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COMMENT

Standing to Sue: A Commentary on Injury in Fact

Robert Dugan*

THE FEDERAL LAW of standing to contest actions by administrative agencies has been the beneficiary of four recent Supreme Court decisions, which in turn have served as precedent for a spate of appellate opinions. These decisions display the courts' growing

* THE AUTHOR: ROBERT DUGAN (B.A., M.A., Stanford University; J.D., M.C.L., University of Chicago) is an Assistant Professor of Law at the University of Alabama.


2 Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970) (tenants have standing to request injunction restraining FHA approval of rent increase for federally subsidized low income housing); Tucker v. Hardin, 430 F.2d 737 (1st Cir. 1970) (welfare organization and eligible recipients have standing to attack Secretary of Agriculture's rule requiring communities to pay local distribution costs as a prerequisite to receipt of surplus commodities); National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970) (welfare recipients and their organization have standing to intervene in hearings designed to determine whether state welfare programs conformed to federal standards); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (conservation groups have standing to attack Secretary of Agriculture's failure to take action upon their petition to cancel the registration of DDT); Environmental Defense Fund, Inc. v. United States Dep't of Health, Educ. & Welfare, 428 F.2d 1083 (D.C. Cir. 1970) (conservation group, agriculture worker, and five would-be breast-feeding mothers have standing to challenge HEW Secretary's refusal to publish a proposal to forbid further use of DDT on raw agricultural commodities); North City Area-Wide Council, Inc. v. Romney, 428 F.2d 754 (3d Cir. 1970) (citizens group has standing to enjoin implementation of a Model Cities Program until the program provides for sufficient citizen participation); Peoples v. United States Dep't of Agriculture, 427 F.2d 561 (D.C. Cir. 1970) (group of poor people have standing to protest the administration of the food stamp program); Whitley v. Wilson City Bd. of Educ., 427 F.2d 179 (4th Cir. 1970) (parents of white children in previously all black school have standing to attack school board's assignment policy on grounds that their children are bearing a disproportionate part of the community obligation to comply with desegregation laws); Harry H. Price & Sons, Inc. v. Hardin, 425 F.2d 1137 (5th Cir. 1970) (tomato wholesaler and retailer have standing to challenge administrative regulation which established size limits on imported tomatoes and thereby restricted importation); Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970) (local ministers have standing to enjoin maintenance of Christmas display on federal parkland).
willingness to embrace the notion of injury in fact as the dominant element in the standing doctrine^{8} — a development which has been

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*Data Processing* was an action by a data processors' association to review the Comptroller's ruling that national banks could make data processing services available to other banks and bank customers presumably served by the petitioners. The petitioners contended that pursuant to section 24 (Seventh) of the National Bank Act, 12 U.S.C. § 24 (Seventh) (1964), these activities constituted illegal competition since the sale of such services was not one of those "incidental powers . . . necessary to carry on the business of banking." After a careful analysis of the prior case law dealing with private interest plaintiffs [Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Chicago Junction Case, 264 U.S. 238 (1924)] and public interest plaintiffs [Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)], Judge Lay of the Court of Appeals for the Eighth Circuit derived the following formula by which to distinguish between the two: "The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or is one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest." Association of Data Processing Serv. Orgs., Inc. v. Camp, 406 F.2d 837, 843 (8th Cir. 1969), rev'd, 397 U.S. 150 (1970). Judge Lay found that the petitioner had no recognized private interest, and that Congress had not "seen fit within the National Bank Act to recognize any 'aggrieved person' to assert the public's rights." *Id.*

The emphasis upon "legal interest" proved fatal. The Supreme Court viewed Judge Lay's formulation as a diluted version of the malodorous violated-right standard which was unacceptable because it anticipated the merits of the controversy. 397 U.S. at 152-53 n.1. The second prong of Judge Lay's test was viewed as inapplicable in the absence of an explicit aggrieved-party clause in the regulatory statute. *Id.* Justice Douglas proceeded to devise a standard which purported to avoid any anticipation of the merits. The new standard established a two-part test: (1) "injury in fact, economic or otherwise" must be shown [*id.* at 152] and (2) "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" [*id.* at 153]. The second element of this standard enabled the Court to grant the petitioners standing by reference to the "general policy" surrounding section 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864 (1964), and section 24 (Seventh) of the National Bank Act, 12 U.S.C. § 24 (Seventh) (Supp. V, 1970), although neither explicitly protects a specific group. 397 U.S. at 157.

The new standard differs from the prior law in two important respects. First, it emphasizes the element of injury in fact. This is underlined particularly by the willingness of Justices Brennan and White [concurring in the result but dissenting in the treatment of the standing question] to make injury in fact the sole criterion. *Id.* at 167-68. Second, the "arguable zone" element — despite its latent anticipation of the merits — represents a considerable expansion of the former rule which ostensibly required that the complainant be able to point either to specific statutory protection or to a general aggrieved-party clause in some relevant regulatory norm. The presence of the aggrieved-party clause in the regulatory statute authorized a private attorney general to question the legality of administrative action. After the promulgation of section 10(a) of the Administrative Procedure Act of 1946, 5 U.S.C. § 702 (Supp. V, 1970), the courts rebuffed the attempt to interpret the aggrieved-party clause therein as a general authorization of such public interest attacks. *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1935) (section 10 was viewed as declaratory of the existing law; it affirmed a party's right to contest an administrative action only if he fell within a statute's aggrieved-party clause). The *Data Processing* standard clearly relaxes the *McKay* result. *See* Davis, *supra* at 451-54. Under *Data*
viewed as a desirable simplification of a complex area of the law. It is, therefore, somewhat surprising that neither the courts nor the academic proponents of this approach have bothered to explicate the notion of injury in fact and explore its broader implications as a basis for standing. In the absence of such explication, little is known concerning the injury in fact approach except that the injury may involve not only economic values, but aesthetic, conservational, spiritual, and recreational values as well.

The author finds it difficult to define injury in fact in such a manner that the new doctrine of standing, as based on such a notion, will overcome the disadvantages of its predecessor without, at the same time, depleting the standing doctrine of all legal significance. More important, the supposedly more liberal criteria invite a decrease in judicial involvement and a rise in discretionary justice. The new approach, it would appear, is at most the expression of the courts' unwillingness to adjudicate difficult questions of substantive law.

Along with Professor Davis, two Supreme Court Justices and a
number of lower courts have adopted the proposition that injury in fact should (and can) be the sole criterion for resolving the standing issue. For Professor Davis, the mere presence of injury calls for judicial scrutiny of the legality of the injury. For Justices Brennan and White, who proceed from the case or controversy requirement, the presence of an injury guarantees that the litigant "can frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vigorously." Both the Brennan-White and Davis arguments reject the previous legal interest approach to standing on the grounds that through its use the court necessarily becomes involved in an anticipatory, and therefore incomplete, consideration of the merits of the case. These issues, it is contended, deserve full analysis and must not be resolved, sub silentio, in connection with the standing question.


See, e.g., Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Air Reduction Co. v. Hickel, 420 F.2d 592 (D.C. Cir. 1969). The court's discussion of standing in Scanwell, however, stresses, in addition to injury in fact, illegality and legislative intent. 424 F.2d at 865-68. Moreover, both cases arose out of an on-going business relationship with the government. In this latter context, once one rejects the doctrine of "privilege" [see Gonzalez v. Freeman, 354 F.2d 570, 574 (D.C. Cir. 1964)], there is no more room for a consideration of the standing problem than there is in connection with a purely private law controversy between two businessmen. One reason why standing has become a complex specialty is that courts and commentators fail to distinguish among the various types of encounters between the state and the individual. As a factual, legal, or historical matter, the encounter between the individual and government qua regulator is different from the encounter with the government qua provider, the government qua businessman, and the government qua competitor. Cf. Dugan, Standing, the 'New Property,' and the Costs of Welfare: Dilemmas in American and West German Provider-Administration, 45 WASH. L. REV. 497, 498-502, 513-20 (1970). It is such variances which motivated Professor Jaffe to divide the analysis of standing between "public actions" and "private actions." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 463, 476-79, 481-85, 510-16, 524-27 (1965). Consequently, it is somewhat misleading to cite cases involving an on-going relationship with the government as authority for a particular proposition concerning the standing of one competing with either the government or a member of a regulated industry.

For the two most recent statements of Professor Davis' view, see Davis, Standing: Taxpayers and Others, 35 U. CHI. L. REV. 601, 613-14, 618 (1968); Davis, supra note 3, at 468-71. For an opposing view, see L. JAFFE, supra note 10, at 522-23, where the author expresses the view that "grievance in fact" is an irrelevant and misleading consideration in determining the propriety of judicial review.

See Davis, supra note 11, at 613-18; Davis, supra note 3, at 468.


As Professor Davis correctly notes, there is no necessary relationship between injury in fact and the "adverseness" or "vigor" of presentation. Davis, supra note 3, at 470.

See Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 167-68 (1970) (Brennan & White, J.J., concurring and dissenting); 3 K. DAVIS, ADMIN-
The nature of injury in fact is seldom discussed at any length either in the briefs or opinions. The question is frequently resolved by way of presumption. In *Association of Data Processing Service Organizations, Inc. v. Camp*, for instance, the petitioner alleged, as its injury, that the ruling "might entail some future loss of profits" and that a defendant bank was "performing or preparing to perform services for two customers for whom petitioner . . . had previously agreed or negotiated to perform such services." These allegations did not involve injury in fact but rather a speculative detriment: the possible loss of profits and the disruption of relationships which seem to have been in the negotiation stage. Yet, apparently on the basis of the allegations alone, the Supreme Court found that "there can be no doubt that the petitioner plaintiffs had satisfied this [injury in fact] test." A survey of the caselaw reveals that such loose treatment of the injury in fact element of the standing doctrine is not uncommon. In connection with economic detriment, courts have declared the criteria to be satisfied by allegations concerning prospects of increased competition, the inability to undertake cogent planning, the frustration of plans for expansion, the inability to contract with the government, the loss of a prospective beneficial relationship, the prospective loss of the "cream" of the petitioner's customers,

ISTRATIVE LAW TREATISE § 22.04, at 217 (1958). But see L. JAFFE, supra note 10, at 501-02, 508-12, 527-28; Jaffe, supra note 4, at 634-37 (the meaning of legal interest in the public law context).

15 397 U.S. 150 (1970) (discussed in note 3 *supra*).
16 Id. at 152.
17 Id.
18 See, e.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-78 (1940) (established radio station challenges issuance of license to a prospective competitor); Matson Navigation Co. v. FMC, 405 F.2d 796, 798 (9th Cir. 1968) (shipping line challenges agency approval of merger of three competitors).
21 Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) (commodities dealer challenges order which debarred him from purchasing surplus government commodities).
the mere presence of other competitors,\textsuperscript{24} and the inability to exploit a capital investment.\textsuperscript{25} In some cases, the petitioners' mere investment in the litigation provides a boot-strap satisfaction of the injury requirement; this is especially common in cases involving aesthetic, conservational, spiritual, and recreational interests.\textsuperscript{26} Finally, some courts have established an explicit presumption of injury in fact where an intended beneficiary is contesting the administration of government largesse.\textsuperscript{27}

It is impossible to determine whether these courts are applying a predetermined definition of injury in fact, whether they are constructing a definition out of whole cloth by way of example, or whether they are doing both. If they are applying a predetermined criterion, they have not elucidated their audience as to its exact content. If they are constructing a definition by way of example, the range of admissible examples remains unspecified. If they are combining the two approaches, the proportion of the mix is not apparent. One thing, however, is certain: All three alternatives presuppose the existence of a metanorm which consists either of an unarticulated definition of injury in fact or a set of criteria for determining the acceptability of certain examples to the exclusion of others. Within this metanormative framework is contained the operative definition of injury in fact.\textsuperscript{28} Precisely what that definition is, however, escapes identification. In the absence of a clear definition, courts are virtually unrestricted in determining the existence of an injury in fact.

The courts might, for example, use a purely solipsistic definition, whereby an injury in fact occurs whenever the complainant feels displeasure. Alternatively, a third party might be called in to determine whether or not the complainant has suffered injury. Another

\textsuperscript{24} Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 383, 388 (8th Cir. 1966) (established banks seek to enjoin operation of newly chartered competitor).


\textsuperscript{26} Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 103 (2d Cir.), \textit{cert. denied}, 400 U.S. 949 (1970) (local and national conservation groups seek to enjoin highway construction and issuance of construction permits in absence of congressional consent); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005-06 (D.C. Cir. 1966) (broadcast listeners seek to intervene in license renewal proceedings and protest the licensee's racial and religious discrimination in its broadcasting practices).

\textsuperscript{27} Tucker v. Hardin, 430 F.2d 737, 739 (1st Cir. 1970); Peoples v. United States Dept. of Agriculture, 427 F.2d 561, 563-64 (D.C. Cir. 1970) (in both cases, potential recipients challenge administration of food stamp program).

alternative, and a variation of the latter approach, might be referral to a less personal arbiter of injury — for instance, the proverbial market,\textsuperscript{29} where injury consists of a change in market value between two points in time. Finally, the court might use injury in fact as a policy variable, applying the label to a situation whenever necessary to arrive at a socially desirable result — social desirability being determined in accordance with a particular set of metanorms.\textsuperscript{30}

These different possibilities must be kept in mind when considering the advantage claimed for the injury in fact approach: that it enables the court to satisfy the case or controversy requirement without anticipating the merits of the controversy.\textsuperscript{31} This claim is usually stated as a general proposition without any reference to the particular metanorm which necessarily accompanies the application of the injury in fact criterion.\textsuperscript{32} Such a general proposition is justified only if both satisfaction of the case or controversy requirement and nonanticipation of the merits may be achieved without depending upon the adoption of a particular set of metanorms. Therefore, the validity of the general proposition can be disproved by a counterexample in which a particular definition of injury entails an anticipation of the merits.

II

Using facts similar to those in \textit{Data Processing}, such a counterexample can be developed. Assume the existence of a regulated industry whose range of business activities is restricted by statute to

\textsuperscript{29} Defining a particular legal concept by use of alternative approaches is not uncommon in the law; an example is the controversy with respect to the objective versus subjective definition of "good faith." \textit{See} Summers, "Good Faith" in \textit{General Contract Law and the Sales Provisions of the Uniform Commercial Code}, \textit{54} VA. L. REV. 195, 198, 207 (1968).

\textsuperscript{30} Manipulation of labels in such fashion has frequently been observed in commercial law. \textit{See}, e.g., G. Gilmore, \textit{Security Interests in Personal Property} \$ 35.4, at 929-31 (1965) (manipulation of the "binding commitment" concept in connection with the enforcement of future advance clauses in security agreements); Gilmore, \textit{The Commercial Doctrine of Good Faith Purchase}, \textit{63} YALE L.J. 1057, 1059-60 (1954) (manipulation of the "voidable title" concept).

\textsuperscript{31} \textit{See} text accompanying note 14 \textit{supra}.

\textsuperscript{32} Professor Davis in his recent article, acknowledges the existence of relevant metanorms: "The only problems about standing should be what interests deserve protection against injury . . . . A person whose legitimate interest is injured in fact should have standing . . . . The guide . . . should be a judicial judgment as to whether the interest asserted is in the circumstances deserving of judicial protection." Davis, \textit{supra} note 3, at 468, 472-73 (emphasis added and omitted).

Professor Davis, however, fails to identify any particular metanorm to which he might be referring, with the possible exception of his allusion to discernible legislative intent. \textit{See} \textit{id.} at 473.
manufacturing and selling certain goods and services. A number of firms in the industry develop a byproduct for which there exists a ready market. At present, this secondary market is occupied by a dozen indigenous firms operating under conditions which are reasonably competitive. There are still profit opportunities in this secondary market for an efficient firm. Unfortunately, transactions involving the particular byproduct are not among those in which the regulated industry is permitted to engage under the relevant statute. The statute and regulations may either explicitly forbid such activity, restrict the industry to specific enumerated activities, or simply adumbrate the general areas of permissible activity so as to raise serious doubt as to whether or not the industry may market its byproduct. Suppose, finally, that entry by the regulated firms into the byproduct market will cut the net revenues of the indigenous firms by 25 percent. Such a prospective drop in revenue is frequently presumed to satisfy the injury in fact element of the standing doctrine. The presumption, however, is valid only so far as it enables the court to satisfy the case or controversy requirement without anticipating the merits, thereby supporting the claimed advantages of the injury in fact approach.

Within the framework of the above fact situation, there exists a perfectly respectable definition of injury under which such a presumption cannot be justified. For example, let us define "injury" as a change in market value. An injury will result only if the value of the object prior to the allegedly injurious event is greater than the value measured after the event. Generally, value is measured by reference to the market in which the particular item is bought and sold (for instance, the market value of damaged automobiles is less than that of new automobiles). A value differential is recorded as an injury incurred.

The value of a firm, and changes therein, can be established


35 See A. CORBIN, CONTRACTS §§ 1003-04, at 36-52 (1964); 2 E. HARPER & F. JAMES, TORTS § 25.6, at 1310 (1956).
by reference to a particular market. Assume, for purposes of simplification, that the firm in question has been financed solely through the sale of equity securities. By reference to the outstanding securities, the value of the firm can be ascertained both before and after the injurious event. A drop in revenues to the firm may, but does not necessarily, entail an injury. The existence of an injury — herein defined as a decrease in value — will depend upon the reaction of those individuals whose demand for the firm’s securities determines their value before and after the injurious event.

A differential will appear only if the change in revenues does not accord with the expectations of the investors. There are two possible extremes. At one extreme, a decrease in revenue is foreseen long before it actually occurs. Under such conditions, the allegedly injurious event will not entail any change in the firm’s value; the investors, having expected the change, will have made allowance therefore in their demand for the firm’s equities. At the other extreme, the change in revenue is wholly unexpected. In this situation, the injurious event will lead investors to revise their expectations, their demand for the firm’s securities will shift accordingly, and the market will record a change in the firm’s value. This particular definition of detriment makes the fact of injury inseparable from the past and revised expectations of individuals.

These expectations, which eventually determine the value of a firm (and, hence, the occurrence of “injury”), will be influenced by the statutory norms governing the present and prospective business activities of the firm. A statutory monopoly, for instance, undoubtedly provides a basis for investor expectations. Should the administrator suddenly, in violation of the statute, permit entry by an outside firm, the resulting drop in revenues of a firm previously enjoying the monopoly would probably be accompanied by a drop in the market value of its securities. On the other hand, the total absence of any statutory or administrative norm providing for a monopoly will lead investors to anticipate the possibility of future entry when they bid for the firm’s securities. Thus, subsequent entry will entail a considerably smaller decline in the market value than would have

37 All but the most elementary models of price determination make explicit allowance for expectation and uncertainty. See, e.g., M. BAILEY, NATIONAL INCOME AND THE PRICE LEVEL 49-56 (1962) (microeconomic model); O. BROWNLEE & J. BUTTRICK, PRODUCER, CONSUMER AND SOCIAL CHOICE 137-40 (1968) (microeconomic models).
occurred in the presence of a clear legislative grant of a monopoly right.

Most examples, however, fall somewhere between the above extremes: A firm may enjoy indirect protection by virtue of a statute which limits another business to enumerated activities, it may be the beneficiary of an exclusive local or state monopoly which can, at some future date, be preempted or superseded by a federal program; or, its activities may be the subject matter of rather ambiguous statutory language which has been interpreted in such a fashion so as to exclude competitors. In all these cases, both the statutes and their administrative application will influence the expectations of investors. It is by way of these expectations that the existence or nonexistence of injury comes to depend upon the ambient statutory norms and administrative practices under those norms. These norms and practices relate directly to the merits of the controversy.

Given the above definition of injury, the court cannot avoid an anticipatory consideration of the merits in determining whether or not the complainant has suffered injury in fact. Proof of injury would require a showing that the value of the firm decreased in response to the administrator's action. In light of the many other factors which influence the daily demand for a firm's securities, such a showing of causation would be formidable. This would be especially true where, at the time of an attack upon prospective administrative action, the market had not as yet registered any change in value. To avoid the difficulties in attempting to determine a present injury, a court would tend to start at the other end of the causal chain: An actual or probable change in value may be presumed if the expectations of the complainant relate to the administrative act under consideration. This presumption is justified only if the expectations do in fact relate to legal norms or administrative practices. It is difficult, however, to corroborate whether or not the plaintiff or group of plaintiffs did in fact build up expectations in reference to a particular norm. In the absence of such corroborative evidence, the court will look to whether the norm could generate expectations, and, in doing so, take into consideration the value differentials (injuries) alleged by the complainant. In this fashion, the ultimate test for injury in fact tends to become identical with the second element of the Data Processing standard: "whether the interest sought

88 See cases cited note 33 supra & accompanying text.
40 Many courts do in fact resolve the injury in fact issue by way of presumption. See, e.g., cases cited notes 18-24, 27 supra & accompanying text.
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." And such considerations almost always anticipate the merits of the controversy.

III

The foregoing discussion sets forth one definition of detriment which contradicts the flat assertion that injury in fact avoids any consideration of the normative problems comprising the merits of the case. Indeed, the counterexample leads to a breakdown of the two-part test for standing enunciated in Data Processing, and reveals the "arguable zone" element as the only operative part of the standard. The counterexample makes it incumbent upon the proponents of the injury in fact approach to come forth with a specific definition of injury in fact which will both satisfy the case or controversy requirement and avoid entanglement in the merits of the case.

Some possible alternatives to the value-differential definition of injury were mentioned briefly at the outset of the discussion: (1) let the complainant alone determine whether or not he has been injured; (2) let a third party make that determination on the basis of his own sensibilities; (3) permit the courts to apply the "injury" label whenever it will enable them to satisfy the case or controversy requirement along the way to a socially desirable result. The second and third possibilities become identical if the sensibilities of the court and third party are both considered a function of social desirability. This assumption leaves two definitions of injury: a solipsistic definition and a policy-oriented definition.

There has been little serious discussion regarding the sufficiency of the solipsistic definition. This is surprising in view of the fact that — as a logical matter — it is the only approach which does not anticipate the merits of the controversy. With the litigant's allegation of an affected interest (be it economic, aesthetic, political, or whatever) accepted as a sufficient indicium of the existence of injury, no attempt need be made to determine whether the injury or alleged injury enjoyed the proper connection with the legal duties or norms in question. That courts have, in practice, adopted the solipsistic approach would seem apparent when considering those cases in which

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41 397 U.S. at 153. See discussion in note 3 supra.
42 See text accompanying notes 28-30 supra.
the plaintiffs are seldom asked to prove their injury. Moreover, the courts stress that injury may involve the frustration of nearly any conceivable interest — economic, spiritual, conservational, or recreational. This broad definition of "interest," when coupled with the absence of a proof requirement, tends to make the litigant's mere allegations dispositive of the injury element of the standing doctrine.

Opponents of the solipsistic approach would presumably argue the likelihood of spurious suits, inadequate presentation of the underlying legal issues, overrun courts and crowded dockets, and declaratory judgments on abstract constitutional questions. However, to the extent that these objections involve empirical questions (crowded dockets, inadequate presentation), no evidence exists either for or against the solipsistic definition. And insofar as the objections derive from higher-order legal concepts, their validity depends upon the yet unexplored meaning of higher-order principles themselves: for example, can a contest be abstract or spurious when the complainant thinks he is injured? In view of this lack of evidence and meaning, and in the absence of an explicit definition of injury in fact, the solipsistic definition affords a valid means by which the mere voluntary presence of the complainant and his allegations of injury are sufficient to insure the necessary degree of adversity to satisfy the case or controversy requirement without requiring consideration of the merits.

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In their separate concurring and dissenting opinion in *Data Processing*, Justices Brennan and White seem to explicitly adopt the solipsistic definition: "[F]or purposes of standing, it is sufficient that a plaintiff allege *damnun absque injuria*, that is, he has only to allege that he has suffered harm as a result of the defendant's action." 397 U.S. at 172 n.5.

Professor Davis also adopts a solipsistic definition; however, he would limit it to require a consideration of the "legitimacy" or "deservingness" of the plaintiff's interest. Davis, *supra* note 3, at 472-73. Later in the course of their opinion, Justices Brennan and White impose a similar limitation on their definition. 397 U.S. at 175 n.10.


45 *But cf. Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 103 (2d Cir.), cert. denied, 400 U.S. 949 (1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 617 (2d Cir. 1965) (litigation cost is deterrent to overrunning the courts with frivolous actions).*

46 *See Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966), where the court invited the agency to specify such higher-order restraints (concerning the representative nature of the intervenor and the amount of intervention feasible in light of administrative exigencies) in the form of regulations for limiting listener intervention in license proceedings. Only Professor Jaffe attempts to identify and explicate these higher-order considerations. *See L. JAFFE, supra* note 10, at 484-89, 524-27; Jaffe, *supra* note 4, at 634-37.*
Under the policy-oriented definition, the desirability of higher-order social goals alone determines whether or not to apply the label of injury in fact. In the absence of an explicit model which describes the interrelationships between the instrument and target variables, the application or nonapplication of the policy-oriented definition to a particular plaintiff necessarily appears obscure if not purely arbitrary. The vitality of the standing doctrine as an instrument for discriminating between plaintiffs can be maintained only by requiring the court to consider the "legitimacy" of the interest alleged to have been injured\(^47\) — the second prong of the Data Processing test.\(^48\) In the context of the Brennan-White-Davis approach, however, such considerations would be impermissible because they entail an anticipation of the merits.\(^49\)

Although the solipsistic definition of injury in fact avoids anticipation of the merits and the policy-oriented definition may do the same, by doing so they create certain dislocations: The standing doctrine is reduced to a tautology, other doctrines of justiciability come under pressure, and substantive issues receive less, rather than more, consideration by the courts. Furthermore, to the extent that either definition is adopted as the sole criterion for resolving the standing issue, it simplifies the law of standing to such a degree that it ceases to be a very meaningful legal doctrine at all.\(^50\)

Proponents of the injury in fact standard, however, have argued that such simplification of the standing doctrine is of no consequence. Other criteria exist — ripeness, exhaustion, reviewability, political question — which serve the same functions ascribed to the legal interest version of the standing doctrine. Moreover, so the argument runs, these concepts are preferable tools since they may focus directly upon the underlying issues.\(^51\)

Of these concepts, particular emphasis has been given to reviewability. Efforts have already been made to expand and elaborate upon the elements of reviewability in order to make it a more effective tool with which to discriminate between justiciable and non-justiciable cases. Justices Brennan and White would modify the tra-

\(^{47}\) Cf. Davis, supra note 3, at 468, 472-73, where Professor Davis emphasizes the "legitimacy" and "deservingness" of the affected interest.

\(^{48}\) See text accompanying note 41 supra.

\(^{49}\) See note 14 supra & accompanying text.

\(^{50}\) See L. JAFFE, supra note 10, at 522-24.

ditional notion of reviewability — whether agency action is conclusive and beyond judicial review by anyone — to include a second requirement, namely, whether the particular plaintiff requesting review may have it. The Justices, although admitting such a modification will necessarily entail an anticipatory review of the merits, justify the application of this new notion of reviewability on two counts. First, they contend that adoption of the new concepts of standing and reviewability offer an approach whereby each may be treated separately, and the "often complex questions" involved therein may be squarely dealt with. Second, they are unfavorably impressed with the use of "standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits."

It would appear, however, that the proffered shift in emphasis to reviewability — serving merely to accommodate adoption of an injury in fact approach to standing — is unfounded and meaningless. The question of reviewability seems to be no less permeated by anticipatory considerations of the merits than the discredited legal interest doctrine of standing. Under the legal interest approach, anticipation of the merits occurred when the court sought to establish whether the "right invaded [was] 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." The Brennan-White proposal focuses upon essentially the same issue under the rubric of reviewability; the court must seek to establish whether "Congress intended the plaintiff's class to be a beneficiary of the statute under which the plaintiff raises his claim." The distinction between a legal interest and a beneficiary status conferred by Congress is, if anything, evanescent.

52 397 U.S. at 169 n.2.
53 Id. at 175. The Justices argue, however, that the evidence needed to establish the plaintiff's class as a statutory beneficiary is less than that needed to establish the plaintiff's claim on the merits. Id. at 175-76. See Abbott Labs. v. Gardner, 387 U.S. 136 (1967).
54 397 U.S. at 176-77.
55 Id. at 178.
56 Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939); see note 7 supra.

For opposing views concerning the legal interest test, compare 3 K. DAVIS, supra note 14, § 22.04, at 216-23 (1958) and Davis, supra note 3, at 458-59, with L. JAFFE, supra note 10, at 522-24.
57 397 U.S. at 174.
58 As an initial proposition, it would seem that conferral of a beneficiary status engenders a legal interest and vice versa. For a detailed discussion of the notion of legal
In all deference to Justices Brennan and White, the legal interest approach to standing seems to provide the most direct route to the heart of the "complex questions" involving court review of administrative action. In most cases, the complainant is claiming for himself a substantive right against the state and the violation thereof by the administrative authorities. The legal interest approach forces the court, at the outset, to deal with the gist of the complaint: Does a particular statute evince a legislative intent to protect the complainant from competition from governmental or private enterprise? Does a statutory welfare program, when read in conjunction with the Constitution, create a right to welfare? Do farmers have rights to subsidies and students rights to scholarships? Do private schools have rights to federal assistance? Once the court resolves these issues of statutory construction, it can turn to the separate, narrower merits of the controversy: Assuming a right exists, was the plaintiff a holder of such right, and if so, was his right

interest, see L. Jaffe, supra note 10, at 486-89, 508-11. See also Jaffe, supra note 4, at 634-37. A detailed analysis of the various possible relationships between the state and the individual can be found in 1 Wolff, Verwaltungsrecht § 43 (6th ed. 1965).

The efficacy of the reviewability doctrine as a tool for discriminating between justiciable and nonjusticiable controversies is further weakened by the establishment of broad presumptions governing reviewability. See Abbott Labs. v. Gardner, 387 U.S. 136 (1967) (the Court established a presumption in favor of review which could be defeated only by clear legislative intent to the contrary).

See, e.g., Professor Jaffe's adroit use of the legal interest concept. L. Jaffe, supra note 10, at 486-88 ("legal interest" as a shorthand expression for certain longstanding priorities among political and economic values); id. at 508-14 (the various origins of legal interests in public law); id. at 518-21 (the relationship between legal interest and administrative competency, discussed in connection with Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), cert. denied, 358 U.S. 946 (1959)). For a discussion of the use of the concept in West German administrative law, see Dugan, supra note 10, at 498-515.


See Goldberg v. Kelly, 397 U.S. 254, 258-60 (1970) (inadequacy of procedures in connection with termination of welfare benefits). In addition to Goldberg, there are other cases which portend the genesis of a constitutional right to a sustenance level of state support. See, e.g., Lewis v. Martin, 397 U.S. 552 (1970); King v. Smith, 392 U.S. 309 (1968) (invalidity of man-in-the-house restrictions upon welfare eligibility); Escalera v. New York City Housing Authority, 425 F.2d 855 (2d Cir.), cert. denied, 400 U.S. 853 (1970) (challenge to procedures followed in termination of welfare tenancy on grounds of "nondesirability"). Although many of these cases focus on procedural issues, it is possible to interpret them as tending to establish a virtual nonterminable right to welfare benefits. See, e.g., Goldberg v. Kelly, supra at 274-76 (Black, J., dissenting).

Litigation of such rights is already commonplace in welfare systems only slightly more advanced than our own. See Dugan, supra note 10, at 508-10 (dealing with West German administrative law).

This issue was indirectly litigated in Flast v. Cohen, 392 U.S. 83 (1968). It has been expressly litigated in West Germany. See Dugan, supra note 10, at 509-11.
wrongfully violated by the particular administrative act in question? In this manner, one can construct a rational procedure which insures a degree of specificity and adverseness sufficient to satisfy the case or controversy requirement without any explicit reference to the notion of injury in fact.\textsuperscript{64}

Certainly the legal interest version of the standing doctrine is no less amenable to profound policy considerations than are the standards for reviewability.\textsuperscript{65} And the injury in fact approach to standing mitigates the complexity of review, if at all, only by postponing consideration of the crucial substantive issues to some later point in time, presumably until the court undertakes to resolve the issue of reviewability. As discussed below, this deferral of substantive questions is far less innocuous than it may appear. Finally, the "slamming-door" criticism of the legal interest test is also misdirected. There is no assurance that the courts will be less cavalier in their use of the now expanded concept of reviewability than they were in their application of the violated right approach to standing.

IV

The ascendency of injury in fact as the dominant element of the standing doctrine has also brought in its wake increased reference to the notion of "public interest."\textsuperscript{66} The discredited legal interest standard, in contrast, generally precluded reference to public interest in connection with determination of the standing issue, the existence of the requisite legal interest being derived primarily from a specific statutory or common law source.

As soon as the courts cut loose from the violated right standard, it was inevitable that public interest considerations would be brought to bear upon the standing issue. Any administrative act sets into

\textsuperscript{64} For example, the West German law of standing is constructed wholly around the notion of violated right. Dugan, \textit{supra} note 10, at 497-503. This approach also comports with Professor Jaffe's view that injury in fact is largely an irrelevant consideration in connection with standing problems. L. JAFFE, \textit{supra} note 10, at 522-24.

\textsuperscript{65} See note 59 \textit{supra}.

\textsuperscript{66} The emphasis on public interest appears in the first cases [Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 15 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475-77 (1940)] cited in support of the injury in fact standard. 3 K. DAVIS, \textit{supra} note 14, § 22.04, at 220. The cases involved competitors' challenges against FCC licensing procedure.

motion an infinitely long chain of events which may be perceived as adverse by parties far removed, both spatially and temporally, from the act. For example, the Comptroller's ruling in *Data Processing* was not only adverse in respect to the data processing organizations, but it also posed a threat to those who supplied labor and machines to the data firms. Furthermore, prior to the Comptroller's ruling there were probably banks which relied upon less sophisticated means of data processing. For these banks, the Comptroller's decision makes feasible a scale of operation which justifies acquisition of a large computer, with a resultant loss of customers to suppliers of the less sophisticated data processing equipment. Second-order suppliers will also suffer, albeit to a lesser degree. The Comptroller's decision opened a billion dollar business for the banks — the resulting dislocations, both adverse and beneficial, reverberate throughout society far into the future.

The same holds true in connection with other administrative acts which frequently come under attack. Consider, for instance, the dislocations caused by freeway construction through or between urban areas, the construction of large-scale power facilities, or experiments which alter the environment. These events produce an effect in fact upon millions of people. The aggrieved in fact approach to standing would make each and every affected party a potential plaintiff. As discussed above, in order to realize the purported advantage of the injury in fact approach (nonanticipation of the merits of the controversy), the courts must in theory adopt a solipsistic definition of injury.

In discarding the legal interest test and adopting, in its place, an extremely open-ended definition of injury in fact, the courts open wide the courthouse doors. And under the recent presumptions regarding reviewability, those doors have been all but ripped away. The lack of a personal legal interest and palpable injury no longer preclude the plaintiff from demanding a consideration on the merits. In addition, the new approach permits certain individuals or groups

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68 See, e.g., Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).


70 See notes 43-44 supra & accompanying text.

71 See note 58 supra.
of individuals, in the guise of public interest crusaders, to litigate whatever they may deem to be obnoxious administrative action.

The public interest plaintiff usually appears in one of two contexts. First, he may ostensibly be trying to vindicate the interests of primary beneficiaries who, for some reason, will not or cannot challenge the particular administrative act. This category of plaintiffs is exemplified by the recent cases attacking the authority of national banks to enter into related fields of activity. In National Association of Securities Dealers, Inc. v. SEC, for example, standing was granted to a third party whose private interests [freedom from competition] were quite different from those of the primary beneficiaries.

The recent conservation disputes have spurred the appearance of the second kind of public interest plaintiff. These cases involve administrative action under statutes which require the weighing of amorphous factors such as aesthetic value, public safety, and public interest. The subject matter of these cases — unlike the

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12 This kind of appearance has been used in litigating constitutional issues. See, e.g., Poe v. Ullman, 367 U.S. 497 (1961) and Tileston v. Ullman, 318 U.S. 44 (1943) (whether physician can assert patient's right to attack a statute forbidding contraceptives); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (whether private school can assert the constitutional right of parents to raise and educate their children). See discussion in 3 K. Davis, supra note 14, § 22.06, at 226-29.


14 420 F.2d 83 (D.C. Cir. 1969), vacated on other grounds, 39 U.S.L.W. 4406 (U.S. Apr. 5, 1971). Discussing the standing problems involved in the case, Chief Judge Bazelon noted: "The intended beneficiaries of the banking laws, if the class is narrower than the public, are the bank customers who have no immediate and compelling interest in litigation to further long-term sound banking." Id. at 99 (concurring opinion).


A second group of cases in which this type of public interest appears as a normative
usual subject matter of legal obligations arising from contract, tort, or property ownership — cannot be readily allocated to a particular person or group. Under such circumstances, the traditional standing tests — based either on legal interest or injury in fact or a combination of both — tend to break down. With such "goods" lacking a well defined "allocatory content," their intangible nature renders awkward an application of any but the most solipsistic definitions of injury in fact. Likewise, in the absence of a unique class of individuals who possess or are entitled to an interest in such goods, the legal interest standard is also difficult to apply. Consequently, courts tend to cut loose from both approaches to the standing problem. Plaintiffs are afforded standing to vindicate the public's interest in the particular intangible good, as well as the public's interest in the maintenance of administrative conduct which conforms with the relevant statute. Those courts which demand an injury in fact are generally satisfied with the complainant's investment in the litigation of these cases, which is thought to insure the requisite degree of adversity under the case or controversy clause. Those courts which insist upon a violated right, or legal interest approach, generally view the complainant as a private attorney general who is vindicating the public's interest in gesetzkonform behavior on the part of its officials.

V

There is much to commend public interest litigation; both historical and comparative precedents exist for the practice. As an element of the new notion of standing, however, the doctrine now becomes a combination, mirabile dictu, of two undefined legal terms

76 For a discussion of the concept of "allocatory content" and its relationship to the problem of standing, see Dugan, supra note 10, at 518-19.
78 These two themes recur throughout the cases cited in note 75 supra.
81 See L. JAFFE, supra note 10, at 463-74.
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See text accompanying notes 35-41, 47-58 supra.


84 See text accompanying notes 42-50 supra.

85 See Reich, supra note 83, at 1234, 1239.


87 This has been especially evident in connection with first amendment problems. For example, the "contemporary community standard" aspect of the Roth test for ob-
When courts combine the notion of public interest with the presently undefined concept of injury in fact, the result is an almost absolute discretionary control over access to the courts. Today the doors are open for conservationists: Tomorrow? The new approach to standing no doubt symbolizes "the trend . . . toward enlargement of the class of people who may protest administrative action;" however, at the same time it isolates the court from the merits of the case. Under the legal interest approach, the courts were forced, at the very outset, to weigh meaty substantive issues: Does a particular statute create a right against certain types of competition, a substantive right to a welfare benefit, a right to participate in the administrative process? The injury in fact approach, on the other hand, permits the courts to postpone and, in many cases, completely avoid these difficult problems of statutory interpretation. Having found the complainant to be injured in fact (which is always possible), the court can turn immediately to the procedural aspects of the case. Noncompliance with any of the complex rules governing hearings, ripeness, notice, or effective representation, will doom the controversy to remand, or to another round, or series of rounds, at the administrative level. Although the legal interest test may have precluded a number of plaintiffs, it did not enable the courts to put litigants on a procedural yo-yo. A greater incidence of judicial relief can be achieved only by an increase in the number and kinds of substantive rights which the individual has with respect to the state. The judicial process must be geared to the vindication of these

| 88 | This discretion is already latent insofar as the standing doctrine derives from the policy of judicial self-restraint. See Flast v. Cohen, 392 U.S. 83, 97 (1968); Whitley v. Wilson City Bd. of Educ., 427 F.2d 179, 183 (4th Cir. 1970) (Sobeloff, J., concurring). |
| 90 | See notes 59-63 supra & accompanying text. |
rights rather than to preoccupation with the shuffling and reshuffling of procedural labels.