labs.*, 387 U.S. at 148–56 (modifying “ripeness” doctrine to permit more “pre-enforcement judicial review” of this sort).

<sup>502</sup> See *Hardin*, 390 U.S. at 7; *supra* notes 45–54, 120–129 and accompanying text.

<sup>503</sup> See *supra* text accompanying notes 87, 111–114.

<sup>504</sup> See *supra* Section III.C.

\*\*\*