Deference to Discretion: Scalia's Impact on Judicial Review of Agency Action in an Era of Deregulation

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Deference to Discretion: Scalia's Impact on Judicial Review of Agency Action in an Era of Deregulation

There are vast tides in human history: the Age of the Industrial Revolution, the Age of Enlightenment. Ours will doubtless go down as the Age of Deregulation in the history books of the future. It is a trend that has been around for some time now . . . and the process raises some special problems of judicial review.¹

With these comments, Antonin Scalia, then a judge on the United States Court of Appeals, opened a panel discussion of the Forty-Fifth Judicial Conference of the District of Columbia Circuit on the topic "Judicial Review in an Era of Deregulation." The era of deregulation to which Scalia referred began in the early 1970s. Deregulation² has reached a high point during President Reagan's terms in office, keeping with his Administration's goal of "getting the Federal Government off the backs of the American people."³ While it is unlikely that the accomplishments of this era of deregulation will ever match the achievements of the Industrial Revolution, Scalia is correct that deregulation raises, or perhaps brings to light, problems for judicial review of administrative action.⁴

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2. "Deregulation" can be defined as "cutting back Federal controls." S. REP. No. 1018, 96th Cong., 2d Sess. 2 (1980). For purposes of this Note, deregulation means the removal or relaxation of administrative rules designed to implement regulatory legislation. The term subsumes rescission or elimination of rules, relaxation or replacement of existing rules with less stringent rules, and inaction where regulatory legislation calls for action.
4. Much of the deregulation is accomplished by administrative agencies through informal rulemaking proceedings. Use of informal rulemaking in place of adjudication has increased significantly since the mid-1960s. As Professor K.C. Davis stated in 1978, "[t]he new emphasis on informal action, including rulemaking, has given rise to new problems that . . . are still largely open, including such vital questions as what procedures are appropriate for developing the factual component of rules and how courts should resolve factual issues in absence of a transcript of evidence produced before an agency." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.6, at 16 (2d ed. 1978) [hereinafter K. DAVIS, TREATISE].

In addition to these practical problems of how the courts' review agency rulings, debate continues over the fundamental role of the courts in the administrative process. Although the courts have power to review agency decisions, 5 U.S.C. § 706(2) (1982), the traditional ap-
Scalia's appointment to the Supreme Court is likely to have a significant impact on the development of administrative law. He has an extensive background in this area: he taught administrative law at the University of Chicago, led the Administrative Law Section of the American Bar Association, and chaired the Administrative Conference of the United States. As a judge, Scalia is reputedly more deferential to agency policy-making choices than former Chief Justice Burger. As a commentator, he has long espoused both regulatory reform and deregulation.

In addition, Scalia has a reputation as "a charming conservative with [the] ability to effect compromises." As one colleague at the University of Chicago has stated, "He has the personal skills, intelligence, patience and manner to work out compromises and find common ground..." Another commentator has remarked:

Scalia is renowned for his congenial and winsome personality... and is effective in forging coalitions in particular cases. These attributes, combined with his cogent writing and intellectual strengths, suggest an ability to persuade the centrist justices (White, Powell, and less frequently Harry A. Blackmun) to coalesce behind a more restrained or conservative jurisprudence.

His persuasiveness, his ability to compromise, and his extensive background in the area of administrative law make certain that Scalia's voice will carry great weight in future administrative law cases.

procedure, reflected in the standard of review, requires that courts treat agency policy decisions with great deference. See O'Reilly, Judicial Review of Agency Deregulation: Alternatives and Problems for the Courts, 37 Vand. L. Rev. 509, 517 (1984) ("The courts' deferential acceptance of policy decisions made by agencies is a widely accepted model of judicial review."). Yet when an agency acts in an arbitrary fashion, contrary to congressional intent or without consideration of the factors Congress has determined the agency should consider, the courts must step in and correct the deficiency. It is the possibility of arbitrary agency decisionmaking, rather than properly exercised agency discretion, which creates problems in determining the role of the courts in the administrative process.

5. Administrative law is the branch of law which controls the administrative agencies, rather than the substantive law produced by the agencies themselves. "It sets forth the powers which may be exercised by administrative agencies, lays down the principles governing the exercise of those powers, and provides legal remedies to those aggrieved by administrative action." B. Schwartz, Administrative Law §1 (1976).


9. Id.; see also Adlev, Live Wire on the D.C. Circuit, Legal Times of Washington, June 23, 1986, at 9, col. 2 ("his aggressively argued, deeply conservative opinions have grabbed attention and earned him a place as a leader of the court").

10. Fein, High Court Upheaval, supra note 6, at 14, col. 3.
Scalia’s overall philosophy reflects an attitude of judicial restraint and a strong tendency to leave the ultimate resolution of issues regarding the governmental balance of power to the political branches. He appears to prefer a more restrictive view of standing than that adopted by the Supreme Court in recent years. His cases dealing with the proper scope of review of agency action are generally deferential, calling for a very narrow construction of the prescribed standard of review.¹¹

Scalia has stated that “[r]ulemaking is a quasi-legislative activity . . . [which] surely implies some element of what might be termed political discretion, not reviewable by the courts.”¹² As this Note will show, Scalia would use his restrictive interpretation of the standing doctrine and a narrow interpretation of the applicable scope of review to decrease the judiciary’s role in what he views as the fundamentally political arena of agency decisionmaking.¹³ Thus, Scalia would protect political discretion by limiting access to the courts and by ensuring that agency decisions are treated with great deference when access is obtained. This decreased judicial role would leave the agencies free to deregulate without judicial scrutiny, a result which Scalia considers highly desirable.¹⁴ This Note argues that adoption of Scalia’s approach is not mandated by either the doctrine of separation of powers nor the legislative history of the Administrative Procedure Act (APA),¹⁵ and would result in a highly undesirable abdication of judicial responsibility given the current deregulatory atmosphere.

This Note first discusses the APA provisions applicable to rulemaking and the background of the deregulatory movement. The Note then analyzes Scalia’s views in two areas of administrative law: standing to secure review of agency action and the scope of review once a claimant gains access to the federal courts.¹⁶ Finally, the Note considers the potential impact should the United States Supreme Court adopt Scalia’s approach in these areas.


¹³. See, e.g., id.

¹⁴. See generally Scalia, Regulatory Reform, supra note 7, at 13 (commenting that Republicans in Congress seem unaware that “every curtailment of desirable agency discretion obstructs . . . departure from a Democratic-produced, pro-regulatory status quo.”).


¹⁶. Scalia’s views will be analyzed in reference to the overall development of the law in these areas rather than attempting to compare his views to those of individual justices on the Supreme Court. Thus, the emphasis is on how Scalia would prefer to see the law developed, rather than on predicting exactly how he would interact with individual justices.
I. Agency Rulemaking and Regulation

A. Provisions of the APA for Rulemaking and Adjudication

Administrative agencies are endowed with both legislative and judicial power: they have authority to issue rules and regulations\(^\text{17}\) having the force of law and to adjudicate individual cases.\(^\text{18}\) An agency’s legislative or rulemaking power is circumscribed by its enabling statute, which sets forth the degree of authority Congress has delegated. “The legislature is vested with all the legislative authority granted by the Constitu-


The Supreme Court has upheld the power of agencies to engage in general rulemaking, as opposed to adjudication governing only the parties before the agency, as early as 1915. See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). The original text of the APA permitted agency action in the form of informal as well as formal rulemaking and adjudication, see 5 U.S.C. §§ 553, 554, but informal rulemaking was largely ignored in favor of the other two methods until about the mid-1960s. See generally Scalia, Vermont Yankee, supra note 7, at 375-78 and sources cited therein. In 1968, the Supreme Court upheld as constitutional a procedure by which the Federal Power Commission, unable to deal with the large volume of rate-setting cases by adjudication, began to establish areawide rates. Permian Basin Area Rate Cases, 390 U.S. 747 (1968). See generally Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 CORNELL L. REV. 375, 375 n.2 (1974) [hereinafter Wright, Limits of Judicial Review]. This assertion by agencies of their “long dormant rulemaking powers,” id. at 377, has accelerated in the 1970s and 1980s so that much of agency action is now achieved through informal rulemaking. As Professor Davis stated in 1978, “[t]he multiplication of rulemaking during the 1970s is in such volume that predictions that rulemaking will become the mainstay for carrying out government programs are no longer appropriate. Such predictions have already come true. Rulemaking is now the mainstay.” K. DAVIS, TREATISE, supra note 4, § 1.9, at 34 (emphasis in original); see also Scalia, Back to Basics, supra note 7, at 25 (“The 1970s have been aptly described by expert observers of the federal administrative process as the ‘era of rulemaking.’ ”).

18. B. SCHWARTZ, supra note 5, § 3, at 6-7. The Supreme Court has upheld congressional conferral of jurisdiction on agencies to decide individual cases through adjudication, despite the fact that the agencies are not article III courts. See Crowell v. Bensen, 285 U.S. 22 (1932). Congressional power to delegate legislative authority has been upheld, so long as the delegation is limited by adequate standards. See, e.g., Lichter v. United States, 334 U.S. 742, 774-75, 778-79 (1948) (“A constitutional power implies a power of delegation of authority under it sufficient to effect its purpose.”); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144-45 (1948) (upholding delegation because “[t]he standards prescribed pass muster under our decisions.”); Yakus v. United States, 321 U.S. 414, 426 (1944) (delegation would be unconstitutional only if “there is an absence of standards for the guidance of the Administrator’s action, so that it would be impossible . . . to ascertain whether the will of Congress has been obeyed”). But cf. Panama Refining Co. v. Ryan, 293 U.S. 388, 420-21 (1935) (“The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.”); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) (“[T]he constant recognition of the necessity and validity of such [delegations] . . . cannot be allowed to obscure the limitations of the authority to delegate.”); see also Carter v. Carter Coal Co., 298 U.S. 238, 310-11 (1936) (striking down delegation of authority to coal producers and mine workers to determine maximum hours).
tion; any power delegated by the legislature is necessarily a subordinate power, limited by the terms of the delegating statute."19

The APA sets forth separate procedural guidelines for agency adjudications and for rulemaking. For rulemaking, "notice and comment" proceedings are required.20 General notice of proposed rulemaking must be published in the Federal Register and must contain, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues involved."21 The agency must provide interested persons with "an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."22

"Notice and comment" procedures are generally designed to promote speed and efficiency in rulemaking, since they lack some of the procedural requirements necessary for adjudication or formal rulemaking. Most significantly, the agency need not create an evidentiary record for review by the courts under notice and comment procedures. The creation of such a record, however, is required in administrative adjudications and formal rulemaking proceedings.23

Judicial review of agency action is most deferential in the rulemak-

19. B. SCHWARTZ, supra note 5, § 4, at 8.
20. Section 553 of the APA provides for both formal and informal rulemaking. Formal rulemaking is utilized when an enabling statute requires a rule to be made "on the record." This requirement triggers the more formal, trial-like procedures of sections 556 and 557, normally applicable to adjudications. For example, under section 556, a party "is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for full and true disclosure of the facts." 5 U.S.C. § 556(d) (1982). No such procedures are required for informal rulemaking. The use of the term "rulemaking" in subsequent discussion will refer to informal rulemaking, unless otherwise indicated.
21. 5 U.S.C. § 553(b) (1982). Unless otherwise required by statute, notice is unnecessary for interpretative rules, general statements of policy, or rules of agency organization, procedure or practice, or where "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Id.
23. From the mid-1960s through the early 1970s, the courts, particularly the D.C. Circuit, attempted to impose so-called hybrid procedures on the agencies, similar to the procedures required for formal rulemaking and adjudication by APA section 554. See, e.g., Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1015-16 (D.C. Cir. 1971) (adjudicatory procedures such as oral hearing and cross examination are required in some types of rulemaking proceedings). The Supreme Court struck down these hybrid procedures in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), holding that section 553's notice and comment procedures were the maximum procedural requirements Congress was willing to impose on the agencies. While an agency is free to use additional procedures, courts may not impose them on agency proceedings without a statutory mandate. Id. at 524.
Since rulemaking is a legislative function, the court does not inquire into "the wisdom of the regulations" but rather inquires into "the soundness of the reasoning by which the [agency] reaches its conclusions only to ascertain that the latter are rationally supported." The exact amount of deference due an agency decision depends on the nature of its enabling statute and the nature of the delegation of rulemaking authority.

B. The Movement Toward Deregulation

Since 1968, informal rulemaking has become an important tool for regulation by the agencies. Traditionally, regulation has been designed primarily to control prices and entry of utilities, communications firms, and transportation companies. The number of federal regulatory agencies and the scope of regulatory activity, have vastly increased in recent years. Between 1965 and 1975, twenty-six new agencies were created to implement legislation involving workplace and product safety, health, and environmental protection. This increased regulation has been attributed to a "combination of prosperity, enthusiasm for social causes, optimism about government and concern about industrial side effects."

Regulatory reform has been a central goal of at least the past three presidencies, in part as a response to the perceived costs of increased regulation and resulting detrimental economic effects. President Ford

Thus, unless the substantive statute governing a particular rulemaking contains an "on the record" requirement, agencies need not create an evidentiary record.

There is much debate over the desirability of imposing an evidentiary record requirement on rulemaking proceedings. The lack of such a record gives a reviewing court less information about what factors the agency considered. Critics of the "on the record" requirement, however, argue against the delay and expense involved in creating such a record as opposed to requiring the more simple and expedient notice and comment procedures. See, e.g., Wright, Limits of Judicial Review, supra note 17, at 376 ("Trial-like adjudication is extremely costly in time, staff and money.").


26. Id. at 756-58.


30. For example, Vice President Bush has commented that the first step of the Reagan program must be "to free this economy from the shackles of unneeded bureaucratic regula-
issued an executive order requiring that agencies write an “inflationary impact statement” detailing how much proposed actions would raise costs and whether there was a less costly alternative to deal with the problem. President Carter undertook a quiet, yet extensive, economic deregulation project but refrained from deregulation in the areas of health, environmental, and other social concerns. President Reagan’s deregulatory policy has been anything but quiet. Deregulation was a principal part of his campaign platform in both 1980 and 1984. President Reagan’s Executive Order 12,291, which authorizes direct participation and oversight by the Office of Management and Budget, constitutes the most extensive executive intervention into the agency decisionmaking process.

Criticisms of regulation typically focus on cost, detrimental economic effect, ineffectiveness, and delay. Critics also attack the lack of
comprehensive oversight of the regulatory process to ensure against overlapping, redundant, or unnecessary regulations. As one author states:

Apart from cost, the sheer mass and messiness of regulation has become a big problem. Too many rules are needlessly rigid, or are written in legal gobbledygook, or conflict with other rules. Too many forms have to be filled out, and too many licenses and permits take years to issue. Dozens of regulatory horror stories have undermined the legitimacy of regulation as a means of settling policy and have contributed to the public’s cynicism about government. 36

Regardless of its cause, this deregulatory movement creates some special problems for the courts in reviewing the rulemaking proceedings where much of the deregulation is accomplished. Without a rulemaking record, 37 the courts are restricted in their efforts to review the deregulatory action to ensure its conformity with applicable law. Since deregulation often demands extensive departure from past practice, the courts arguably need information about the rationale underlying the agency's decision, which may not be contained in the simple “basis and purpose” statement required for rulemaking proceedings.

In addition, the courts may be tempted to adopt a less deferential stance towards the agency's decision to deregulate. Proponents of existing regulation typically challenge in the courts agency action that threatens to lift or relax those regulations. Challenges to agency action focus primarily on errors in agency reasoning. Challenges to deregulatory action, on the other hand, may focus on preservation of rules under theories such as stare decisis or entitlement to the continued existence of the rule. These latter challenges focus more on the substance of agency rulemaking than on the reasoning used in making a decision. As one commentator has suggested, the pressure of these more substantive challenges may have “shifted the courts’ sympathies from the agencies to the beneficiaries of endangered rules.” 38

The next section analyzes Scalia’s views on standing in light of the Supreme Court’s current test for standing under the APA.

II. The Standing Doctrine

Standing to sue is the initial barrier which proponents of existing

supra note 27, at 2-4. Breyer cites studies which show that growth in regulated industries has been slower since the advent of health, safety and environmental regulations when compared to growth in unregulated industries. Id. at 2. In addition, he states that though “studies of auto safety regulation credit federal regulation with a significant reduction in the number of auto deaths, and the environment is clearly cleaner in some parts of the country, the extent to which regulation can be credited with the improvement and whether its effect is worth its cost are open to debate.” Id.

37. See supra note 23 and accompanying text.
38. O'Reilly, supra note 4, at 509.
rules must overcome to gain access to the courts to challenge agency
deregulation. The law of standing has been described as a "complicated
specialty of federal jurisdiction." It is based on the "case or contro-
versy" clause of article III of the Constitution, and places a limit on the
judicial power of the United States consistent with the theory of separa-
tion of powers. As Justice Sutherland stated in Massachusetts v. Mellon,
without proper standing, courts would intervene "not to decide a
judicial controversy, but to assume a position of authority over the gov-
ernmental acts of another and co-equal department, an authority which
plainly [the court does] not possess."

The standing requirement has two objectives. First, standing pre-
vents use of the federal courts as a forum for airing generalized griev-
ances about the conduct of government. Second, the doctrine ensures
that issues are specifically framed and actively contested so that chal-
lenges will be made in a form traditionally thought to be capable of judi-
cial resolution. Thus, the federal courts have power to review a
governmental act only when a claimant has suffered or is threatened with
a direct, justiciable injury arising from that act.

Scalia views standing as an essential tool for protecting the political
judgments underlying an agency's promulgation of a rule. He believes
that "[t]he doctrine of standing . . . was almost tailor-made to protect
political discretion." As the following sections demonstrate, Scalia
would adopt a strict test for standing to achieve this end, rationalizing
the resulting limited access on majoritarian and separation of powers
grounds.

A. Standing Under the APA

The judicial review provisions in section 702 of the APA extend a
right of judicial review to any person "suffering legal wrong because of
agency action, or adversely affected or aggrieved by agency action within
the meaning of a relevant statute." According to the executive branch
interpretation of the APA, while section 702 was meant to be a restate-
ment of existing laws regarding standing, Congress implicitly recog-

41. Id.
42. 262 U.S. 447 (1923).
43. Id. at 489.
46. Scalia, Rulemaking, supra note 12, at vi.
48. United States Department of Justice, Attorney General's Manual on the Administra-
tive Procedure Act 96 (1947) [hereinafter Attorney General's Manual]; see also S. BREYER &
R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY (2d ed. 1985) (Section 702
nized the “continuing role of the courts” in determining who may seek judicial review. The federal courts have not treated the APA as a “static codification of standing law.” Instead, they have modified the doctrine to reflect current needs and perceptions.

When Congress passed the APA in 1946, plaintiffs challenging agency action in the federal courts were required to show the allegedly unlawful action had inflicted or threatened to inflict a “legal wrong.” Under the legal wrong test, a plaintiff with an actual injury might not have standing to sue. The right invaded must have been 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.

In other words, to invoke judicial review, a plaintiff had to show that a traditional “common-law right” had been invaded.

This requirement of a legal wrong was criticized as imposing “an unnecessary impediment to judicial review.” In Association of Data Processing Service Organizations v. Camp, decided in 1970, the Supreme Court abandoned the legal interest requirement for standing under the APA. The Court adopted a new test, requiring plaintiffs to show only

“is best understood as codifying the various bases for standing developed in previous judicial decisions.”

51. The concept of “legal wrong” meant “such wrong as particular statutes and the courts have recognized as constituting ground for judicial review.” Attorney General’s Manual, supra note 48, at 96. A court could not decide a case unless “the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties [were] such that judicial determination [was] consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.” Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

Section 702 was intended to preserve the rules developed by the Supreme Court in such cases as Alabama Power Co. v. Ickes, 302 U.S. 464 (1938), and Massachusetts v. Mellon, 262 U.S. 447 (1923). Attorney General’s Manual, supra note 48, at 96. In Massachusetts v. Mellon, the Supreme Court stated that a plaintiff must show not only that a statute is invalid “but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.” 262 U.S. at 488. The Ickes Court further clarified the concepts of “direct injury” and “legal wrong”: “[t]he term 'direct injury'... used in its legal sense... [means] a wrong which directly results in the violation of a legal right... [W]here, although there is damage, there is no violation of a right, no action can be maintained.” 302 U.S. at 479.

52. Tennessee Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939). For example, in Tennessee Power, the Supreme Court held a claim of economic injury resulting from competition by an allegedly unlawful government agency insufficient to establish standing because it did not violate a legal right.
54. B. Schwartz, supra note 5, § 8.15, at 468.
56. Id. at 153; see also Barlow v. Collins, 397 U.S. 159 (1970) (tenant farmers have standing to challenge Department of Agriculture regulation because they had a personal stake
that the challenged action caused "injury in fact," and that the alleged injury was "arguably within the zone of interests to be protected or regulated" by the statute that the agency allegedly violated. 57

As currently construed by the Supreme Court, APA section 702 grants a statutory right of review 58 to any plaintiff who can establish all

and interest in the issue and were within the zone of interests protected by the Act). Barlow, a companion case to Data Processing Service, involved challenges to agency action, thus bringing the plaintiffs within the purview of the APA's more liberal grant of standing. The "injury in fact" test, however, has been extended to govern standing in nonagency cases as well. See, e.g., Diamond v. Charles, 106 S. Ct. 1697 (1986) (dismissal of a physician's challenge to the constitutionality of a state abortion statute for lack of injury in fact).

57. Data Processing Serv., 397 U.S. at 152-53. Although the Court cited no precedent for its injury in fact test, at least one commentator called for such a test prior to the Data Processing Service decision. Relying on statements in the legislative history of the APA, Professor Davis argued that section 702 should be interpreted to provide for standing to those "adversely affected in fact" or to those "'aggrieved . . . within the meaning of any relevant statute.'" Davis, Standing to Challenge Governmental Action, 39 MINN. L. REV. 353, 355-56 (1955) (citing S. Doc. No. 248, 79th Cong. 2d Sess. 212, 276 (1946)). This interpretation of section 702 has been criticized. See, e.g., S. BREYER & R. STEWART, supra note 48, at 1090 n.134 ("There is no evidence that Congress contemplated such a change, or that it intended anything more than a codification of preexisting judge-made standing law."); Scott, Standing in the Supreme Court — A Functional Analysis, 86 HARV. L. REV. 645, 659 (1973) (referring to the support for Davis' theory as "bark" which is "altogether too frail for the load he would have it carry.").

Thus, the "injury in fact" test was not an entirely new concept, since several states had been using such a test for a long period prior to its adoption in Data Processing Service. Professor Davis criticized Justice Frankfurter's characterization of standing as a "specialty of federal jurisdiction" in United States ex rel. Chapman, see supra note 39 and accompanying text, saying that it was true "only in one sense." According to Davis, states with independent tests for standing adopted an "injury in fact" inquiry so the federal law of standing was a "specialty" only to the extent that it involved artificial concepts of "legal interest" which the state courts had refused to adopt. Davis, supra note 57, § 1 at 354.

58. There are two types of cases for purposes of standing analysis—those involving statutory review (statutory cases) and those involving nonstatutory review (constitutional cases). Statutory review can be defined technically as "review of an act or decision of a government official or agency which Congress has expressly provided shall be subject to review in the courts by some prescribed proceeding." Scott, supra note 57, at 647. Nonstatutory review is review based on "some general jurisdictional grant or remedy not related to the specific governmental action or decision being challenged." Id. at 647-48.

Nonstatutory review subsumes all challenges to the constitutionality of a statute or of government action when there is no express right of review. Standing in nonstatutory cases is governed solely by judicially created rules. The typical challenge to agency action under APA section 702 involves statutory review. With statutory review, Congress is free to modify these judicially created rules, as long as it does not eliminate the standing requirement completely. See infra note 61.

Unfortunately, the Supreme Court has not always observed this distinction. See, e.g., S. BREYER & R. STEWART, supra note 48, at 1097 ("[T]he Supreme Court has sometimes blurred the differences between the two types of cases and spoken as if the same standards applied to both."). Thus, although the following discussion focuses primarily on statutory review under the APA, some nonagency cases are included for purposes of clarifying the standing doctrine.
the elements of a bifurcated test for standing. This bifurcated test is essentially the Data Processing Service formula. The plaintiff's complaint must be "arguably within the zone of interests" the challenged statute protects or regulates.\(^{59}\) The test embellishes on the constitutional requirement of injury in fact: three elements must now be shown to satisfy this requirement. First, the plaintiff must show injury in fact—that the plaintiff personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.\(^{60}\) Second, the injury must be fairly traceable to the challenged action of the defendant.\(^{61}\) Third, the injury must be "likely to be redressed by a favorable decision."\(^{62}\)

The following sections look more closely at Scalia's interpretation of each element of the standing inquiry and the rationale underlying his approach.


\(^{60}\) Id. at 38, 41.

\(^{61}\) Data Processing Serv., 397 U.S. at 153; Simon, 426 U.S. at 39 n.19. For nonstatutory cases, the general purposes of the standing doctrine have been incorporated into several so-called prudential considerations. If these prudential considerations indicate that the court should not intervene, standing will be denied. The "zone of interests" requirement for standing under the APA is one such prudential consideration. There are at least two others which a reviewing court undertaking nonstatutory analysis must consider. The plaintiff's claim must not involve "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)). In addition, the "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 474 (quoting Warth, 422 U.S. at 499).

Ordinarily, application of these prudential considerations is mandatory and the reviewing court must exercise its discretion to determine whether these limitations are present. Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 137 n.37 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). Congress has power, however, to remove prudential barriers, creating statutory standing for persons who would otherwise be barred from suit, although it may not eliminate the essential constitutional requirement of injury in fact. See Warth, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); Simon, 426 U.S. at 39 (broadened access permitted but "[a] federal court cannot ignore the [injury in fact] requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies.").

Section 702, as currently interpreted by the Supreme Court, constitutes a congressional modification of the standing inquiry to eliminate the latter two prudential elements, leaving only the zone of interests factor to augment the constitutional requirements. Although the lower courts have applied a mixture of multi-pronged tests to the standing analysis, see generally, S. BREYER & R. STEWART, supra note 48, at 1120-21 and cases cited therein, the injury in fact-zone of interests formulation was recently upheld in Clarke v. Securities Indus. Ass'n, 107 S. Ct. 750 (1987).

B. Scalia's Approach to the Standing Doctrine

(1) Preferred Position: Statutory Review or a Legal Wrong

Apparently, as a first choice, Scalia favors return to the earlier legal wrong standard for acquiring access to the federal courts, unless a specific substantive statute makes statutory review available. Scalia has criticized the abandonment of the “legal wrong” requirement in the Data Processing Service case and its companion, Barlow v. Collins. "An incorporation of existing liberalized standing provisions was transmogrified into an affirmative grant of standing in 'all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language.'”

In addition, Scalia is critical of the Supreme Court's interpretation of section 702 as a conferral of broad statutory standing. Instead, he favors a narrower interpretation of section 702 that makes statutory review available only in certain instances. In Scalia's view, Data Processing Service and Barlow eliminated the important distinction between statutory and nonstatutory review which underlay the original intent of section 702.

These decisions read “adversely affected or aggrieved within the meaning of a relevant statute” to mean no more than “adversely affected or aggrieved in a respect which the statute sought to prevent.” In other words, the courts converted the requirement of a statutory review provision into merely a requirement that the plaintiff be within the “zone of interests” that the statute seeks to protect.

Under Scalia's preferred approach, if the substantive statute governing particular agency action contains the “adversely affected” language or something similar, statutory review would be available under a congressional grant of more generous standing and a broader class of plaintiffs may sue. When the substantive statute does not contain a special review provision, nonstatutory review would be a fallback position if plaintiffs could meet the “traditional, more restrictive notions of 'legal wrong,' through the use of common-law writs such as injunction and

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63. Scalia would define a "legal" wrong as "a wrong already cognizable in the courts—that is, one as to which standing already existed pursuant to traditional principles." Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U.L. REV. 881, 887 (1983) [hereinafter Scalia, Standing]. Absent an explicit provision for statutory review, only those plaintiffs who could show that agency action caused injury to a common law right—property, contract or tort—would gain access to federal court.

64. 397 U.S. 159 (1970). See supra note 56 and accompanying text for a discussion of the cases which Scalia criticizes.

65. Scalia, Standing, supra note 63, at 889 (quoting Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 872 (D.C. Cir. 1970)).

66. See supra note 58 for general discussion of the two types of review utilized by the Court.

67. Scalia, Standing, supra note 63, at 889.
mandamus." \(^{68}\)

This limitation, providing two means of establishing standing, is consistent with Scalia's view of the primary purposes of the doctrine. First, the doctrine is useful as a means of limiting access to the courts in order to protect political discretion. \(^{69}\) Scalia considers this discretion an essential feature of agency rulemaking:

An agency may make some decisions in rulemaking not because they are the best or the most intelligent, but because they are what the people seem to want . . . . [This is] a good thing, too, unless you are comfortable with the notion that the many agencies charged with pursuing goals no more specific than "the public interest, convenience and necessity" are to do so in some isolated think-tank, without regard to what the public wants . . . . \["What the public wants"] refer[s] not to the latest Gallup poll, but to the manifestations of the popular will through the political process—the administration placed in office in the last election, the oversight and appropriations committees of Congress, the groups with political power . . . that appear before the agency and are listened to more closely than John Doe precisely because of their political power. \(^{70}\)

Scalia would protect political discretion by limiting challengers' access to the courts, thereby insulating agency decisions from judicial scrutiny to a certain extent. This insulation would permit decision makers to take into account more of the political factors that ordinarily accompany a legislative process such as rulemaking.

Second, in addition to protecting political discretion, the law of standing furthers traditional separation of powers principles. It "roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself." \(^{71}\) Returning to the legal wrong test would serve this purpose by confining nonstatutory access to those plaintiffs who can show that a very individualized common law right has been invaded. Under Scalia's interpretation of section 702, more generous statutory review is made available by the representative branches in the specific instances where the "adversely affected or aggrieved" language is incorporated into a substantive statute. In Scalia's view, increased access under a statutory right is still consistent with a separation of powers analysis: the courts may more readily intervene when Congress and the President allow it.

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68. Id.

69. Scalia, Rulemaking, supra note 12, at vi.

70. Id. at v.-vi. (emphasis added).

71. Scalia, Standing, supra note 63, at 894.
(2) Interpretation of the Supreme Court’s Test of Standing

Scalia has criticized the Supreme Court’s bifurcation of prudential and constitutional limitations on standing as “unsatisfying” because “it leaves unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate.” 72 Prudential considerations have no place in the analysis of standing because, rather than being capable of exercising any discretion in the matter, “the Court must always hear the case of a litigant who asserts the violation of a legal right.” 73 In addition, Scalia argues that the constitutional requirements place no limit on the courts’ power to confer broader standing because “the courts have no such power to begin with.” 74 Only Congress has power to broaden standing and, absent an explicit and more liberal grant, the only legitimate means for establishing standing is through assertion of a legal wrong. 75 Notably, both these arguments advanced by Scalia ignore the continuing judicial role in defining standing, which was implicitly recognized in the APA’s legislative history. 76

Despite his criticism of the Supreme Court’s current test, Scalia was faced with several cases requiring its application during his tenure on the court of appeals. As developed below, Scalia’s application of this test comports with his generally restrictive view of the doctrine and its ultimate purpose of ensuring greater separation of powers.

a. Injury in Fact

It is easier to state the purpose of the injury in fact requirement than to predict precisely when an alleged injury will be sufficient to meet a reviewing court’s standing inquiry. As Justice Rehnquist stated in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 77 the actual injury requirement, like standing in general, “tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” 78

Injury to an economic interest is not required under the injury in fact inquiry; harm to a noneconomic interest will suffice. In Sierra Club v. Morton, 79 the Court stated that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality

72. Id. at 885.
73. Id. (emphasis added).
74. Id. at 886 (emphasis in original).
75. Id.
76. See supra note 49 and accompanying text.
78. Id. at 472.
of life in our society.”

The injury in fact test “requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.” Thus, in order to be an “adversely affected” party under APA section 702, an organization like the Sierra Club must show more than “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem.” An abstract concern with the subject is not sufficient. The group must show that its members will be adversely affected.

That an injury is widely shared does not defeat a claim of standing. As long as the harm is concrete and not merely a generalized grievance, it suffices to show injury in fact. In Sierra Club, the petitioner challenged a plan to build a ski resort in Mineral King valley, a national game refuge in California. Although the Court ultimately denied standing because the Sierra Club had not shown any of its members would be harmed, the Court stated that “the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”

Similarly, in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), the Supreme Court stated that to “deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.” In SSCRAP, various environmental groups alleged ‘economic, recreational and aesthetic’ harm from an agency rate structure they claimed would discourage the use of recyclable materials, thus adversely affecting the environment. Though the “alleged injury to the environment [was] far less direct and perceptible” than that alleged in Sierra Club, requiring the Court “to follow a far more attenuated line of causation to the eventual injury,” plaintiffs had alleged “a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.”

Dissenting in Center for Auto Safety v. National Highway Traffic

80. Id. at 734.
81. Id. at 734-35.
82. Id. at 739.
83. Id. at 739.
84. Id. at 740 n.15.
85. Id. at 734.
87. Id. at 687.
88. Id. at 675-76.
89. 405 U.S. 727 (1972).
90. SSCRAP, 412 U.S. at 688-89.
Scalia quoted language from a long list of Supreme Court opinions in his attempt to define "injury in fact." In order to satisfy article III standing requirements, Scalia would have plaintiffs show an injury that is "distinct and palpable," "particular [and] concrete," "specific [and] objective," rather than "conjectural [or] hypothetical," "remote [and] unsubstantiated by allegations of fact," "speculative" or "abstract." Where allegations are of future injury, "the harm must be "certainly impending"... and "real and immediate." 92

In Center for Auto Safety, the petitioners were four nonprofit consumer groups whose goal was to promote energy conservation. They challenged an NHTSA order which amended previously published fuel economy standards for light trucks to establish lower standards. The petitioners alleged that this order gave impermissible weight to shifts in consumer demand. 94 Thus, the order arguably violated a provision of the Energy Policy and Conservation Act of 1975 (EPCA), 95 which required that the agency designate standards at "the maximum feasible average fuel economy level." 96 A majority on the District of Columbia Circuit Court of Appeals upheld standing for three of the organizations because individual members would have had standing to sue in their own right. 97

91. 793 F.2d 1322 (D.C. Cir. 1986).
92. Id. at 1342-43 (D.C. Cir. 1986) (Scalia, J., dissenting) (citations omitted).
93. Id. (citations omitted). Scalia used a similar long list of adjectives to define injury in fact in United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1378 (D.C. Cir. 1984). That case involved a challenge to a Presidential order governing intelligence activities of the executive branch. The appellants, political and religious organizations, and private individuals active in public affairs, alleged two injuries—the chilling effect on constitutionally protected activities that would result from fear of surveillance under the order, and the immediate threat of being targeted for surveillance. They also claimed that the trial court abused its discretion by refusing to permit discovery so appellants could allege more specific injuries. Id. at 1377-78. Scalia denied standing because appellants had not alleged any specific threatened or contemplated action against them. Although the nature of the plaintiffs' activities might have made them more likely to be the subject of surveillance, the harm of chilling effect was not sufficient to establish the "genuine threat" required for standing. Id. at 1380.
94. 793 F.2d at 1323-24.
97. 793 F.2d at 1329-30, 1338-39. The majority cited the Supreme Court opinion in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 1333, 1343 (1977), for the proposition that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

793 F.2d at 1329 (quoting Hunt, 432 U.S. at 1343). Finding the second and third require-
In his dissent, Scalia argued that the petitioners in Center for Auto Safety had engaged in "nothing more than an 'ingenious academic exercise in the conceivable,' in which petitioners have merely 'imagine[d] circumstances in which [they] could be affected by the agency's action.'" He characterized petitioners' allegations of injury as "bald assertions that unidentified members of their organizations may be unable to purchase unidentified types of fuel-efficient light trucks or light-truck model options." Scalia would have held this insufficient to show a concrete, palpable, and distinct injury. Reasoning that such an attenuated injury would infringe upon the legislative authority of Congress and the rule-making process of the executive agencies, Scalia explained:

If the injuries hypothesized by the interest groups suing in the present cases are sufficient, it is difficult to imagine a contemplated public benefit under any law which cannot—simply by believing in it ardently enough—be made the basis for judicial intrusion into the business of the political branches. What we achieve today is not judicial vindication of private rights, but judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied.

Apparently, in Scalia's view, the fact that many individuals share an injury may be sufficient in itself to deny standing to those seeking judicial review of agency action. The doctrine of standing "is an essential means of restricting the courts to their assigned role of protecting minority rather than majority interests." Therefore, "not all 'concrete injury' indirectly following from governmental action or inaction" would support "a congressional conferral of standing." Criticizing SCRAP's conferral of standing on "all who breathe [the country's] air," Scalia argued:

98. 793 F.2d at 1343 (Scalia, J., dissenting) (quoting United States v. SCRAP, 412 U.S. 669, 688-89 (1973)) (emphasis added by Scalia).
99. Id. at 1343-44.
100. Id. at 1344.
101. Id. at 1342.
102. Scalia, Standing, supra note 63, at 895.
103. Id.
104. Id. (emphasis added).
105. SCRAP, 412 U.S. at 687.
One can conceive of... a concrete injury so widely shared that a congressional specification that the statute at issue was meant to preclude precisely that injury would nevertheless not suffice to mark out a subgroup of the body politic requiring judicial protection... There is surely no reason to believe that an alleged governmental default of such general impact would not receive fair consideration in the normal political process. 106

Scalia believes SCRAP illustrates how "diminutive the new APA requirements of standing" may have become. 107 Such widely shared injuries should not be permissible bases for standing because there is no reason to remove the matter from the political process and place it in the courts. Unless the plaintiff can show some respect in which he is harmed more than the rest of us... he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention. 108

To redress the type of widely shared injury involved in SCRAP, Scalia would require a challenger to plead her cause in the legislature or before the agencies themselves.

b. Fairly Traceable Causation

The causation requirement 109 is the only factor in the standing analysis that Scalia interprets more liberally than the Supreme Court. To

106. Scalia, Standing, supra note 63, at 895-96.
107. Id. at 890.
108. Id. at 894-95.
109. The causation and redressability requirements first appeared as part of the article III standing analysis in Warth v. Seldin, 422 U.S. 490, 505 (1975). The Court required plaintiffs to "establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." Id. In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), the Court used both the causation and redressability requirements to dismiss a claim that the Internal Revenue Service's tax treatment of hospitals encouraged the hospitals to deny services to indigents. Id. at 38, 41-43. Finally, in Valley Forge Christian College v. Americans United For Separation of Church & State, Inc., 454 U.S. 464, 472 (1982), the Court adopted the decisions with approval making the two requirements, "at an irreducible minimum," part of the article III inquiry.

The Supreme Court has occasionally treated the two requirements as one. See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1978) ("The more difficult step in the standing inquiry is establishing that these injuries 'fairly can be traced to the challenged action of the defendant,'... or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries." (quoting Simon, 426 U.S. at 41)). Nevertheless, other cases make it clear that the factors are distinct and that both are essential to article III standing. The causation requirement "examines the causal connection between the assertedly unlawful conduct and the alleged injury." The redressability requirement "examines the causal connection between the alleged injury and the judicial relief requested." Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (emphasis added). The analysis of the two requirements, however, may be similar in some cases. When relief requested by the plaintiffs is "simply the cessation of illegal conduct," the analyses are "identical." Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1334 (D.C. Cir. 1986) (citing Allen, 468 U.S. at 759 n.24 (1984)). If the injury
satisfy the causation requirement, the Supreme Court requires a showing that the injury results from the defendant's actions and not from independent action of a third party not before the court. In *Simon v. Eastern Kentucky Welfare Rights Organization,* the Supreme Court rejected the plaintiffs' claim of standing, in part because causation depended upon a showing that the Internal Revenue Service's (IRS) tax regulations would encourage hospitals to stop furnishing services to indigents. The hospitals' reaction formed the basis of the plaintiffs' claims that the IRS' actions injured them; the plaintiffs failed to meet the causation requirements.

In *Block v. Meese,* the plaintiff challenged government classification of foreign films as political propaganda. The government argued that causation was not present because any harm caused by the political propaganda classification would be due to irrational public reaction based upon a false impression as to the meaning of the classification. Scalia, writing for the majority, rejected this argument, saying it was relevant only to the merits of the case. In his view, the constitutional inquiry requires only "de facto causality." Scalia did not directly distinguish *Simon* in *Block,* but merely stated that it would be impossible to maintain that there is no standing when the defendant's action harms the plaintiff only through the reactions of third persons. The public reaction in *Block,* however, is virtually indistinguishable from the hospital's reaction in *Simon.* In both cases, the reaction that directly caused the injury was proximately caused by the putatively unlawful conduct of the government. Thus, Scalia appeared to adopt a more liberal approach to causation than the Supreme Court took in *Simon.*

c. Redressability

Scalia interprets redressability more stringently than the Supreme Court currently requires. In *Allen v. Wright,* Justice O'Connor's ma-

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110. *Simon,* 426 U.S. at 42.
112. *Id.* at 40-41.
113. 793 F.2d 1303 (D.C. Cir. 1986).
114. *Id.* at 1309.
115. *Id.* Scalia cautioned that defamation and tortious interference with contract are examples of actions where standing may be maintained on the basis of third-party reactions. *Id.*
116. However, Scalia's standing analysis may have been a somewhat result-oriented manipulation of the causation requirement. Although he interpreted the causation requirement fairly liberally, Scalia then decided against the plaintiffs on the merits, holding that there was no first amendment or statutory violation in the government's labeling of Canadian environmental films about acid rain as "political propaganda." *Id.* at 1309-18.
majority opinion stated that in order to meet the redressability requirement, relief must be "likely" to follow from a favorable decision by the court. Scalia would require that relief be "substantially likely" to follow from the requested action.

Scalia's application of the standard in the Center for Auto Safety case is illustrative of his more stringent approach. Consider the following characterization of the events that would be necessary for the Center for Auto Safety petitioners to receive the relief requested: A court order compelling NHTSA to issue new standards would remedy petitioners' alleged injury only if (1) NHTSA could thereby issue significantly higher standards, (2) manufacturers would try to meet the new standards rather than pay noncompliance fines, and (3) manufacturers would choose to meet the new standards by introducing new truck models that would not have been available otherwise, rather than sell more of their already existing trucks.

Scalia characterized his test as a showing of substantial likelihood that an injury will be redressable. In actuality, his application of the test requires that petitioners show redressability is certain to follow. The redressability requirement would be a formidable barrier if plaintiffs were required to show that a favorable decision would, by a direct chain of causation, achieve the desired result. Requiring proof that the relief requested would redress the injury alleged, that manufacturers would comply rather than paying fines, would have imposed an impossible burden on the plaintiffs in Center for Auto Safety. If the inquiry, however, were whether the relief requested might alleviate the injury alleged, it would seem that, on the facts of Center for Auto Safety, a plaintiff need only show that an agency could impose sanctions on the manufacturers, and not that those sanctions would ultimately be effective.

d. The Zone of Interests Requirement

As discussed previously, only one prudential factor must be met to establish standing under the APA: the plaintiff's claim must be arguably within the zone of interests to be regulated by the statute in question. The zone of interests requirement is not meant to be particularly demanding, and there need be no indication of congressional purpose to benefit the particular plaintiff who challenges agency action. Thus, review is denied only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot

118. Id. at 751.
120. Id.
121. See supra text accompanying notes 58-59.
reasonably be assumed that Congress intended to permit the suit."\textsuperscript{123} The inquiry is not limited to the particular section of the statute under suit; courts may look to the overall purposes of the statute as a whole.\textsuperscript{124}

The Supreme Court's opinion in \textit{SCARP} \textsuperscript{125} illustrates a particularly liberal application of the test. The Court found that anyone who used the natural resources allegedly affected by disregard of the National Environmental Policy Act (NEPA) could claim an injury in fact.\textsuperscript{126} Further, it was "undisputed" that the injury alleged was within the zone of interests Congress intended to protect under NEPA.\textsuperscript{127}

The Court's recent decision in \textit{Clarke v. Securities Industry Association} \textsuperscript{128} shows a more typical application. The Court held that a trade association representing competitors could challenge the Comptroller of Currency's grant of permission to certain banks to open offices offering discount brokerage services outside their home states.\textsuperscript{129} The Comptroller argued that the trade association was not within the zone of interests because the section of the statute challenged was meant to establish competitive equality between state and national banks, rather than to protect securities dealers as competitors.\textsuperscript{130} The Court rejected this argument, stating that the association was within the zone of interests of the general policy goal of the statute.\textsuperscript{131}

In \textit{Community Nutrition Institute v. Block},\textsuperscript{132} individual consumers and consumer organizations challenged several milk marketing orders issued by the Secretary of Agriculture because the orders raised the costs for milk handlers and producers, resulting in higher milk prices. The District of Columbia Circuit Court of Appeals granted standing to these consumers, in part because the general policy section of the statute in question expressed a goal of protecting consumers from unreasonable price fluctuations, thus bringing the challengers within the zone of interests of the statute.\textsuperscript{133} That the injury was shared by many consumers

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 756, 758.
\textsuperscript{126} \textit{Id.} at 689-90.
\textsuperscript{127} \textit{Id.} at 686 n.13.
\textsuperscript{128} 107 S. Ct. 750 (1987).
\textsuperscript{129} \textit{Id.} at 754.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} at 759. Scalia did not participate in the \textit{Clarke} decision since he was a member of the D.C. Circuit panel which heard the case. Securities Indus. Ass'n v. Comptroller of the Currency, 758 F.2d 739 (D.C. Cir.) (per curiam), \textit{reh'g denied en banc}, 765 F.2d 1196 (D.C. Cir. 1985). Scalia, dissenting from the denial of rehearing, would have accepted the Comptroller's argument regarding the zone of interests test. \textit{See} 765 F.2d at 1197 (Scalia, J., dissenting).
\textsuperscript{132} 698 F.2d 1239 (D.C. Cir. 1983).
\textsuperscript{133} \textit{Id.} at 1249-50.
was insufficient to defeat standing according to the majority.134

Scalia, dissenting in Community Nutrition Institute, dismissed the references to consumer interests in the general purpose section of the act as "if not . . . 'pious platitudes,' then at least no more than a recital of the ultimate purpose of the statutory scheme which has no real bearing upon who was expected to enforce it."135 The consumers were only the "indirect general beneficiaries" of the regulation. Since direct beneficiaries, the milk handlers and producers, were readily identifiable; the consumers had no standing.136

In Scalia's view, the zone of interests requirement is meant to determine whether Congress intended a plaintiff to act as a "private attorney general" in challenging agency action.137 The broader the zone within which plaintiff claims his interests lie, the weaker the indication of such intent becomes, especially when there is a direct and immediate beneficiary who could be relied upon to challenge the agency's disregard of the law.138

Scalia's argument is inconsistent with the Supreme Court's holding in SCRAP, where anyone who used the affected resources was within the zone of interests of NEPA.139 Scalia sought to distinguish SCRAP, however, by saying that a different case is presented "when a statutory provision benefits generalized interests through the protection of more particularized interests to which it is immediately directed."140 When a direct beneficiary class could be relied upon to challenge agency disregard of the law, "the claim of the indirect general beneficiaries to be congressionally designated 'private attorneys general' is weak indeed."141

C. Summary

It is highly unlikely that the Supreme Court will return to a legal wrong test for standing. In Clarke v. Securities Industry Association,142 the Court summarized the lower court's opinion in Association of Data Processing Service Organizations v. Camp,143 which had essentially applied the legal interest analysis and reaffirmed its rejection of that analysis and its adoption of the injury in fact-zone of interests test for standing

134. Id. at 1251.
135. Id. at 1258 (Scalia, J., dissenting) (footnote omitted).
136. Id. at 1257.
137. Id. at 1256.
138. Id. at 1256-57.
139. See supra text accompanying notes 125-127.
140. Community Nutrition Inst., 698 F.2d at 1256-57 (Scalia, J., dissenting) (emphasis in original).
141. Id. at 1257.
143. 397 U.S. 150, 156 (1970).
under the APA. However, the Court has retreated somewhat from its original liberal injury in fact analysis by adding the redressability and causation requirements.

The Supreme Court has determined that Congress intended to allow broader standing under the APA. Yet Scalia's analysis of injury in fact and redressibility is much narrower than the Court's recent decisions seem to require. He believes only a very particularized injury shared by a few affected individuals supports standing. Furthermore, under his view of the redressibility requirement, it is insufficient to show that judicial relief is available that is likely to remedy the injury. The plaintiff must show a chain of cause and effect making it substantially likely that judicial relief will redress the injury.

Scalia has acknowledged that he would manipulate the standing doctrine to preserve separation of powers. In his 1983 article on standing, Scalia recognized that it is unlikely that the APA's judicial review provision would be restored to its original meaning. He perceived, however, a favorable swing in philosophy by the current Court showing an apparent movement toward more restrictive standing. Commenting that the Supreme Court's "zone of interests" formulation "leaves plenty of room for maneuvering," Scalia stated that he expected that maneuvering to be in the direction of separation of powers.

Scalia has also described the doctrine of standing as "a crucial and inseparable element of [the principle of separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the processes.

144. 107 S. Ct. at 755-56.
145. See supra note 109 for a discussion of the Court's adoption of the redressability and causation requirements; see also Community Nutrition Inst. v. Block, 698 F.2d 1239, 1256 (D.C. Cir. 1983) (Scalia, J., concurring in part and dissenting in part) (arguing that application of the zone of interests test differs in non-APA cases and may be somewhat stricter because "[t]he Supreme Court's most recent recitation of the 'arguably within the zone of interests' formula in a non-APA case omits the word 'arguably.' ", rev'd, 467 U.S. 340 (1984).
146. See supra notes 56 & 61 and accompanying text. The "adversely affected or aggrieved" language in APA section 702 was always interpreted as showing a congressional intent to broaden the class of claimants capable of challenging agency action. See, e.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940) (construing a similar provision in the Communications Act of 1934, chap. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 402(b)(6) (Supp. II 1984))); Sierra Club v. Morton, 405 U.S. 727, 736-38 (1972). In Data Processing Service, the Court extended this construction of the "adversely affected or aggrieved" language to section 702 as a whole, construing the "generous review provisions" of the APA as a broad grant of statutory standing which enlarges the class of people who can protest administrative action. 397 U.S. at 156 (quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955)); see supra notes 66-67 and accompanying text for discussion of Scalia's criticism of this expansion.
147. See supra notes 91-108 and accompanying text.
148. See supra notes 117-120 and accompanying text.
149. Scalia, Standing, supra note 63, at 891.
150. Id. at 899.
of self-governance."151 His view that widely shared injuries should not support standing is consistent with separation of powers, since he believes that widely shared injuries are capable of resolution through the political branches and before the agencies themselves.152 The validity of this majoritarian, separation of powers premise in the context of standing to challenge agency action is discussed in the final section of this Note.

Along with his willingness to use the standing doctrine as a tool for protecting political discretion, Scalia has similarly adopted a deferential approach towards judicial review of rulemaking proceedings.153

The next section discusses Scalia's interpretation of the scope of judicial review of rulemaking proceedings as an additional means of protecting political discretion once a claimant gains access to the federal courts.

III. Scope of Review

The APA requires agencies to engage in "reasoned decisionmaking."154 The courts are obligated to ensure that the agencies have adequately met this requirement. The standard of review for informal rulemakings, set out in APA section 706(2)(A), requires that the courts determine whether an agency rulemaking is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law... ."155 The

151. Id. at 881; see also Fein, High Court Upheaval, supra note 6, at 14, col. 3 ("Scalia is likely to be scrupulous in seeking to limit judicial authority to resolving concrete disputes properly within the judicial universe.").

152. See supra notes 102-08 and accompanying text.

153. See supra note 46 and accompanying text.


155. 5 U.S.C. § 706(2)(A) (1982). Section 706 provides: To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determina-
nature of this obligation, however, is not completely clear and much depends on how narrowly or broadly a reviewing court interprets the standard of review. The following sections present the two standards of review adopted by the courts and demonstrate that Scalia would apply an extremely deferential interpretation of the standard of review, consistent with his theory that the element of political discretion in rulemaking should not be subject to judicial review. 156

A. Standards of Review: The "Hard Look" and "Rational Connection" Doctrines

Although on its face it appears deferential, the arbitrary and capricious standard of APA section 706(2)(A) is susceptible to varying interpretations. A broad interpretation gives the court greater latitude to scrutinize agency action closely; a narrower interpretation forces the reviewing court into a position of greater deference. Thus, some cases have interpreted the standard broadly as requiring a more vigorous review to ensure that the agency has taken a "hard look" at all the factual and policy issues underlying a particular rule. 157 Other cases have narrowly interpreted the standard as requiring merely a "rational connection" between the agency's findings and the promulgated regulation. 158

To facilitate discussion, this Note treats these two interpretations of the standard of review as distinct doctrines. It should be noted, however, that these two approaches are actually shades on a spectrum rather than isolated standards. The Supreme Court has not made a clear distinction between the two approaches and therefore neither is a truly separate "test" adopted in one case or another. The Court's decision in Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co., 159 which applied a "hard look" scrutiny, also required articulations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The "arbitrary and capricious" standard applies to informal rulemaking. Two of the other five standards, the substantial evidence standard and de novo factual review, have limited applicability in essentially formal rather than informal proceedings. Section 706(2)(E) sets out the substantial evidence test which is authorized only when the agency action is taken pursuant to an adjudication under 5 U.S.C. § 554, or a rulemaking provision required to be made "on the record" under 5 U.S.C. § 553(c). Note, Judicial Review of Informal Administrative Rulemaking, 1984 DUKE L. J. 347, 350 (1982). As the Supreme Court stated in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), section 706(2)(F) applies only "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate... [or] when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." Id. at 415. The other three standards set out the basic constitutional, statutory, and procedural boundaries controlling agency action. See 5 U.S.C. §§ 706(2)(B),(C),(D) (1982).

156. Scalia, Rulemaking, supra note 12, at v.
157. See infra notes 163-73 and accompanying text.
158. See infra notes 174-82 and accompanying text.
ulation of a rational connection. Yet the Court's decision one week earlier in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, which did at least mention the hard look doctrine, only required articulation of a rational connection. On the surface, the standards appear to be distinguishable only through a semantic word game. There is a difference, however, in the degree of scrutiny to which the reviewing court subjects an agency decision, a difference which has significant impact on the scope of review of deregulatory action.

(1) The "Hard Look" Doctrine

The "hard look" or "adequate consideration" doctrine is used to examine the factual basis of rules to ensure compliance with the arbitrary and capricious standard. Generally, it requires the agency to provide an evidentiary record reflecting the basis for its decision, to explain its reasoning in detail, and to give adequate consideration to the evidence submitted during the rulemaking proceeding. A court does not consider policy issues de novo, substituting its judgment for that of the agency. Instead, a court subjects the agency decision to an extensive evaluation to determine whether the agency has exercised reasoned discretion.

To satisfy the standard, a court must determine "whether there has been a clear error of judgment" and "whether the decision was based on a consideration of the relevant factors." In *Motor Vehicle Manufacturers Association, Inc. v. State Farm Mutual Automobile Insurance*

160. *Id.* at 43.
162. *Id.* at 105.

The hard look doctrine first developed from a series of District of Columbia Circuit Court of Appeals decisions. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (courts must intervene where "the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision making." (citations omitted)), *cert. denied*, 444 U.S. 830 (1979); *Portland Cement Ass'n. v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) ("[the] agency... has a continuing duty to take a 'hard look.'"), *cert. denied*, 417 U.S. 921 (1974). The Supreme Court provided implicit support for a hard look approach to review of an informal adjudication in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). As interpreted by the Court in *Overton Park*, although application of the arbitrary and capricious standard "is to be searching and careful... the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* at 416. Thus, the Secretary of Transportation's decision, as reviewed by the Court in *Overton Park*, was "entitled to a presumption of regularity... but [this] presumption was not to shield his action from a thorough, probing, in-depth review." *Id.* at 415; see also Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) ("The only role for a court is to insure that the agency has taken a 'hard look.'").

the Court clarified what would constitute consideration of relevant factors:

[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.\textsuperscript{167}

In State Farm, the Court indicated that an agency decision cannot be upheld where there are no findings or analysis to justify the choice made and no indication of the basis on which the agency exercised its discretion. Justice White explained that “an agency must cogently explain why it has exercised its discretion in a given manner.”\textsuperscript{168}

The hard look doctrine can be criticized because judges arguably may lack the expertise necessary to understand a highly technical agency decision.\textsuperscript{169} One commentator has argued even that the hard look approach undermines the legitimacy of administrative decisions:

[[@]ltigation plays an ever more critical role in the regulatory process, as agencies must defend all major regulatory actions in the judicial arena. Intrusive and extensive judicial supervision of administrative decision-making increases the vulnerability of agency rules, and the legitimacy of federal agencies inexorably wanes when their regulations become contingent on the judicial imprimatur.\textsuperscript{170}

For the hard look approach to be effective, the agencies must create a “reviewable” record, containing “a thorough ventilation of the [scientific and normative] issues’ so that judges themselves may scrutinize and assess the rationality of administrative decisions.”\textsuperscript{171} This so-called judicialization of the administrative process arguably contributes to inordinate delay and inefficiency in the regulatory process.\textsuperscript{172} In addition, the Supreme Court’s holding in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., which clearly stated that courts may not impose extra procedural requirements not mandated by the

\textsuperscript{166} 463 U.S. 29 (1983).
\textsuperscript{167} Id. at 43.
\textsuperscript{168} Id. at 48.
\textsuperscript{169} See, e.g., Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981), rev’d on other grounds, 463 U.S. 680 (1983). The D.C. Circuit opinion covers over 100 pages and contains detailed diagrams, tables and graphs used by the Court to take a “hard-look” at the reasonableness of emissions standards promulgated by the EPA. The opinion itself states that “the volume and technical complexity of the material” necessary for review was “daunting.” Id. at 314.
\textsuperscript{172} See id. at 473.
APA, makes it doubtful that a reviewing court can impose an evidentiary record requirement on the agencies without congressional authorization.173

(2) The "Rational Connection" Test

The rational connection doctrine is a more deferential approach to review of an agency decision than the hard look doctrine. The State Farm dissent, written by Justice Rehnquist, for Chief Justice Burger and Justices Powell and O'Connor, embodies the rational connection doctrine. Although the majority concluded that the agency had acted arbitrarily, Justice Rehnquist believed the agency's explanation of its result should be treated with greater deference.174 In his view, the agency decision articulated a rational connection and should have been upheld.175

Similarly, Justice O'Connor's majority opinion in Baltimore Gas & Electric Co. v. Natural Resources Defense Council,176 reasoned that the "only task [was] to determine whether the [Nuclear Regulatory] Commission ha[d] considered the relevant factors and articulated a rational connection between the facts found and the choice made."177 In that case, the Nuclear Regulatory Commission (NRC) had issued a rule requiring licensing boards to assume, for licensing purposes, that the permanent storage of nuclear wastes by power plants would have no significant environmental impact.178 Over the objections of a dissenting judge who accused the majority of taking "too hard a look,"179 the court of appeals concluded that the agency's decision was arbitrary and capricious because the NRC had failed to factor in uncertainties surrounding its assumption and had not allowed those uncertainties to affect individual licensing decisions.180 The Supreme Court reversed unanimously, treating the agency assumption as a policy judgment and finding that the NRC had articulated a rational connection. The Court stated that review must be most deferential when an agency is making predictions within its special area of expertise.181

On the surface, O'Connor appeared to apply the same "hard look"
approach used by the *State Farm* majority since she clearly stated that
the court must determine whether the agency had considered all the fac-
tors. Actually, her approach was much more deferential. The majority
in *State Farm* required the agency to examine relevant data and articu-
late a satisfactory explanation for its action *including* a rational con-
nection.\(^1\) By characterizing the agency's assumption as a policy judgment
and requiring *only* articulation of a rational connection between the facts
found and the choice made, the Court in *Baltimore Gas and Electric*
applied a more deferential approach than it later adopted in *State Farm*.

B. Scalia's Interpretation of the Standard of Review

Scalia has criticized the imposition of the hard look doctrine on
agency decisionmaking. In *KCST-TV, Inc. v. Federal Communications
Commission*,\(^1\) the agency denied an application for a waiver from the
significantly viewed exception to the nonduplication rule. A majority of
the District of Columbia Circuit Court of Appeals remanded the order,
stating that the agency was required to take a "hard look at meritorious
applications for waiver and [to] consider all relevant factors."\(^1\) In dis-
sent, Scalia argued against the majority's hard look approach, describing
it as "the type of 'fine-tuning'... contributing to regulatory delay and to
the increasing caseload of the courts."\(^1\)

Even when an agency has made a major departure from prior deci-
sions, as is often the case with rulemakings having deregulatory effects,
Scalia views "overall rational support" as sufficient to uphold the
agency's decision.\(^1\) Thus, Scalia would refuse to reverse "simply be-
because there are uncertainties, analytic imperfections, or even mistakes in
the pieces of the picture petitioners have chosen to bring to [the court's]
attention."\(^1\) In *Center for Auto Safety v. Peck*,\(^1\) the petitioners chal-
gallenged as arbitrary and capricious a rulemaking procedure involving the
relaxation of automobile bumper standards. The petitioners argued that
because the agency had reversed a longstanding policy, the court must
scrutinize more carefully the agency decision.\(^1\) Relying on the
Supreme Court's opinion in *State Farm*, Scalia wrote:

The Supreme Court has made clear that "the same test" applies to the

cost, the NRC had compensated for the uncertainties of the assumption in other parts of
the rule. *Id.* at 103-04.

United States, 371 U.S. 156, 168 (1962)).

183. 699 F.2d 1185 (D.C. Cir. 1983).

184. *Id.* at 1191.

185. *Id.* at 1195 (Scalia, J., dissenting).


187. *Id.*

188. 751 F.2d 1336 (D.C. Cir. 1985).

189. *Id.* at 1342-43.
rescission or modification of a rule as to its initial promulgation—the "arbitrary or capricious" standard of 5 U.S.C. § 706(2)(A) (1982)—and that there is "no difference in the scope of judicial review depending upon the nature of the agency's action." The same "presumption . . . against changes in current policy that are not justified by the rulemaking record," exists whether those changes consist of enacting a new rule or of revoking or modifying an old one.\textsuperscript{190}

Scalia went on to uphold the agency's decision under a rational connection analysis, rather than giving the close scrutiny that seems to be required under \textit{State Farm}.\textsuperscript{191}

Judge Skelly Wright's dissent in \textit{Center for Auto Safety} viewed Scalia's majority opinion as "an unacceptable retreat from our judicial responsibility to carefully review agency decisionmaking and an unsupported condonation of agency failure to act in accordance with explicit instructions from the legislative branch."\textsuperscript{192} Judge Wright embraces the hard look doctrine. In his view, even when an agency is operating in a field of its expertise, review under the arbitrary and capricious standard, though narrow, "is not merely perfunctory"; the Court should "engage in a 'searching and careful' inquiry, the keystone of which is to ensure that the [agency] engaged in reasoned decisionmaking."\textsuperscript{193}

C. Summary

The hard look doctrine involves an element of rationality—the agency must have demonstrated a reasonable connection between the facts on the record and the resulting policy choice.\textsuperscript{194} The reviewing court's analysis, however, is more extensive than it would be if the court is looking only for articulation of a rational connection in the agency's explanation of its action.

Although abusive application of the hard look approach might in some cases involve judicial "fine-tuning," resulting in "too hard a look," the rational connection test is subject to the criticism that it is \textit{overly} deferential. It tends to reduce judicial review of agency action to a merely perfunctory procedure. In an era of deregulation, such perfunctory review arguably is dangerous since radical and potentially arbitrary departures from prior policy will likely go undetected. Judicial review of agency action is intended to be deferential, but as an earlier statement of the Supreme Court warns, "'[t]he deference owed to an expert tribunal

\textsuperscript{190.} Id. at 1343 (citations omitted).
\textsuperscript{191.} Id. at 1370.
\textsuperscript{192.} Id. at 1371 (Wright, J., dissenting).
\textsuperscript{193.} Id. at 1373 (Wright, J., dissenting) (quoting International Ladies' Garment Workers Union v. Donovan, 722 F.2d 795, 815 (D.C. Cir. 1983), cert. denied, 469 U.S. 820 (1984)).
cannot be allowed to slip into a judicial inertia.' 195

The next section explores some of the difficulties presented by Scalia's political view of the rulemaking process and examines the potential effect of his restrictive views on standing and his deferential interpretation of the scope of review.

IV. Impact in an Era of Deregulation

Sed quis custodiet ipsos custodes? 196

As shown in sections II and III, Scalia favors highly deferential judicial review of agency action with more limited access to the federal courts. In part, this stance may be motivated by a concern that less deferential review transfers executive branch authority to the federal courts, dominated by liberal Democrats, who may be unsympathetic to deregulatory policy. 197 These liberal Democrats are the 250 federal judges appointed by former President Carter and, as Scalia points out, a "Reagan Supreme Court" would be able to review only a small portion of these cases. 198 This section explores some of the difficulties presented by this intensely political view of the rulemaking process.

Scalia's deferential approach to deregulation is somewhat puzzling in light of his reputedly strong commitment to judicial restraint. 199 On the surface, a deferential approach seems entirely consistent with a restraintist attitude toward judicial review. Scalia's deference, however, can be shown to be nothing more than an activist attempt to protect the agencies now that they are tending toward deregulation. In a 1981 article entitled Regulatory Reform—The Game Has Changed, 200 Scalia noted with disfavor the lack of awareness among conservatives in Congress that the people heading up the agencies were now committed to the same deregulatory goals. He criticized continued proposals for heightened judicial review of agency action that actually impeded the progress of deregulation:


196. But who is to guard the guards themselves? VI Juvenal, Satires 1.347.

197. Scalia, Regulatory Reform, supra note 7, at 13.

198. Id. at 13-14.

199. See, e.g., Barnes, Reagan's Hopes for High Court: Rehnquist Could Be the Answer to Burger 'Mistake,' San Francisco Chron., July 2, 1986, at C3, col. 4 ("Scalia's adherence to conservatism and judicial restraint isn't open to much doubt.").

[a]t a time when the GOP has gained control of the executive branch with an evident mandate for fundamental change in domestic policies, Republicans, and deregulators in general, seem to be delighting in the prospect of legislation which will make change more difficult. Those in the Congress seem perversely unaware that the accursed "unelected officials" downtown are now their unelected officials, presumably seeking to move things in their desired direction; and that every curtailment of desirable agency discretion obstructs . . . departure from a Democrat-produced, pro-regulatory status quo.201

In light of this statement and those regarding limiting review of deregulation by Carter-appointed judges, Scalia’s advocacy of deferential court review of agency deregulation could be construed as “one-way” judicial activism rather than judicial restraint.

Scalia’s activism may be best understood in light of the problems associated with intervention by courts in the administrative process. One such problem has been described by Professor Charles Koch as “the inherent myopia of judicial decisionmaking.”202 Since judges naturally focus on the controversy at hand and the best interests of the citizen seeking review in a particular case, judges are prevented “from reconciling the many public values and interests represented by [an agency’s] program.”203

Moreover, reviewing judges may lack the technical expertise necessary to perform the type of hard look review required in cases like Sierra Club v. Costle.204 There may also be problems of nonacquiescence by agencies or agency action controlled by the “threat” of judicial review:

[w]hen a court enters the fray of overseeing agency discretion, the policy choices the court makes will be much more difficult to anticipate, and the agency's anticipation of the political discretion of the President or Congress becomes less useful. The policy administrator, fearful of reversal, will narrow his or her policy options when the court assumes this policy oversight role.205 Thus, Scalia is not alone among the commentators calling for decreased judicial review of agency action.206

The alternate argument in favor of judicial review, was presented by Justice Douglas in his dissent in Sierra Club v. Morton:

the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is un-

201. Id.
203. Id.
205. O'Reilly, supra note 4, at 518.
206. See O'Brien, supra note 170, at 447 ("[C]ontemporary judicial oversight of the administrative process, largely due to litigation over health, safety and environment regulation, has rendered the APA anachronistic, with pernicious rather than auspicious consequences for regulatory politics.").
desirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.\textsuperscript{207}

In addition to this natural affinity which Douglas mentions, many members of the agencies are recruited from the industries they are supposed to regulate. This recruitment puts agency impartiality in doubt: a two–year congressional investigation of nine regulatory agencies between 1975 and 1976 indicated that agency commitment to interests of regulated industries took precedence over commitment to the public interest.\textsuperscript{208}

In addition to the federal courts' intervention in the administrative process, the courts' review of Presidential intervention will also have an impact on agency action. Presidential intervention in the administrative process has increased during this era of deregulation, particularly through President Reagan's Executive Order 12,291, which provides for direct input and oversight from the Office of Management and Budget and mandates cost-benefit analysis for new major regulations.\textsuperscript{209} This presidential input is not necessarily "evil" in a government organized around separation of powers principles. The President and Vice President are elected to positions in the executive branch whereas agency personnel are not directly accountable to the public. There is a danger, however, that presidential intervention will cause agency heads, often appointed by the same administration, to give inordinate weight to factors favoring deregulation which are contrary to congressional intent. Given that Scalia is described as "a forceful proponent of strong presidential powers,"\textsuperscript{210} he is unlikely to disapprove of this executive intervention in the rulemaking process.\textsuperscript{211}

Scalia has frequently emphasized that separation of powers principles underlie his interpretation of standing and the role of the courts in the administrative process generally.\textsuperscript{212} This reliance on separation of powers can be criticized on several grounds. First, reliance on separation of powers is criticized where "mere incantation of that phrase" is substituted for an analysis of the difficult questions posed by the facts of a

\begin{itemize}
  \item 207. 405 U.S. 727, 745-46 (1972) (Douglas, J., dissenting).
  \item 210. Fein, High Court Upheavals, supra note 6, at 14, col. 3.
  \item 211. But see Scalia, Reagulation—The First Year, Regulation, Jan.-Feb. 1982, at 19 (questioning the effectiveness of the executive order in achieving regulatory reform).
  \item 212. See supra notes 71, 149-52 and accompanying text.
\end{itemize}
By simply citing separation of powers as a reason to deny standing, the reviewing court ignores the question of whether an actual, concrete injury in fact should support standing to sue.

Second, Scalia's separation of powers argument is inconsistent with the intent of section 702 of APA. Although section 702 was enacted to codify existing laws on standing, the legislative history of the APA recognized the judiciary's continuing role in determining who could seek review of agency action. The Supreme Court now interprets section 702 as a broad congressional conferral of standing. Scalia's narrower construction would make statutory review available only where substantive statutes provide for it. Notwithstanding his interpretation, a broader conferral of standing is constitutional as long as Congress does not remove the essential constitutional requirement of injury in fact. The Supreme Court's present construction, therefore, remains consistent with separation of powers because it still involves a congressional grant of more generous standing.

A third criticism of Scalia's argument is that separation of powers analysis should not be used to deny standing where Congress has given the courts power of review, thereby consenting, within constitutional bounds, to some encroachment by the courts. Rather, separation of powers principles are appropriately used to ensure that each of the three coequal branches of government does not encroach too far into the activities of the others.

Finally, Scalia's separation of powers argument ignores the courts' essential function as a check on the actions of the other two branches. The increased executive branch intervention in the process authorized by Executive Order 12,291 supports an argument for increased judicial review of agency action to maintain the coequal status of the three branches of government. Since rulemaking is an essentially legislative function, congressional intent should control whether deregulation is undertaken. Courts must preserve legislative intent by determining not only whether all relevant factors have been considered but also whether any improper factors have been considered. Executive intervention must be subject to effective judicial review to ensure that the agencies do not give undue weight to one of the political branches while ignoring the instructions of the other.

There has been no indication in recent cases that any other Justice on the Supreme Court favors a return to the amorphous "legal wrong"
test. In fact, the Court recently reaffirmed its injury in fact—zone of interests formulation in Clarke v. Securities Industry Association.\(^\text{217}\) Scalia will seemingly therefore be forced to settle for the "maneuverability" provided by the Court's current bifurcated standard, even though he disagrees with the test in theory. Under Scalia's restrictive approach of the present standing test, an injury shared by many would be redressible only through the political branches. If injury in fact can be established, a plaintiff's attempt to meet the redressability requirement would be defeated if there was any likelihood that the relief granted would be ineffective for whatever reason.

The decreased access resulting from his restrictive interpretation is consistent with Scalia's view of the ideal rulemaking process. According to Scalia, the rulemaking process should be essentially political, taking into account the "manifestations of the popular will through the political process" by those groups with the political power necessary to make their voices heard.\(^\text{218}\) Persons seeking relief from agency action directly through the political process, however, are required either to wait for the next presidential election and hope for change or to solicit aid from Congress. The latter route, in order to be effective, requires the help of a well-financed and well-organized political action group. Arguably, this is appropriate where the person seeking relief has suffered no direct harm. Mere dissatisfaction with government is insufficient to justify judicial intervention. Yet where a plaintiff suffers an actual injury from allegedly unlawful agency action, access to judicial relief should not be denied.

The result of increased access to the courts under a more liberal standing doctrine, even under a less deferential "hard look" approach, need not be replacement of the agency's judgment with that of a judge sitting in an "isolated think-tank."\(^\text{219}\) Courts need not inquire into the wisdom of deregulation. Applied properly, the "hard look" approach merely ensures that the agencies have taken a closer look at all the relevant factors affecting a decision to rescind or relax regulations which earlier agency action has deemed necessary.

Without effective review, there is a danger that "important legislative purposes, heralded in the halls of Congress," may be "lost or misdirected in the vast hallways of the federal bureaucracy."\(^\text{220}\) Scalia apparently feels that as long as no minority interests are affected, this result is acceptable:

[w]here no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday's herald is today's

\(^{218}\) Scalia, Rulemaking, supra note 12, at vi.
\(^{219}\) Id.
bore—although we judges, in the seclusion of our chambers, may not be *au courant* enough to realize it.221

Yet one factor that prompted passage of the APA in 1946 was the concern that agencies acted as a "headless fourth branch of government."222 A primary impetus for reform was the perceived need for effective judicial review of agency action.223

Under the approach adopted by Chief Justice Rehnquist and Justices O'Connor and Scalia, this "effective" review is reduced from a "hard look" to a "rational connection." Their perfunctory approach goes beyond the deference originally required by the APA and leaves the agencies too free to deregulate without consideration of the legislative purposes underlying the health, safety, and environmental legislation of the late 1960s and early 1970s. If important legislative purposes are to be lost in the federal bureaucracy through deregulatory agency action, they should only be lost after consideration of all relevant factors. When mere rationality takes the place of close scrutiny, and plaintiffs suffering actual injury are prevented from reaching the courts to complain of arbitrary action, the result is not protection of political discretion but rather abdication of judicial responsibility.

Conclusion

The appointment of Antonin Scalia to the United States Supreme Court is likely to have a significant effect on the development of administrative law. Justice Scalia's approach to standing and scope of review will further insulate agency action from substantive judicial review.

Barriers to access to the courts, like Scalia’s interpretation of the redressability factor, will have the effect of once again using "standing to slam the courthouse door against plaintiffs who are entitled to full

221. Scalia, _Standing, supra_ note 63, at 897.

222. K. DAVIS, _TREATISE, supra_ note 4, § 1.7, at 21. The statement was made in a 1937 report of the President's Committee on Administrative Management. The report also described agencies as "a haphazard deposit of irresponsible agencies and uncoordinated powers." *Id.* at 21-22 (quoting the President's Committee on Administrative Management, Report No. 39-40 (1937)).

223. In 1933, the American Bar Association created a Special Committee on Administrative Law, partly in response to New Deal legislation which had resulted in an extension of administrative powers. The Special Committee "served not only as a continuing agency for observation and criticism, but also as the mainspring of the persistent efforts towards improvement which at last came to fruit in the Administrative Procedure Act." Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 434-35 (1947). The Committee was primarily concerned with the undermining of the judiciary through delegation of judicial functions to executive and legislative agencies. K. DAVIS, _TREATISE, supra_ note 4, § 1.7, at 21 (citing 59 A.B.A. R. 539, 549 (1934)). Administrative judges with "insecure" tenure of office handed down decisions the ABA felt were not subject to effective judicial review. *Id.* (citing 61 A.B.A. R. 720 (1936)).
consideration of their claims on the merits.’”

This test for standing creates too great a barrier for proponents of regulation to challenge allegedly arbitrary agency action in court. The test seems unwarranted given the broadened class of plaintiffs allowed to sue under the APA.

Scalia’s interpretation of the scope of judicial review of agency action is overly deferential, providing for almost no review of deregulation once a plaintiff gains access to the courts. The effective judicial review that the APA’s supporters called for becomes a formality under his approach. The court’s role becomes that of a perfunctory “rubber stamp” on agency action so long as a rational connection can be made.

The courts’ role in the administrative process is properly a limited one and judges must be relied upon to exercise self-restraint. It is true that the doctrine of standing can be used as a means of protecting political discretion. As Justice Powell stated in Warth v. Seldin, the standing doctrine “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”

The narrow and deferential scope of review under the “arbitrary and capricious” standard can be used for the same purpose. At some point, however, an overly restrictive view of standing and an overly perfunctory scope of review result not in self-restraint but in abdication of judicial responsibility.

This abdication of judicial responsibility cannot be justified simply by incantation of the phrase “separation of powers” or deference to “some element of . . . political discretion, not reviewable by the courts.”

In an era of regulation, the agencies serve as guards appointed by Congress to protect society against perceived social ills. In this era of deregulation, the courts must be capable of effectively reviewing the actions of the guards so that legislative purposes are not lost to arbitrary decisionmaking.

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226. Id. at 498.
227. Id.
228. Scalia, Rulemaking, supra note 12, at v.

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