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STANDING INJURIES

In *Association of Data Processing Serv Org v Camp*,[1] the Supreme Court, in an opinion written by Justice William O. Douglas, revolutionized the law of standing. The Court rejected the old idea that a "legal interest" is a necessary basis for standing. Instead, it set out a new requirement: the plaintiff must show an "injury in fact."[2] The Court clearly thought that it was possible to identify "injury in fact" in an entirely law-free way. On the Court's view, judges should answer the question whether there was injury by looking at consequences, and without examining the relevant law.

The *Data Processing* Court did not make clear whether in setting out the "injury in fact" test, it was speaking of the Administrative Procedure Act[3] or the Constitution. But eventually the Court con-

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[1] 397 US 150 (1970).

[2] Id at 153. The Court also suggested that the plaintiff's injury must be "arguably within the zone of interests" protected by the statutory or constitutional provision at issue, id at 156; but the Court meant this test to be quite lenient, and it is largely irrelevant for present purposes. If the discussion here is correct, however, the "zone" test holds some promise of refocusing standing law on the question of congressional instructions. The recent tightening of the "zone" test, see *Air Courier Conference of America v American Postal Workers Union*, 498 US 517 (1991), should be welcomed as an effort to return to the legal interest test, asking whether Congress has conferred a right to bring suit. I cannot discuss this issue here, though it should emerge from the discussion that there is an intriguing relationship between my reading of *Northeastern Contractors* and the possible tightening of the "zone" test.

[3] The relevant provision, which the Court purported to be interpreting, is 5 USC 702: "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." The interpretation was misconceived; the APA contains no "injury in fact" test. On the injury in fact idea and the APA, see Sunstein, *What's Standing After Lujan?* 91 Mich L Rev 163, 181–82 (1992).

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cluded that an injury in fact is a constitutional prerequisite for standing under Article III of the Constitution.[4] Without injury, no one has standing. This is an extraordinarily novel development. Contrary to the Court's recent claims, the notion of injury in fact has no basis in the text or history of the Constitution.[5]

Indeed, the Court has never thoroughly explained the shift from "legal interest" to "injury in fact." But in *Data Processing*, the Court said that it wanted to make it unnecessary to investigate "the merits" in order to decide issues of standing, and it appeared to seek instead to make the standing problem turn on a law-free inquiry into the harm suffered by the plaintiff. Under this framework, whether the plaintiff had standing would not turn on the statutory or constitutional provision at issue.[6] Instead it would turn on a commonsensical, largely value-free inquiry into the question of harm. If you are harmed, you have standing; without an injury, you cannot sue.

All this seems very simple and straightforward. But how do we know whether an injury has been incurred? The question is much more vexing than it might appear. Consider the following cases.

1. Smith lives near a proposed project for developing a waterway; he thinks that the project would make the air dirtier. He believes that if the project is built, he will be injured. Is his injury an actual incidence of cancer? An increased risk of cancer? A diminished opportunity to enjoy days without sulfur dioxide in the atmosphere? A diminution in the value of his property?

2. Jones likes classical music, and she is unhappy that the Federal Communication Commission is going to award a license to a rock music station on 104.3 FM. Is her injury the actual unavailability of classical music in her area? Her diminished opportunity to hear classical music? The unavailability of classical music on 104.3 FM? Her offense at the presence of rock music on the airwaves?

3. Richardson wants the local prosecutor to initiate proceedings against the father of her child, who was born out of wedlock; she hopes that the proceedings will convince him to pay child support. But the prosecutor acts only in cases involving children born within

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[4] See, e.g., *Simon v EKWRO*, 426 US 26 (1976); *Lujan v Defenders of Wildlife*, 112 S Ct 2130 (1992).

[5] See Sunstein, *What's Standing After Lujan?* 91 Mich L Rev 163.

[6] Subject to the qualification in note 2 supra.

wedlock. Is Richardson's injury the diminished incentive to pay child support? The actual absence of child support? The failure to have her child treated the same way as legitimate children?

4. Friends of the Planet (FOP) claim that they have suffered a procedural injury, consisting of an agency's failure to prepare an environmental impact statement before developing a waterway.[7] What sort of an injury must FOP allege in order to bring suit?[8] Must they live near the waterway? Must they show that the failure to prepare the statement will degrade their waters? What kinds of harms must they connect to any such degradation?

Questions of this kind may seem exotic, but they make all the difference. Take a recent example: People who live near Mexico think that if the North Atlantic Free Trade Agreement (NAFTA) is ratified, the air will become dirtier, and they will be injured. But what, exactly, is their injury?[9] If the injury can be characterized broadly—as, say, increased exposure to dirtier air—many people may have standing to contest NAFTA. If the injury must be characterized narrowly—as, say, cancers and respiratory diseases that would not otherwise occur—many and or perhaps all people will be deprived of access to court. They will lack the requisite injury, and they will be unable to show that any injury is due to the defendant's conduct or likely to be redressed by a decree in their favor. Few who are subject to dirtier air actually will be able to show that they will get some disease without court action.

Similar conclusions might be reached for our listeners to classical music. Such listeners will almost certainly be able to find their preferred fare elsewhere on the dial.[10] (It is unclear that their "offense" at rock music will count as a legally cognizable injury, a point that raises further complexities for the notion of a value-free inquiry into whether there has been "injury.") And as the Court

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[7] Compare *The Fund for Animals v Espy*, 814 F Supp 142 (DDC 1993), granting standing to people interested in studying bison, in the context of a challenge to failure to complete an environmental impact statement. See also *Fund for Animals v Lujan*, 962 F 2d 1391 (9th Cir 1992), characterizing a similar injury as involving an "opportunity."

[8] See the discussion in *Lujan v Defenders of Wildlife*, 112 S Ct 2130 (1992).

[9] The issue arose in *Public Citizen v USTR*, 822 F Supp 21 (DDC 1993), in which the district court found standing without closely investigating the issues of injury and redressability. The court of appeals reversed on other grounds.

[10] Compare *Office of Communication of the Church of Christ v FCC*, 359 F2d 994 (DC Cir 1966); *Public Citizen v Friends of the Earth*, 5 F3d 549 (1993).

held,[11] it is highly speculative to suggest that prosecutorial action will necessarily lead a delinquent father to make good on past child support payments. Therefore—as the Court also held—no injury could be shown.[12]

It is astonishing but true that the Supreme Court has given very little guidance on a key issue in modern administrative law: how injuries should be characterized for purposes of standing. Its most serious and sustained confrontation with the issue came last term in *Northeastern Florida Chapter of the Associated General Contractors v Jacksonville* (hereafter *Northeastern Contractors*).[13] The result and the reasoning in the case are in conspicuous tension with other Supreme Court precedents, most of them quite recent. And the Court's distinctive approach, offered in an intriguing setting, has the potential to allow the Court to sort out much of the law in this area, and also to move standing doctrine in some generally salutary directions. This is so especially in light of the fact that, as we will see, the *Northeastern Contractors* case exposes the fundamental flaw in *Data Processing*—the view that it is possible to identify injuries without looking at law. One of the important legacies of *Northeastern Contractors* will be the understanding that in characterizing injury, it is the law that counts. In deciding whether there is standing, what matters is what the law says. There can be no law-free inquiry into the subject of injury. This will be my principal claim here.

I. The Case

A. DESCRIPTION

In Jacksonville and Duval County, Florida, there is an association of construction contractors, operating under the name of Northeastern Florida Chapter of the Associated General Contractors (hereinafter AGC). In 1991 AGC challenged Jacksonville's Minority Business Enterprise program, which requires that 10% of total city contract funds be set aside for minority business enterprises. A minority business enterprise is defined as one that is owned at least 51% by a woman or a member of a minority group.

[11] *Linda RS v Richard D*, 410 US 614 (1973).

[12] Id.

[13] 113 S Ct 2297 (1993).

AGC's members are mostly non-minorities under the program. They regularly bid and perform construction work for the City of Jacksonville. They complained, however, that they had been excluded from bidding on the contracts that had been set aside for minority business enterprises. They contended that many of the non-minority members of AGC would have bid on those contracts if not for the set-aside program. Invoking section 1983,[14] which provides a cause of action for people deprived of federal rights by state law, they claimed that they had been denied equal protection of the laws.

The United States Court of Appeals for the Eleventh Circuit held that AGC lacked standing.[15] The key point was that its members had not alleged that they "would have bid more successfully on any one or more of these contracts if not for the ordinance."[16] They therefore could not show injury in fact. In the court's view, it was purely speculative to say that if the program were invalidated, AGC's members would be awarded any additional contracts. The plaintiff's action thus ran afoul of a number of Supreme Court decisions holding that there must be a concrete and definable injury to the plaintiff, one that was attributable to the defendant's conduct and likely to be remedied by a decree in the plaintiff's favor.[17]

The Supreme Court reversed.[18] The centerpiece of the Court's decision consisted of a description of the injury not as a failure to receive a contract, but instead as an inability to compete. This description of the injury stemmed from the Court's understanding of the Equal Protection Clause. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not alleged that he would have obtained the benefit but for the barrier

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[14] 42 USC § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[15] 896 F2d 1283 (1990).

[16] Id at 1219.

[17] For discussion of these cases, see Sunstein, *What's Standing After Lujan?* 91 Mich L Rev 163; text at notes 38–50 infra.

[18] 113 S Ct 2297 (1993).

in order to establish standing."[19] The injury in fact requirement was met by "the denial of equal treatment resulting from the imposition of the barrier."[20]

It was therefore sufficient for the plaintiffs to claim that they are ready and able to bid on contracts and that they were prevented from doing so as a result of the discriminatory policy. In so concluding, the most important precedent was the *Bakke* decision,[21] in which Allan Bakke was allowed to challenge an affirmative action program without showing that he would have been admitted without the program. And in an intriguing and seemingly offhand footnote, the Court added that because of this characterization of the injury, the redressability requirements were fully met.[22] By this the Court appeared to say that since the injury was the interference with the opportunity to compete, it was due to the defendant's conduct; and it also followed that any judicial decree in the plaintiffs' favor would remedy their injury.

The Court was aware that its decision was in some conflict with earlier outcomes, especially that in *Warth v Seldin*.[23] In the *Warth* case, the Court had denied standing to a construction association that was seeking to challenge an allegedly discriminatory zoning ordinance. In trying to come to terms with *Warth*, the Court made two points. First, the association in *Warth* did not contend that it could not *apply for* variances and permits on an equal basis; its complaint was that it could not *obtain* variances and permits. Second, there was no allegation in *Warth* that any members had actually applied for a permit or variance for a current project. Here, by contrast, actual applications were alleged.[24]

B. EVALUATION

It is not necessary to linger long over the question whether the Court's decision was correct. Section 1983 confers a cause of action on people whose federal rights have been violated by state law.

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[19] Id at 2303.

[20] Id.

[21] See *Regents of the University of California v Bakke*, 438 US 265, 281 n 14 (1978).

[22] Id at 2303 n 5.

[23] 422 US 490 (1975).

[24] There was also a question of mootness, on which two justices dissented, id at 2305 (O'Connor, joined by Blackmun); but that question is not relevant for my purposes here.

The Equal Protection Clause is concerned to ensure an opportunity to compete on an equal basis.[25] If blacks who want to attend professional schools in Arkansas are not permitted to attend such schools in Arkansas, they have been deprived of their rights.[26] It does not matter whether any particular person can show that he would have been admitted under a nondiscriminatory policy. So too for the plaintiffs in *Northeastern Contractors*.[27] The appropriate remedy is a decree invalidating the discrimination, not a requirement of admission or award of a contract. Whether these things follow will depend on what happens when the discriminatory barrier is removed.

The Court's conclusion that standing existed because of the nature of the interest protected by the Equal Protection Clause is by itself highly notable, and it has general implications for the law of standing. The *Northeastern Contractors* case could not possibly have been resolved if the Court looked at the issue of "injury" independently of law. In order even to identify the relevant injury, the Court had to look at the law, that is, the Equal Protection Clause. So much for the attempt in *Data Processing* to ensure that courts would inquire into "injury in fact" without investigating law. In cases in which the issue is how to characterize the injury—that is, in every case—an exploration of "facts" will not be enough. Something has to be said, at least implicitly, about law as well. In the easy cases, the injury seems obviously present, but this is not because law is irrelevant. It is because there is agreement on the legal background.[28]

In any case, what sense would it make to require the plaintiffs to prove that they would actually have been awarded the relevant

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[25] Of course this formulation does not imply a judgment about affirmative action; that question depends on what "equal protection" means, a question that is irrelevant here.

[26] The case may be different if there is absolutely no chance that the plaintiff could be admitted if he applied. But in almost all realistically imaginable cases, a prohibition on admission is enough. I do not discuss here the question whether someone must allege application for admission. Application may be discouraged by the discriminatory barrier—it would be futile—and in such a case a facial attack on the barrier would seem acceptable. This issue was not squarely presented in *Northeastern Contractors*, though the Court seemed to suggest an application would be required.

[27] This is so at least if we assume, as we must for purposes of the standing question, that their claim is correct on the merits.

[28] I cannot discuss some of the complexities underlying this claim. For general discussion, see Fletcher, *The Structure of Standing*, 98 Yale L J 221 (1988); Sunstein, *What's Standing After Lujan?* 91 Mich L Rev 163. See also text at notes 53–55 infra (discussing the ways in which any claim about consequences is in fact underlain by norms).

contracts? How would constitutional goals be served by such an odd requirement? It may be difficult or even impossible to reconstruct the facts sufficiently to assess the matter. Evaluation of what would have happened in a counterfactual world is often extremely difficult after the fact. Moreover, that assessment would seem to have no point. Because it would serve no ascertainable set of purposes, it would be a waste of judicial resources. Perhaps there would be some saving of judicial resources too, by avoiding the need to resolve disputes whose outcome may not result in an actual award of a contract to any party; but with respect to judicial resources, any gains seem likely to be small. In any event, no serious constitutional goal seems to require the plaintiff show that an actual contract would be awarded. At least this is what the Court in *Northeastern Contractors* seemed to assume. Some such assumption must be implicit in the Court's readiness to characterize the injury as involving an opportunity rather than a more discrete harm.

There is one possible line of response to this argument, suggested in the recent cases[29] though, surprisingly, not even discussed in *Northeastern Contractors*. Certainly courts ought to minimize the occasions for intervening with political processes; almost certainly this is especially so if we are dealing with a constitutional attack on state law. If the plaintiffs' interest is widely shared—and any "opportunity" is by definition likely to be widely shared—perhaps judges should refuse to interfere with the outcomes of electoral processes. And if the interest is as broad as the opportunity to compete, it is indeed going to be widely shared. On this view, the construction contractors in *Northeastern Contractors*—perhaps not incidentally, members of the white majority,[30] though this particular point need not be emphasized here—ought to have been forced to rely on the political process unless and until they could show that contracts would actually have been awarded to them. Without such a showing, all they had was a "generalized grievance," one that is best taken up before legislative bodies. Courts ought, in short, to require tangible, concrete harm, rather than injury to opportunities, as a way of minimizing the occasions for interfering

[29] *United States v Richardson*, 418 US 166 (1974); *Lujan v Defenders of Wildlife*, 112 S Ct 2130 (1992); *Allen v Wright*, 468 US 737 (1992).

[30] Compare J. H. Ely, *The Constitutionality of Reverse Discrimination*, 41 U Chi L Rev 723 (1974).

with political processes. It follows that the lower court in *Northeastern Contractors* was right after all.

In form, the Supreme Court has found this argument highly persuasive in other contexts.[31] In *Northeastern Contractors*, the Court should have addressed this underlying concern, especially in light of its prominence elsewhere in the law of standing. Here we find a significant gap in the Court's opinion.

The construction contractors burdened by the program were not, however, an electoral majority. While the possibility of political remedy may be relevant to an assessment of the merits of their claim,[32] it does not justify the view that the case should not be heard at all. The contractors are hardly in the same position as taxpayers or ordinary citizens; their injury, even if somewhat diffused, was not felt by all or most. In principle, the need to limit judicial interference with political processes is far too general to justify a restriction on standing when a discrete class of people has been precluded from competing with others on the basis of skin color. The dispute was hardly abstract or hypothetical. And if courts were to be made unavailable to the plaintiffs here, courts would be unavailable to a wide range of people making familiar constitutional or statutory claims. In the typical administrative law case,[33] for example, equally numerous plaintiffs are allowed to offer their claims; the same is true in many constitutional cases brought under (for example) the Equal Protection and Due Process Clauses.[34] A refusal to characterize the injury in terms of "opportunity"—if based on the numbers of people whose interests were at stake—would wreak havoc with too much established law. For all these reasons, the outcome in *Northeastern Contractors* is unexceptionable.

There is a further point. I have noted that in section 1983, Congress granted a cause of action to all those whose federal constitutional rights have been violated by state law.[35] In *Northeastern Contractors*, the plaintiffs alleged that the set-aside program violated

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[31] *Allen v Wright*, 468 US 737 (1984); *Lujan v Defenders of Wildlife*, 112 S Ct 2130 (1992).

[32] See Ely, *The Constitutionality of Affirmative Action*, supra note 30.

[33] See, e.g., *Industrial Union v API*, 448 US 607 (1980); *NRDC v EPA*, 824 F2d 1146 (DC Cir 1987); *MVMA v State Farm*, 463 US 29 (1983).

[34] See, e.g., *Brown v Bd of Educ*, 349 US 294 (1955); *Griswold v Connecticut*, 381 US 479 (1965).

[35] See note 14 supra.

their rights under the Equal Protection Clause. The existence of a congressionally conferred cause of action should have been sufficient to establish standing. The Supreme Court neglected to emphasize this point—the creation of a cause of action for people whose federal rights have been violated—and here we have another major gap in the opinion. The Court did not refer to the particular source of federal law that conferred a right to bring suit on the plaintiffs. But if we attend to section 1983, the case seems relatively simple.

One final issue. In many cases since *Data Processing*, the Court has been faced with the implicit issue of how to characterize injuries in standing cases.[36] Often the question is whether to characterize an injury in terms that are familiar to the common law. At common law, a discrete wrongdoer typically imposes a discrete wrong on a discrete person at an easily identifiable time. This is the basic form of the common law allegation, and it can easily be transplanted to the administrative law setting, where we might ask whether the same framework is at work. In public law cases, however, it is possible that the common law understanding should be rejected, on the theory that it is poorly adapted to the goals and functions of the modern state. The alternative is to characterize an injury as involving (for example) an increased probability of harm, an injury to an opportunity, or a failure to have potential wrongdoers face the kinds of incentives that Congress (or the Constitution) seeks to impose on them. In many cases the Court has opted for the common law characterization, and thus denied standing, when the public law alternative was fully available. Strikingly, in *Northeastern Contractors* the Court seemed to think that a common law–like understanding, one that speaks in terms of discrete harms to discrete people, would make no sense; the Equal Protection Clause protects the opportunity to compete, not the award of contracts. We need not quarrel with this result in order to insist that the Court ought to have explained how this characterization of the injury fits, or fails to fit, with other cases. And it is here that the case leaves a conspicuous gap not only in logic but also for the future.

[36] See text at notes 38–50 infra.

II. Precedents and Puzzles

From what has been said thus far, it seems clear that *Northeastern Contractors* does not coexist easily with recent cases and trends in the area of standing. For this reason the case, though seemingly minor and technical, raises a host of complex and novel issues. It will be useful to begin by showing how the same analytic strategy used in *Northeastern Contractors* might have been used in a wide range of cases in which standing was denied. That strategy consists of recharacterizing the injury so as to ensure simultaneous compliance with the requirements of injury in fact and redressability.[37]

Consider, for example, *Linda RS v Richard D.*[38] It will be recalled that the case involved a complaint that the local prosecutor had failed to prosecute fathers of illegitimate children for failure to provide child support. The plaintiff claimed that the discriminatory prosecution policy was in violation of the Equal Protection Clause. The Court denied standing. On the Court's analysis, the problem for purposes of standing was that the plaintiff could not show that her injury would be redressed by a decree in her favor. Perhaps the father would simply go to prison. Structurally, this approach is the same as that of the Court of Appeals in *Northeastern Contractors*. The failure of redressability stemmed from the narrow characterization of the injury, just as the broad characterization of the injury in *Northeastern Contractors* eliminated any problem with redressability.

But it would have been equally plausible to say that the injury suffered in *Linda RS* involved not the absence of child support, but the opportunity to ensure that payments by the child's father were subject to the same incentives as everyone else similarly situated. *That* was the violation of the equality principle, and with respect to *that* violation, there was no problem with either injury or redressability—just as in *Northeastern Contractors*. Imagine, for example, if a local prosecutor initiated proceedings against white fathers

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[37] There are really two such requirements: the injury must be due to the defendant's conduct, and the injury must be likely to be remedied by a decree in the plaintiff's favor. In most cases, these will lead to the same result. See *Allen v Wright*, 468 US 737 (1984).

[38] 410 US 614 (1973).

for child support, but not against black fathers. Suppose that in such circumstances a mother of a child whose father is black complains that the discrimination has made it impossible for her to support her child. Would there be any problem with standing? Certainly there should not be,[39] and *Northeastern Contractors* is a powerful precedent in her favor. The injury consists not of the absence of child support, but of the fact that her opportunity to receive child support is not subject to the same incentives as that of others similarly situated.

The only difference between *Linda RS* and *Northeastern Contractors* is that the former involved an action against a criminal prosecutor to enforce the law. It therefore raised the arguably distinctive considerations involved in a proceeding by a private party against the government to require it to proceed against another private party. In *Lujan v Defenders of Wildlife*,[40] the Supreme Court brought out this point, which had been largely implicit in several other cases.[41] In *Lujan*, the Court said that a case in which a plaintiff sought enforcement action was the weakest case for standing. In the Court's view, the injury in such cases is especially likely to be speculative. As we have seen, however, whether the injury is speculative cannot be decided in the abstract; *everything depends on how the injury is described.*[42] On that particular question, there is no difference between an ordinary action and one brought against the government for unlawful enforcement activity. On that particular question, it is utterly irrelevant whether the government is being asked to initiate proceedings. If the injury is characterized broadly, as it was in *Northeastern Contractors*, this difference should not make a difference. Certainly there is no Article II problem with a suit against a state or local prosecutor for unlawful discrimination.[43]

Perhaps Article II concerns should bear on standing in cases in which the federal executive is the defendant. But any such concerns should be analytically separate. They should not be folded into the inquiry whether the injury is "speculative." The merger of these two questions—both complex enough—is a recipe for confusion.

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[39] See *Heckler v Mathews*, 465 US 728 (1986).

[40] 112 S Ct 2130 (1992).

[41] See, e.g., *Allen v Wright*, 468 US 737 (1984).

[42] See text at notes 22, 38–39 supra.

[43] See also Sunstein, *Article II Revisionism*, 92 Mich L Rev 131 (1993).

I conclude, then, that on the issue of injury, the strategy used in *Northeastern Contractors* could equally well have been used in *Linda RS*, so as to allow standing to be granted.

So much for *Linda RS*. Turn now to the key cases involving the redressability requirement, both arising under the tax code. In *Simon v Eastern Kentucky Welfare Rights Org.*,[44] the Supreme Court denied standing to indigent plaintiffs challenging a change in regulations implementing the Internal Revenue Code. The plaintiffs alleged that they had sought and been denied services at hospital emergency rooms. They contended (what was not controverted) that the new regulations decreased the incentives of hospitals to provide medical care to the indigent. According to the Court, the plaintiffs should be denied standing because they could not show that the change in policy was responsible for the particular denial of services of which they complained. In other words, they could not show injury, for they could not establish that if the previous policy had been in place, they would have received free services. For all we know, the denial of services might have taken place in any event. (Notice the structural similarity to the Court of Appeals ruling in *Northeastern Contractors*.)

But in *Eastern Kentucky Welfare Rights Org.*, the Court could have characterized the relevant injury quite differently. It could have said that the injury involved the interest in ensuring that hospitals are subject to the incentives that Congress sought to introduce through the relevant provision of the Internal Revenue Code. The plaintiffs could have complained that their "injury" involved the opportunity to receive medical services on the conditions and with the incentives for which the statute provided. Perhaps this seems odd;[45] but why would such a conception of the injury be any less appropriate than the parallel conception in *Northeastern Contractors?* The Court itself has offered no answer.

The second tax case is *Allen v Wright*.[46] In that case, parents of schoolchildren attending schools undergoing a process of desegregation complained about an IRS policy granting tax deductions to people who send their children to all-white private schools. Ac-

[44] 426 US 26 (1976).

[45] If it does, it is, I think, because of the persistence of common law thinking about injuries. See below.

[46] 468 US 737 (1984).

cording to the plaintiffs, the deductions were unlawful, and their existence jeopardized the desegregation process by encouraging "white flight." The Supreme Court denied standing. According to the Court, the parents could not show that their particular children would be affected in any way by a change in IRS policy.

As a factual claim, the Court's point seems quite reasonable; it is hardly clear that such a change would affect any particular child. But suppose that the plaintiffs had urged, not that any particular child would be affected in any particular way, but that each child had been injured in a legally cognizable fashion by the IRS's failure to ensure that the process of desegregation was not adversely affected by the grant of unlawful tax deductions. The plaintiffs might have described their injury as involving the opportunity to have a desegregation process unaffected by unlawful incentives for white flight. Here as well—the now-familiar punchline—the strategy used in *Northeastern Contractors* could easily have been used to authorize standing.

As a further example, consider *Lujan v Defenders of Wildlife*.[47] There the plaintiffs were people interested in the preservation of endangered species and planning to go abroad to see certain species at some unspecified future date. The plaintiffs complained about the relevant agency's failure to apply the Endangered Species Act extraterritorially, a failure that, in their view, injured their future prospects as professionals and tourists. The Supreme Court held that the plaintiffs lacked standing, since they could not show an injury. Their "abstract" interest in protecting and even in seeing members of the relevant species was not enough. If, on the other hand, the plaintiffs had acquired a plane ticket to places in which the endangered species were imminently at risk, there would indeed be a concrete harm.[48] Otherwise, no injury was at stake; any harm was speculative or merely ideological.

Suppose, however, that following the approach in *Northeastern Contractors*, the plaintiffs described their injury not as an inability to see a particular species at a particular time, but instead as a harm to their opportunity to see certain endangered species. Why

[47] 112 S Ct 2130 (1992).

[48] On this point see *Japanese Whaling Ass'n v ACS*, 478 US 221 (1986) (allowing standing to prospective whale watchers); *Animal Protection Inst. v Mosbacher*, 799 F Supp 173 (DDC 1992) (same, and characterizing injury as involving an opportunity).

would this description be illegitimate? Why would it be constitutionally inadequate? Is the plane ticket in *Lujan* the equivalent of formal bids in *Northeastern Contractors?* If so, why should we accept the conception of the injury entailed by these requirements?

Consider, finally, the most conventional of cases under the Administrative Procedure Act.[49] A company regulated by the EPA complains of agency noncompliance with the procedural requirements of the APA. Is there a hard standing issue if it is doubtful whether the agency would do anything different if the right procedures were followed? Surely not. The legally cognizable injury stems from the agency's failure to follow procedures that Congress has specified. It does not matter if an agency, having followed those procedures, nonetheless fails to do what the company wishes. The injury consists of the increased likelihood of harm, stemming from the failure to comply with procedural requirements.[50]

Northeastern Contractors shows, in short, that there is a large degree of manipulability in the characterization of the injury in standing cases. In nearly every case in which the Supreme Court has denied standing, it would have been possible to describe the injury in such a way as to meet all applicable requirements. It follows that *Northeastern Contractors* poses a large question of how to characterize the relevant injury. And on this question—the critical one for the future—the Supreme Court has offered no guidance.

III. A Proposal

A. POSITIVE LAW—AND THE DEMISE OF DATA PROCESSING

I suggest that when courts are deciding how to characterize injuries, the starting point is positive law. The key question—certainly the initial one—involves constitutional or congressional instructions. It follows that the question of standing is the same as the question whether the plaintiff has a cause of action.[51] The major

[49] 5 USC §§ 551 et seq.

[50] Compare the discussion of procedural injuries in *Lujan*, which seems to support this view: "This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." 112 S Ct at 2130, 2142.

[51] To the same effect see Fletcher, supra note 28; Currie, *Misunderstanding Standing*, 1981 Supreme Court Review 41.

mistake in the last generation, made in Justice Douglas's opinion in *Data Processing*, was to split these questions apart. Always the issue is: Has the law entitled someone to bring suit? Courts should look to the underlying provision of law in order to identify the injury that it is designed to prevent. *Northeastern Contractors* was easy because it was clear that the constitutional provision protects the opportunity to compete on an equal basis, not merely the loss of a particular contract. *EKWRO* and *Allen* were much harder because in those settings, it is much harder to discern congressional instructions on how to characterize the injury.

This general approach suggests that it is quite hopeless to try to decide whether there is an "injury" apart from positive law. If courts must characterize injuries by looking at positive law—and where else might they look in order to do this?—it is necessary to reject the effort of the Court in *Data Processing* to abandon the "legal interest" test in favor of "injury in fact." As we have seen, the divorce of these questions was brought about explicitly and self-consciously by Justice Douglas in the (now-infamous[52]) *Data Processing* case. It is hopeless to divorce the two questions because we cannot know whether there is an injury without knowing what the law is. Before the enactment of the civil rights act in 1964, for example, a victim of racial discrimination lacked "injury"; there was no harm for courts to redress; any harm was purely ideological and no basis for a lawsuit. After enactment of the statute, the question of standing became trivially easy. Of course the injury requirement was met.[53]

To be sure, it is sometimes transparently clear that there is an injury—as, for example, when someone loses $10,000 or is put in jail. But even in such easy cases, an understanding of law does some important conceptual work. We see the loss of money or liberty as "injury" partly because our legal (not to mention social) tradition makes such matters clear. I do not deny that in some cases we can identify injuries as such without knowing much about the law. But as participants in the legal culture, even the easy cases are connected with shared understandings about the legal background; and when the cases become hard, an assessment of

[52] See Fletcher, supra note 28 (collecting authorities critical of *Data Processing*).

[53] See *Havens Realty Corp. v Coleman*, 455 US 363 (1982); *Trafficante v Metropolitan Life Ins. Co.*, 409 US 205 (1972).

law is indispensable to an assessment of whether, for legal purposes, there is harm.

There is a close relationship between this general point and the much broader claim that any social assessment of "consequences" is in fact mediated by social norms identifying which "consequences" matter, and helping us to decide how to characterize them.[54] People who purport to be pure consequentialists—in philosophy or law—may well be relying on a background normative theory, itself not purely consequential in character, that helps us see what counts at all, and exactly how those things that do count ought to be assessed in social decisions. Consequential approaches, in short, are rarely or perhaps never simply consequential. It is only in this way that we can understand, for example, the (probably correct) view that offense is not a legally cognizable harm under the Federal Communications Act, or for that matter under the Clean Air Act.

If injuries are a product of law, it follows that at least within broad limits (and perhaps across the board), it is for Congress to decide whether people are entitled to bring suit.[55] It also follows that the appropriate characterization of the injury should be based on an understanding of positive law. Especially intriguingly, *Northeastern Contractors* itself paves the way toward a repudiation of *Data Processing*, and explicitly so. In deciding on the relevant injury, the Court actually reasoned about the nature of the "legal interest" at stake under the Equal Protection Clause. We can therefore see *Northeastern Contractors* as at least a partial endorsement of the view that "legal interest," rather than "injury in fact," is the key issue in standing cases.

B. STATUTORY SILENCE

Positive law is a start; but it is only that. Frequently Congress does not attend with anything like particularity to the issue of standing; frequently it is not easy to make inferences from statutory text, structure, and history. Frequently the characterization of the injury will be far from simple. To be sure, the statutory structure and history might help. In *EKWRO* and *Allen*, for example, the Court might have been responding to the general idea that one

[54] See generally Elizabeth Anderson, *Value in Ethics and Economics* (1993).

[55] *Lujan v Defenders of Wildlife*, 112 S Ct 2130 (1992), imposes a limit on this understanding. Of course the Constitution might sometimes create causes of action and hence standing.

person ought not to be allowed to litigate the tax liability of another.[56] If this idea is in fact attributable to Congress' ordinary goals and understandings, both cases might be right—not because of absence of injury, but because this outcome is the best understanding of the governing statutes. On this view, Congress did not say how the injury should be characterized, but Congress could be taken to have expressed a judgment about standing. That judgment excludes third-party actions in tax cases.

In other settings, however, there is no plausible congressional judgment with which to work. In such settings, the characterization of the injury will be a product of what we might call background understandings on the part of the judiciary, rather than of anything realistically attributable to Congress. Two alternative approaches seem to be plausible candidates for judicial adoption.[57]

The first, a common law model of standing, favors narrow characterization of injury. This is so for two reasons: (1) any large group of citizens should presumptively be required to use the political process rather than the courts, and (2) there are special problems, constitutional in origin, whenever citizens attempt to require the executive to undertake enforcement action on their behalf. The second candidate, a public law model of standing, favors broad characterization of the injury. It does so principally on the theory that broad characterization is most likely to fit with congressional goals and expectations.[58]

Of course broad-gauged models of these kinds cannot substitute for close engagement with particular statutes and facts. We cannot come up with a simple approach to unite the appropriate characterization of injuries in cases involving consumers, radio listeners, victims of discrimination, environmentalists, purchasers of securities, and many more. Any real case will require knowledge of the particular legal claim, and for these purposes abstractions provide at best broad orientation. But these alternative positions do seem

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[56] See *EKWRO*, supra note 4, at 46 (Stewart concurring).

[57] The general standing provision is 5 USC 702, see note 3 supra, and it is of course binding. The problem is that it is uninformative on the question at hand. If it is taken to require an "injury in fact," the question remains how any alleged injury is to be characterized. If it is to be taken to require a legal interest (as I think that it should), the question remains how to decide whether one exists. The APA provision therefore leaves a number of uncertainties.

[58] Related issues are discussed in more detail in Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum L Rev 1432 (1988).

to be the most important and most general candidates; ideas that draw on these positions are usually implicit in the cases. I devote the rest of this essay to a brief discussion of their merits.

1. *The common law model.* On one view, it is especially important to begin with a distinction between the objects of regulation (people subjected to governmental controls) and the beneficiaries of regulation[59] (people for whom statutes are enacted, like consumers, listeners to the radio, victims of discrimination, and so forth). Of course the objects of regulation have standing. Their common law interests are at stake, and the Due Process Clause may well protect their right to judicial review of interferences with those interests.[60] In any case, no one denies that the objects of regulation are entitled to standing. But perhaps courts should be reluctant to grant standing to beneficiaries of regulatory programs, at least when they are very numerous, and at least when they seek to require enforcement action of a certain kind or degree. We might think that the cases involving appropriate characterization of injuries, and especially those denying standing to regulatory beneficiaries, ought to be seen with these facts foremost in mind. Thus seen, the cases do not really turn on "injury"—that term is a smokescreen for the real concern—but instead on a particular understanding of the constitutional backdrop. That understanding calls for judicial caution when numerous beneficiaries ask the government to initiate enforcement proceedings.

This idea might be justified on various grounds. Perhaps numerous beneficiaries ought to be relegated to their political remedies. Perhaps an agency that (for example) fails to apply the Endangered Species Act extraterritorially, or to prepare an environmental impact statement before going forward with NAFTA, ought to be forced to defend itself before the public and in democratic arenas,

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[59] A qualification is necessary here: The distinction between regulated objects and regulatory beneficiaries depends on some controversial assumptions. These include the decision to take the common law system as the ordinary or natural state of affairs, and to see departures from that system as regulatory impositions into an otherwise prepolitical status quo. See Sunstein, supra note 3, at 196–97. I stay with conventional usage here, but for ease of exposition, not because of acceptance of what underlies that usage. Note also that the "beneficiaries" of regulation could plausibly be (*a*) narrow interest groups of various kinds, including companies exempted from statutory requirements, or (*b*) people who are actually the "objects" of regulation, that is, people who can be imposed upon only because of what the law says. On the latter point, see Jeremy Waldron, *Homelessness and the Problem of Freedom*, 39 UCLA L Rev 295 (1991).

[60] See *Yakus v US*, 321 US 414 (1944).

rather than in court. This is a complex issue on which political deliberation ought to be strongly favored over adjudication. Of course courts should be available if there is a sharply focused injury, of the sort familiar to the common law; but if no such injury is at stake, standing should be denied.

There are, moreover, good reasons to be concerned about private conscription of public resources—a problem that is uniquely at issue in cases brought by regulatory beneficiaries. (When a company stops the government from regulating something, no such conscription is at work.) If beneficiaries are bringing suit against an agency on the ground that it has not enforced the law with sufficient intensity, perhaps there is a risk that some well-organized groups will be able to obtain enforcement resources at the expense of others. The problem is especially serious in light of the fact that an agency always has before it a wide range of possible claims to scarce enforcement resources. A suit brought by group X may make it harder for various social benefits—including law enforcement—to be granted to group Y. Environmental enforcement activity in Ohio may compromise efforts in New York; redress of discrimination in California may impair enforcement efforts in Illinois. This problem will rarely be visible to a court, which has only the particular problem before it. Considerations of this sort led the Supreme Court to conclude that agency inaction, unlike agency action, should be presumed unreviewable.[61]

Such considerations have special strength in the context of regulatory programs that must be coordinated with each other and over time. Typically an agency is charged with implementation of a variety of different statutes, and it has the large responsibility of bringing about a coherent overall scheme. Typically it must fit together provisions that were enacted at different periods and that must be implemented in a temporally rational manner. An agency is in an especially good position to decide which problems need to be addressed, and when. A court is most unlikely to have a sufficient overview to examine such issues.[62] This idea fortifies the view that courts ought to presume that Congress did not grant standing to beneficiaries alleging only an "opportunity-type" harm. At least in general, something more concrete must be claimed. It follows

[61] *Heckler v Chaney*, 470 US 821, 832 (1985).

[62] See the discussion of coordination in Breyer, *Closing the Vicious Circle* (1993).

that discrete harms—of the sort demanded in *EKWRO* and *Allen*—must be shown in the typical administrative law case.

On the approach I am suggesting, ideas of this sort would not have constitutional status. Congress could override the presumption against standing for "opportunity-type" harms by a clear statement. When it has done so, standing should be available for regulatory beneficiaries, however numerous, and however much courts will be overseeing (for legality) enforcement action. This is one way to understand things in the area of environmental law, where beneficiary suits are plentiful, and where Congress has firmly endorsed them.[63] The common law model of standing would serve only to provide the background understandings against which to understand congressional silence. It would disallow suits by especially numerous beneficiaries unless Congress has said otherwise. Narrow characterization of the injury would really be a proxy for the relevant background understandings. In deciding standing cases, we would really be talking not of "injury in fact," but of the appropriate allocation of authority among Congress, courts, and agencies.

This approach has the advantage of synthesizing a good deal of current law. It helps reconcile *Northeastern Contractors* with the cases that preceded it, most notably *Allen v Wright* and *Lujan*. It explains why the strategy in *Northeastern Contractors*—broad characterization of the injury—would not make sense when regulatory beneficiaries are seeking to compel enforcement action. The capacity for rationalization itself counts as a strong argument in favor of this approach.

2. *The public law model.* A competing view would stress two points. First, the common law model is untrue to the best understanding of Congress' goals and expectations. Second, the relevant constitutional concerns are without force. Suits by regulatory beneficiaries produce no constitutional difficulties.

The initial point here is that regulatory statutes are rooted in ideas quite foreign to the common law. Typically they are enacted not to prevent discrete harms by discrete actors, but to restructure incentives or to ensure against what we might describe as probable or systemic harms. When Congress requires an environmental impact statement, for example, it is trying to restructure incentives

[63] See, e.g., 30 USC 1270; 42 USC 6305; 42 USC 7604.

by ensuring consideration of environmental effects, not to prevent identifiable harms to identifiable people. When Congress says that schools receiving federal funds may not discriminate on the basis of sex, it is creating an incentive for sex equality, rather than imposing particular results on particular schools with respect to particular students. When Congress imposes national occupational safety standards, it is trying to reduce systemic risks, not to eliminate particular incidences of cancer. When Congress requires motor vehicles to reduce levels of air pollution, it is not attempting to cure identifiable respiratory problems, but to produce air quality that produces lower aggregate risks.

This is the characteristic form of modern regulatory statutes. Risk management, rather than redress of grievances, is a conventional goal.[64] In many ways, this difference signals a fundamental departure from the more narrow right-duty relations characteristic of the common law. In the face of that departure, courts ought to be closely attuned to what Congress has done. The consequence—a public law model of standing—would be to allow standing to people complaining of opportunity-like harms, at least where Congress has not provided otherwise. Hence it should be presumed that listeners to radio, breathers of air in identifiable regions, victims of discrimination, and others should be allowed to bring suit to prevent the sorts of injuries that the regulatory scheme was designed to prevent. This understanding would be designed to ensure that agencies adhere to the will of Congress, and its conception of "injury" would track the best understanding to be attributed to the national legislature in light of its general goals and expectations.

Other considerations support this basic approach. The distinction between regulated objects and regulatory beneficiaries rests on shaky conceptual foundations.[65] The purported objects of regulation might well be counted as beneficiaries insofar as law—statutory and common—confers on them a wide range of rights that are advantageous to their interests. The so-called beneficiaries of regulation might well be regarded as objects insofar as it is

[64] Of course, risk management was a goal of the common law too; see Richard Posner, *Economic Analysis of Law* (4th ed 1992). But the common law judges lacked the tools to engage in the kinds of structural reform sought by modern regulatory agencies.

[65] See note 59 infra.

law—statutory and common—that allows people to intrude on interests that they would prefer to protect. As it operates in the cases, the distinction between beneficiaries and objects tends to take the common law as the normal or desirable state of affairs, and this judgment, however plausible it might be as a matter of theory, ought not to be made by courts in the face of conspicuously contrary views from Congress. This idea would be an effort to ensure that modern standing law is consistent with the post–New Deal shift in national legislation.[66]

Moreover, it is plausible to think that beneficiaries of regulatory programs are at least sometimes at a comparative disadvantage in the implementation process.[67] Often they are too poorly organized to exert continuing influence. Often they face large transactions cost barriers to exerting such influence; this is so even though "public interest" organizations can sometimes help overcome organizational problems. Often statutes enacted by Congress are defeated by a process of inadequate implementation, which can be the result of political pressure by regulated industries, pressure that is not adequately countered by those who seek vigorous implementation. Whether or not transactions cost barriers are severe, there is no reason to believe that regulated industries are at a universal or systematic disadvantage compared to regulatory beneficiaries. And if this is right, an asymmetry in the law of standing—of the sort that lies at the heart of the common law model—could be perverse from Congress' own standpoint. Such an asymmetry would immunize insufficient enforcement action from legal scrutiny, while at the same time subjecting aggressive enforcement action to judicial review.[68] This result is hardly likely to fit with Congress' goals in enacting regulatory statutes.

Nor is it entirely persuasive to say that the beneficiaries should be required to resort to political remedies. The beneficiaries will be able to win in court only if they can invoke a statute that entitles them to victory. This means that they can succeed only if they

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[66] See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv L Rev 421 (1987).

[67] See, e.g., *The Politics of Regulation* (James Q. Wilson ed, 1980); James Q. Wilson, *Bureaucracy* (1990). There is a complex set of influences here. See Kaye Schlozman and James Tierney, *Organized Interests and American Democracy* (1986).

[68] To say all this is hardly to argue that beneficiary suits are an important corrective to pathologies in the regulatory state. Those pathologies lie much deeper. See Stephen Breyer, supra note 62; Cass R. Sunstein, *After the Rights Revolution* (1990).

have—in the important sense—already won in the political process. To this extent, judicial review helps to fortify democratic processes by testing agency decisions against congressional instructions, which are the ultimate source of agency authority.

Perhaps these ideas do not apply when the Constitution is the source of the plaintiffs' claims. In such cases, perhaps courts should demonstrate the "passive virtues"[69] and allow the political process to deliberate as long as possible. It seems right to insist that courts will be cautious about allowing plaintiffs to obtain a constitutional ruling on legislative or executive action. For this reason, it is reasonable to say that courts should not readily assume that the Constitution creates private rights of action. Moreover, courts should generally require a discrete harm to a discrete interest before hearing a case based solely on the Constitution, without a statute creating a cause of action.[70] But statutory cases present a different issue. The argument for judicial refusal to hear the plaintiffs' claim is far weaker when plaintiffs are complaining not that the Constitution forbids legislative action, but that a democratically enacted statute requires a regulatory agency to take action of a particular kind. In a case of that sort, considerations of democracy point toward rather than against access to court. There is no special need to insulate administrative or bureaucratic deliberation from an attack based on a statute where an interest protected by that statute is at stake. In any event, the regulated entities are, by hypothesis, entitled to judicial relief; they need not resort to the political process. Here too it is important to avoid building an asymmetry into the law of standing.[71] None of this means that plaintiffs need not show an interest at all. But it does mean that in deciding whether a legal interest is at stake, the constitutional considerations do not counsel against granting standing to people who invoke "opportunity-type" harms.

The same considerations suggest the difficulty of invoking Arti-

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[69] Alexander Bickel, *The Least Dangerous Branch* (1965).

[70] Compare *United States v Richardson*, 408 US 166 (1974), and *Valley Forge Christian College v Americans United for the Separation of Church and State*, 454 US 464 (1982), with *Bivins v Six Unknown Named Agents*, 418 US 166 (1974), and *Flast v Cohen*, 392 US 83 (1968).

[71] There are lurking questions here on the appropriate place of "protection by government" in the constitutional background. I cannot discuss those questions here. For relevant discussion, see Heymann, 41 Duke L J 507 (1991); Strauss, *Due Process, Inaction, and Private Wrongs*, 1989 Supreme Court Review 53. The New Deal of course bears on these issues. See Sunstein, *Constitutionalism After the New Deal*, 101 Harv L Rev 421.

cle II as a basis for denying standing to beneficiaries.[72] Article II says that the President shall "take Care that the laws be faithfully executed." Its basic purpose is to require executive implementation of enacted law. To be sure, it forbids judicial execution of the laws. But it does not forbid courts from saying that a regulatory agency has failed to execute the laws, as it is constitutionally required to do. Of course there would be a problem if courts were to require agencies to enforce the law as courts wished, or without legal requirements to this effect. But nothing of this kind is at risk in the cases at hand. Article II obliges the President to implement the law. Suits by beneficiaries of regulatory statutes, complaining of executive default on that fundamental obligation, do not undermine the allocation of power set up by Article II. At least this is so if a genuine legal claim is at stake, and if recognition of a cause of action is the best reading of legislative instructions.

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I think that these considerations would justify several conclusions. First, *Warth* itself may well have been rightly decided. Because the plaintiffs' claim was constitutional in nature, it was probably right for the Court to require more particular allegations before assessing that claim. In any case, there are important differences between constitutional and statutory claims for purposes of standing. Second, *Allen* and *EKWRO* were wrong as "pure" standing cases. *Northeastern Contractors* shows that the relevant injuries could well have been described in terms that would satisfy all applicable requirements. The strongest argument on behalf of the outcomes in these cases would rest on the peculiarities of judicial assessment of the liability of one taxpayer in a case brought by another. Perhaps Congress did not want to allow this result, and in that event, both cases were right—not as a reading of "injury," but as a reading of the key issue, congressional instructions. Third, *Northeastern Contractors* ought to stand for the general proposition that when Congress has been silent, plaintiffs should be permitted to characterize their injuries as involving increased risks or harms to opportunities. It follows that in all of the cases with which I began this essay, a creative plaintiff ought to be allowed to formu-

[72] See Sunstein, supra note 17, for a more detailed discussion.

late the relevant injury in such a way as to allow for a grant of standing.[73] It also follows that the public law model can be made to fit well with most of current law, seeing *EKWRO* and *Allen v Wright* as tax cases; emphasizing the difference between constitutional and statutory cases; and seeing *Lujan* as a narrow ruling, requiring a more definite plan on the part of the plaintiffs, rather like the equivalent of a bid in *Northeastern Contractors*.

If the public law model is to be resisted, it is because courts should adopt a clear statement principle, one that opposes standing at the behest of large numbers of regulatory beneficiaries seeking to require the executive to enforce the law. This principle would require an explicit congressional statement, on the basis of background concerns that are constitutional in nature, that seek politics first and adjudication last, and that insist on the need for presidential control over the enforcement process. I do not believe that this principle should be adopted, but it is certainly intelligible. Like its apparent adversary—the public law model of standing—this approach would have the large benefit of fitting *Northeastern Contractors* together with a set of cases with which it does not now easily coexist. In other words, both of the approaches that I have discussed here would serve to synthesize *Northeastern Contractors* with the complex body of law that preceded it.

Conclusion

Northeastern Contractors is the Court's first sustained encounter with a key issue in the new law of standing: the appropriate characterization of injuries. The Court's conclusion is unobjectionable, and there is nothing terribly wrong with the particular reasoning that underlay that conclusion. Section 1983 grants a cause of action to all those whose federal rights have been invaded by state law. The contractors in *Northeastern Contractors* complained that the set-aside program violated their constitutional rights. The Equal Protection Clause safeguards not particular outcomes, but general opportunities; and if the plaintiffs were correct on the merits, their legal rights had been violated.

The basic problem with *Northeastern Contractors* is conceptual,

[73] For some qualifications, see Sunstein, *Standing and the Privatization of Public Law*, supra note 58, at 1467–69.

and though it does not bear on the result in the case, that problem goes very deep. The case exposes, more clearly than any previous case, a fundamental problem in the modern law of standing—the assumption, key to *Data Processing*, that "injuries" can be identified without reference to positive law. This assumption is false. Whether there is an injury depends at least in significant part on what the law says. The Court's reasoning and result in *Northeastern Contractors* confirm the point; it would have been impossible to decide the case without reference to the meaning of the Equal Protection Clause. The case thus inaugurates a healthy return[74] to the view, vindicated by constitutional history[75] and by the Administrative Procedure Act, that the question of standing is the question whether some source of law has conferred a cause of action on the plaintiff.

Although a trend in this direction would be salutary, the Court has a large task of sorting out the relations among its previous decisions, nearly all of which ignore the issue of how to characterize injuries for purposes of standing. *Northeastern Contractors* fits poorly with the many cases in which the Court assumed or asserted a narrow characterization of the relevant injury. In all of those cases, the Court might easily have done what it did in *Northeastern Contractors*. It now remains to decide how the question of characterization is to be resolved.

I have suggested here that the answer lies in positive law; it depends on congressional (or constitutional) instructions. Recognition of this point would itself be a significant advance insofar as it would maintain fidelity with both the Administrative Procedure Act and relevant constitutional provisions. But often congressional instructions are unclear, and they must be constructed on the basis of an understanding of the legislative and constitutional background. In the modern regulatory state, statutes are typically designed to restructure incentives, to diminish risks, or to protect opportunities, rather than to guarantee particular results to particular people. If this is correct, a broad characterization of the injury is generally appropriate in administrative law cases. Hence the strategy used in *Northeastern Contractors*—recharacterization of the

[74] See also the discussion of the "zone" test, note 2 supra.

[75] See Sunstein, supra note 17, for details.

injury so as to ensure compliance with all standing requirements—ought to be broadly generalizable.

An alternative view would suggest that in light of the Article II background, and the need for judicial caution in overseeing enforcement programs, standing ought to be denied unless (*a*) Congress has expressly granted standing or (*b*) a common law–like harm, one that can be described in discrete, individualized terms, is at stake. This view would have the advantage of explaining both *Northeastern Contractors* and a number of cases that deny standing on apparently similar facts. And although I have urged that this alternative is ultimately unsound, there is much to be said in its favor, for it would also have the virtue of helping to correct the fundamental flaw of *Data Processing*, and of reestablishing that it is both desirable and inevitable for courts to focus on legislative instructions, rather than to pretend to assess standing issues on the basis of "injury in fact" alone.